Evaluation of the International Law regarding Humanitarian Intervention in Human Rights Abuses not breaching International Peace and Security

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Abstract

This study examines, in stages of development, the existing law regarding humanitarian intervention, problems in respect of this law and cases of intervention. More specifically, intervention in human rights abuses not breaching international peace and security but rather posing a so-called threat to peace is examined. This information is used to consider whether more adequate provision can be made regarding circumstances of intervention to stop situations of grave human rights abuses sooner. From the law regarding humanitarian intervention, it is evident that the institution of intervention is illegal under the present UN legal system. Yet, in a time when the human rights culture has become so important that it forms part of the basis of international law, effective intervention is not being authorised by the Security Council. As a result, other actors have been intervening in cases of grave human rights abuses. These interventions need to be appropriate and well managed.

Since the protection of human rights is as valid in non-democracies, as in any democratic state form, the study finds that human rights will benefit from dependence on legitimate authority. Attributing more importance to the Uniting for Peace Resolution could expand the role of the General Assembly. Humanitarian intervention also needs to be coupled with a commitment to address the causes of human rights abuses through conflict resolution and social reconstruction. The study concludes with some criteria/guidelines for the establishment of the legitimacy of intervention.

Opsomming

Hierdie studie is - binne 'n raamwerk van ontwikkelingstydperke – 'n ondersoek na die bestaande reg aangaande humanitêre ingryping, probleme tenopsigte daarvan en gevalle van ingryping. Veral ingrypings in menseregte-skendings wat nie internasionale vrede en sekuriteit skend nie, maar eerder 'n sogenaamde bedreiging vir vrede is, word ondersoek. Die inligting wat so bekom is, word gebruik om te oordeel of meer gepaste voorsiening gemaak kan word waarvolgens situasies van growwe menseregte-skendings deur ingryping gouer beëindig kan word. Die reg aangaande humanitêre ingryping toon dat ingryping onwettig is in die bestaande regsisteem van die Verenigde Nasies. In 'n tyd waarin menseregte so belangrik geword het dat dit ten grondslag lê van internasionale reg, word effektiewe ingrypings nogtans nie gemagtig deur die Veiligheidsraad nie. Gevolglik gryp ander partye in om teen situasies van growwe menseregte-skendings op te tree. Hierdie ingrypings moet daarom gepas wees en goed bestuur word.

Aangesien die beskerming van menseregte net so geldig is in ander staatsvorms as in demokrasieë, bevind die studie dat menseregte sal baat daarby indien dit afhanklik is van legitieme gesag. Voorts kan die rol van die Algemene Vergadering aangaande die beskerming van menseregte uitgebrei word deur groter waarde te heg aan die "Uniting for Peace"-resolusie. Dit is verder nodig dat humanitêre ingryping gekoppel word aan 'n verbintenis om die oorsake van menseregte-skendings aan te pak deur konflik-resolusie en sosiale heropbou. Ter afsluiting word riglyne neergelê om te help met die bepaling van die legitimiteit van ingryping.

Dedication

This thesis is dedicated to all those people, whose human rights we feel so strongly about, but for whom we do not seem to be able to make the sacrifices necessary to protect their rights. May a time come when the value we attach to human lives, will be worth sacrifices.

Acknowledgements

It is a wonderful thing to realize that life, with all its failures and triumphs, is not meant to be faced alone. Thank you, every single person, who, sometimes unbeknown to yourselves, gave me courage when I had none, gave me hope when I wanted to run away and gave me strength when I was crushed. Without you I could never have finished this work.

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Abbreviations

AFL	Armed Forces of Liberia
AFRC	Armed Forces Revolutionary Council
ASEAN	Association Of Southeast Asian Nations
AU	African Union
CIS	Commonwealth of Independent States
CSCE	Conference on Security and Cooperation in Europe
ECOMIL	ECOWAS Military Peacekeeping Mission in Liberia
ECOMOG	ECOWAS Cease-firing Monitoring Group
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EU	European Union
FRY	Federal Republic of Yugoslavia
GA	General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGNU	Interim Government of National Unity
IICK	Independent International Commission on Kosovo
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organisation
NIF	Neutral International Force
NPFL	National Patriotic Front of Liberia
OAS	Organization of American States
OAU	Organisation for African Unity
OSCE	Organization of Security and Co-operation
PAU	Pan American Union

PCIJ	Permanent Court of International Justice
RPF	Rwandese Patriotic Front
RUF	Revolutionary United Front
SCR	Security Council Resolution
SC	Security Council
SG	Secretary General
UN	United Nations
UNAMIR	UN Assistance Mission in Rwanda
UNAMIR II	UN Assistance Mission in Rwanda II
UNAVEM	UN Angola Verification Mission
UNCHR	UN Commission on Human Rights
UNHCHR	UN High Commissioner for Human Rights
UNIIMOG	UN Iran-Iraq Military Observer Group
UNITAF	United Task Force
UNOMIG	UN Observer Mission in Georgia
UNOMIL	UN Observer Mission in Liberia
UNOSOM	UN Operation in Somalia
UNOSOM II	UN Operation in Somalia II
UNPROFOR	UN Protection Force in the former Yugoslavia
US	United States

CHAPTER ONE

Introduction

"Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured or detained without charge and that, if charged, they will have a fair trail. I believe there is nothing in these aspirations that is dependant upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment."[1]

– Rosalyn Higgins

1 1 Introduction

One of the issues on the centre stage of international law today, is humanitarian intervention; armed intervention without the Security Council authorisation necessary under the United Nations (UN) system, with the aim to end gross human rights abuses within the borders of a country. While it seems evident and desirable that civilians subject to gross human rights abuses should receive assistance, the problem is that the unilateral use of force violating the borders of a country is prohibited under present international law. International law actors are currently trying to find an answer to the question whether civilians subject to abuses, such as those in the two cases below, can be protected under international law in the event that authorisation for armed intervention is not given by the Security Council. This is especially important since the world was sickened by the holocaust that accompanied the Second World War. The extent of the massacres was unimaginable and people hoped that this would never happen again. This hope did not survive for long. Some 25 years after the founding of the United Nations one of the more memorable cases of gross human rights abuses started.

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[1] Higgins *Problems and Process: International Law and How We Use it* (1996) 97

The 1971 *coup d'état* that brought Idi Amin to power in Uganda was followed by the expulsion of 75 000 Ugandan Asians at 90 days' notice in 1972. Of these people, a third consisted of Ugandan citizens, and even they were roughly treated and a number killed. The following years saw people from tribal groups other than that of Amin "arbitrarily massacred, political opponents liquidated, and elite and religious leaders annihilated. Whole villages were destroyed".[2] Amnesty International estimates that between 100 000 and 500 000 people died during Amin's eight year rule.[3]

In the media Amin was known as a caricature rather than a brutal dictator. His activities, including his expulsion of the 75 000 Ugandan Asians in 1972, were brought to the attention of various UN organs, but only in 1977 did the UN Secretary-General act on the complaints by asking Amin to carry out an investigation into his own activities. In the same year the United Nations Commission on Human Rights (UNCHR) deferred deliberations regarding Amin's behaviour to the following year. This resulted in the investigation procedures into Amin's rule only starting in March 1978, shortly before the toppling of his government in 1979.[4]

During Idi Amin's 1975/76 term as chairperson of the Organisation for African Unity (OAU), the twelfth summit of the organisation was held in Uganda. The mere fact that he was elected as chairperson of the OAU at the height of his regime of human rights abuses gave legitimacy to his murderous rule. Tanzania was one of only three African countries that boycotted the summit.

When loyalists pursued Ugandan mutineers over the Tanzanian border in 1978 and some Tanzanians were killed in the annihilation that followed, the Tanzanian government drove the invading forces out. The Tanzanian president accused Amin of murdering more black Africans than South Africa and Southern Rhodesia and urged the Ugandan people to overthrow the dictator. Amin's rule was finally brought to an end in 1979 as Kampala fell to a force combining Ugandan exiles and

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[2] Ramsbotham & Woodhouse *Humanitarian Intervention in Contemporary Conflict* (1996) 4
[3] ibid
[4] idem 5

Tanzanian troops.[5] At the sixteenth summit of the OAU in 1979, most states refrained from criticising the Tanzanian intervention and thus seemed to tacitly approve of the intervention. Criticism from the broader international community was soon muted as countries recognized the new Ugandan government.[6]

The most noteworthy action taken to help the people of Uganda thus happened after approximately 7 years of tyranny, slaughter and displacement of nationals and only because the disturbance spilled over the border of Uganda into Tanzania.

In light of the human rights abuses committed by Amin, Kuper wrote the following while contemplating the role of the UN:

> "[T]he United Nations is not a humanitarian, but a political organization, and its humanitarian goals are at the play of political forces, pressure groups and blocks, in an area where delegates pursue the divisive interests of the state they represent. Added to this, its ideological commitment to the protection of the sovereignty of the state, with the corollary of non-intervention in its domestic affairs, stands in the way of effective action against 'domestic' (internal) genocide."[7]

This critique of the UN left the international community wondering how and if people subject to gross human rights abuses, like the Ugandan people, were going to be helped in future. The tragedy in Kosovo, another instance of such human rights abuses, reached its height almost twenty years later in the nineties. Although the hope existed that the questions left by the Tanzanian intervention in Uganda would be answered, the intervention in Kosovo seemed to leave more questions than answers.

> "Kosovo was one of the eight constituent units of Yugoslavia; there were six republics (Serbia, Croatia, Slovenia, Montenegro, Macedonia, and Bosnia-Herzegovina) and two autonomous provinces in Serbia (Vojvodina and Kosovo). The removal of autonomy from Kosovo and

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[5] idem 6
[6] idem 52
[7] idem 5

> Vojvodina in 1989 was a key moment in a series of events leading to … the wars in Slovenia, Croatia, Bosnia-Herzegovina, and eventually Kosovo".[8]

The difference between the republics and the provinces now was that in contrast with the provinces the republics had the right to secede from the federation and were seen as bearers of Yugoslav sovereignty. The provinces did not have this right as the Albanians in Kosovo, like the Hungarians in Vojvodina, were considered a nationality rather than a nation, as their homeland was supposedly somewhere else.[9] In truth, demonstrations demanding republic status for Kosovo, seemingly forming part of a greater Albanian national awakening, started years before the autonomy of the province was in fact removed. These 1981 demonstrations were brutally crushed. A state of emergency was declared and while hundreds of people were tried and imprisoned, thousands of teachers and university professors were dismissed and "[t]he provision of Albanian professors and Albanian textbooks was stopped".[10]

By 1989 Yugoslavia's President Slobodan Miloševic had revoked Kosovo's autonomy, following his allegations that the Serb minority in Kosovo was at risk.[11] This was followed by an increase in human rights abuses and discrimination against Kosovar Albanians, including the dismissal of thousands of them from public employment and the virtual elimination of their language from use in educational facilities and the media.[12] Despite attempts to reconcile the parties through, among others, the 1991 Brioni agreement,[13] the 1992 Common Statement by Kosovar Albanians and the federal government[14] and the efforts to open dialogue through the establishment of Missions of Long Duration by the Organization of Security

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[8] IICK *The Kosovo Report* (2000) 34
[9] idem 36
[10] idem 36, 37
[11] Wedgwood "NATO's Campaign in Yugoslavia" 1999 Vol 93 *AJIL* 828 828
[12] IICK *The Kosovo Report* 41, 42
[13] The EU brokered this agreement, but attempts to find a global approach to the crisis in Yugoslavia came to an end after Yugoslav forces destroyed the Croatian town of Vukovar in 1991
[14] Communications ended after the rector of the university of the parallel state was arrested in 1992

and Co-operation (OSCE) in 1992, the descent into war and ethnic cleansing could not be stopped.[15]

During the North Atlantic Treaty Organisation (NATO) bombing campaign to stop the Serb ethnic cleansing aimed at purging Kosovo of the Albanians living there, the following human rights abuses, among others, were documented by a number of organizations including the Independent International Commission on Kosovo (IICK).[16] Approximately 863 000 people, of which most became refugees, were displaced, while more than 590 000 people became internally displaced persons within Kosovo. Reports and statistics from different organizations came to the conclusion that an estimated 11 000 people were killed. Of these people an overwhelming number were Kosovar Albanians. More than 500 villages were burned and at least 54 were almost or entirely destroyed. Human Rights Watch confirmed 96 cases of rape, but note that the stigma attached to rape in traditional Albanian society may mean that this figure only represents a fraction of actual cases. Especially men of so-called 'fighting age' were detained and as many as 2000 of the people that disappeared during the NATO campaign were seized by Serb forces.[17]

The bombing campaign lasted 78 days and was brought to an end as the Yugoslav government finally accepted a peace plan based on principles set forth by the G8 countries.[18] While the campaign thus eventually ended the ethnic cleansing, it did not have prior Security Council authorisation and however necessary it might have been, was therefore still illegal in terms of international law, because it happened outside of the UN system as required by the UN Charter.[19] The question then is, how effectively is human rights protected under the current UN system?

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[15] IICK *The Kosovo Report* 55, 57, 58

[16] Some of the organizations include the International Criminal Tribunal for the Former Yugoslavia, the American Association for the Advancement of Science, the Centre for Disease Control, Physicians for Human Rights and Human Rights Watch

[17] IICK *The Kosovo Report* 301 - 309

[18] idem 96, The G8 is the Group of Eight and includes the Heads of State or Government from France, the United States of America, the United Kingdom, Germany, Japan, Italy, Canada and Russia

[19] Dugard *International Law: A South African Perspective* 2nd ed (2000) 416

1 2 The United Nations Charter and the Protection of Human Rights

When the UN came into existence in 1945, its basis was the UN Charter. Because several organs performing basic functions within the international arena, originate in the Charter, this document is usually also considered as a constitution for the international community.[20] Another reason for the constitutional dimension of the Charter is the fact that the UN has comprehensive international obligations and responsibilities with regard to multiple areas of interest. Some of these areas include human rights, peace and security, economic relations, international disputes and international cooperation.[21] The fact that most countries in the world are members of the UN further supports the view of the Charter as a constitution for the international community. Most importantly, however, the Charter is an international treaty, which was signed voluntarily, making signatories voluntary members of this international organisation.[22] In doing so, the now more than 180 signatory countries subject themselves to the regulations set out in the Charter.

It should be noted that the UN was established to maintain international peace and security. The concept of international peace and security, which was aimed at peaceful relations between states, was central in the minds of international law actors after the devastation caused by the aggression between states in World War II. This consideration was acknowledged in the wake of the Second World War, at the Moscow Conference in 1943 where the creation of the UN was first contemplated.[23] When the UN finally came into being, however, this was not the only purpose of the organisation. Where the protection of human rights in situations like those in Uganda and Kosovo is concerned, one of the purposes of the UN is of particular importance:

> "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for

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[20] Conforti *The Law and Practice of the United Nations* (2000) 10
[21] United Nations, *United Nations Charter*, Article 1, 2
[22] Conforti *Law and Practice* 10
[23] idem 2

> fundamental freedoms for all without distinction as to race, sex, language, or religion..."[24]

With the ever-increasing focus on human rights, the relevance of this purpose is even more evident today. Because this purpose is one of the bases of the Charter, it might have been expected that signatories of the Charter would intervene to stop atrocities such as those that happened in Uganda and Kosovo. However, this was not the case.

In addition, as a result of the massive human rights abuses that were part of the atrocities of World War II, the Charter contains further human rights clauses. These include article 13, which obliges the General Assembly to make recommendations and initiate studies for the promotion of international cooperation with regard to human rights. Article 55 requires the UN to promote universal respect for human rights and fundamental freedoms and the observance of these rights, while article 56 contains a pledge by members to "take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55".[25] Although it would be impossible to help everybody whose human rights are being abused, it is difficult to understand in the light of these clauses, why the human rights of people in nations that are signatories to them, could have been so severely abused.

1 2 1 Armed Intervention and other Protection Mechanisms

According to the Encyclopedia of Public International Law, the concept of humanitarian intervention in its classic state, entailed the "use of armed force by a State against another State for the purpose of protecting the life and liberty of the citizens of the latter State unwilling or unable to do so itself".[26] Both the interventions in Uganda and Kosovo show some of the above characteristics, such as the 'use of armed force' and the protection of 'life and liberty of the citizens of

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[24] *UN Charter*, Article 1
[25] idem Article 56
[26] Beyerlin *Humanitarian Intervention* in Bernardt (ed) *EPIL Volume 2* (1995) 926 926

the latter State unwilling or unable to do so itself'. Because the international community eventually approved both interventions, they seem to give some answers as to when armed intervention can be used as a protection mechanism.

Both Uganda and Kosovo were situations of large-scale abuses. Terms like massacre[27] and ethnic cleansing[28] have been used to describe them. International approval of the interventions in Uganda and Kosovo suggests that this is the kind of abuses, which would justify armed intervention. Other abuses of this kind seem to include massive deportation, apartheid, torture, cruel and degrading punishment, the arbitrary arrest of thousands of persons, suppression of freedom of expression and association, political mass murder and enslavement or massacre of political opponents, national minorities and religious sects.[29] It would seem that the test to establish whether such abuses have reached the magnitude at which they can be called gross human rights abuses, would be the same for determining whether a crime against humanity has been committed. Article 7 of the Rome Statute, establishing the International Criminal Court (ICC),[30] defines crimes against humanity to include extermination, enslavement, deportation, torture, rape, persecution against any identifiable group and apartheid.[31] It would entirely depend on the facts whether the abuses happening have reached this level of brutality.

While armed intervention is used as a means to protect human rights, it is not the only protection mechanism that exists. The UN has developed several other human rights instruments and protection mechanisms. The Economic and Social Council (ECOSOC) for example, established the UNCHR in 1946.[32] A mandate to draft an International Bill of Rights ensued, and resulted in The Universal Declaration of Human Rights.[33] This recommendatory resolution inspired among others the

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[27] ICISS *The Responsibility to Protect: Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (2001) 61

[28] IICK *The Kosovo Report* 88

[29] Conforti *Law and Practice* 144, 244; Ramsbotham & Woodhouse *Humanitarian Intervention* 21; Walzer *Just and Unjust War* in Ishay (ed) *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (1997) 358 365

[30] *Rome Statute of the International Court* 1998 article 7

[31] ibid

[32] Dugard *International Law* 240

[33] ibid; UN, *Universal Declaration of Human Rights UN Doc. A/811*

International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[34]

The impact of the Universal Declaration can also be seen in the fact that it served as a model for the Bills of Rights of numerous countries,[35] including South Africa. Because of the impact of the Universal Declaration on standards by which human rights conduct is measured, some of the more basic principles of the Declaration are seen as customary international law. These include non-discrimination, the prohibition on torture and cruel, inhuman or degrading treatment and the right to a fair trial.[36] An instrument such as the Universal Declaration, acquire the status of custom through state practice and *opinio juris*. This means that there must be lasting state practice or constant and uniform use of a certain rule, thus widespread acceptance in the first place. States must in addition feel bound to the rule to such an extent that its general application is accepted as law.[37] Where these conditions exist, even countries that have not signed a specific human rights instrument are bound by such instrument and thus have no justification for not observing the human rights of their citizens.

International human rights instruments, as any number of other treaties, usually provide their own mechanisms for the protection of human rights as well as sanctions in the event of non-compliance with the treaty terms. These protection mechanisms could take on a number of different appearances depending on the preferences of the signatories. A few examples include the Human Rights Committee, international supervisor of the ICCPR, which makes general comments and seeks to settle disputes amicably if states accuse one another of non-compliance with the Covenant.[38] Mechanisms in the UN Charter include expulsion from the organization for persistently violating the principles, including the human rights principles, contained in the Charter.[39] The UNCHR provides a public forum for debating human rights questions and investigates information regarding human

[34] Dugard *International Law* 240
[35] ibid
[36] idem 241
[37] idem 28, 31
[38] idem 244, 245
[39] *UN Charter*, Article 6

rights abuses. Such investigations are followed by recommendations to ECOSOC.[40] In 1970, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was authorised by Res. no 1503-XLVIII of ECOSOC. This Sub-Commission is allowed to appoint working groups to investigate and reveal existing gross human rights abuses, which are reported back to the UNCHR and ECOSOC along with recommendations and may even result in UN General Assembly resolutions.[41]

Another protection mechanism that developed in the aftermath of the Second World War is the notion of international criminal liability aimed at bringing the perpetrators of crimes against humanity to justice.[42] This notion is supported by the universal jurisdiction that exists with regard to customary international law norms and was furthermore established in the Geneva Conventions and Additional Protocols relating to specifically to war crimes.[43] Even though the biggest parts of these Conventions and Protocols relate only to international atrocities, common article 3 to all of the Conventions makes provision for a minimum standard of humane treatment for all civilians and non-combatants in armed conflict that is not of an international character.[44] However, the Conventions and Protocol I only make provision for the punishment of those responsible for grave breaches of the conventions, that is war crimes, in international armed conflicts.[45] While Protocol II does not provide for such punishment flowing from war crimes committed in internal armed conflicts, it seems that the International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded in the Tadic case that "customary international law today imposes criminal liability for the violation of the laws and customs of war in both internal and international armed conflicts".[46]

The concept of universal jurisdiction has a permissive quality in that it allows states, whose national legislation confers such jurisdiction to their courts, to

[40] Dugard *International Law* 253
[41] Conforti *Law and Practice* 244
[42] ICISS *Supplementary Volume* 118
[43] ICISS *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001) 6
[44] Robertson *Crimes against humanity: The Struggle for Global Justice* (1999) 177
[45] Dugard *International Law* 437
[46] ibid

lawfully exercise such jurisdiction to prosecute crimes under customary international law such as "piracy, slave-trading, war crimes, crimes against humanity, genocide and torture".[47] The conviction in Belgium, of Rwandan nuns for their involvement in the Rwandan genocide of 1994 is indicative of the effects of universal jurisdiction.[48] Even though the Belgian parliament has now repealed their landmark "universal jurisdiction" legislation of 1993 that permitted victims to file complaints in Belgium for atrocities committed abroad, this legislation "had made Belgium a leader in the struggle for international justice"[49] according to human rights groups[50]. This developing trend of international criminal accountability has eventually led to the establishment of the International Criminal Tribunal for Rwanda (ICTR), the ICTY and recently the ICC where individuals can now be held accountable before an international tribunal for such crimes. However, a significant difference between the first two tribunals and the ICC is that while the first two were established by the Security Council in terms of Chapter VII of the UN Charter,[51] the Rome Statute establishing the ICC is a separate multilateral treaty[52]. All UN members have to comply with resolutions under Chapter VII, while only those states that have ratified the Rome Statute, will evidently be bound by its provisions. Nevertheless, the fact that the ICC for instance have specific jurisdiction regarding genocide, war crimes and crimes against humanity,[53] indicates a universal justice which is especially beneficial for the protection of human rights. The importance of the developments with regard to international criminal jurisdiction is that new means are being established to enforce the growing human rights trend.

A further development regarding the protection of human rights is the fact that the UN Security Council is increasingly dealing with gross human rights abuses as

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[47] idem 141
[48] ICISS *The Responsibility to Protect* 6
[49] http://www.hrw.org/press/2003/08/belgium080103.htm [Accessed 2 March 2004]
[50] These groups include Amnesty International Belgium, La Ligue des Droits de l'Homme, Liga voor Mensenrechten, la Fédération Internationale des Droits de l'Homme, Avocats sans Frontières and Human Rights Watch
[51] Dugard *International Law* 152
[52] idem 153
[53] ibid

threats to international peace and security; the latter serving as a basis for action taken under Chapter VII of the Charter.[54] Because of this wider interpretation, the term threats to international peace, which were originally seen as "limited to overt cross-border aggression",[55] are in a process of transformation. The Security Council, for example, described the situation in Somalia in 1992,[56] in Bosnia in 1992,[57] in Iraq in 1991[58] and in Kosovo in 1999 as a threat to international peace and security.[59] Intervention under Chapter VII was considered in all these circumstances. The actions under Chapter VII include non-armed force such as severance of diplomatic relations and complete or partial interruption of economic relations and different means of communications.[60] It also includes force as deemed necessary to restore international peace and security.[61]

As a part of the various protection mechanisms that exists, the aspect of prevention of human rights abuses is receiving progressively more attention. In their report about the abuses and subsequent NATO intervention in Kosovo, the IICK makes specific reference to the lack of preventative efforts from the international community in the face of a range of early warnings.[62] Such efforts would have included more sufficient support for the non-violent resistance and sufficient political will to support the diplomatic initiatives.[63] The International Commission on Intervention and State Sovereignty (ICISS) in particular, emphasizes the need and responsibility to prevent conflicts and human rights abuses. According to the commission, this responsibility lies within the sovereign state, as "[a] firm national commitment to ensuring fair treatment and fair opportunities for all citizens provides a solid basis for conflict prevention".[64] The importance attached to prevention is further seen by the resolutions adopted by the UN General Assembly

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[54] Conforti *Law and Practice* 244
[55] Thomashausen *Humanitarian Intervention in an Evolving World Order: The Cases of Iraq, Somalia, Kosovo and East Timor* (2002) 10
[56] Ramsbotham & Woodhouse *Humanitarian Intervention* 207, Security Council Resolution 794
[57] idem 177, 178, SCR 770
[58] idem 71, SCR 688
[59] IICK *The Kosovo Report* 325, SCR 1244
[60] *UN Charter*, Article 41
[61] idem Article 42
[62] IICK *The Kosovo Report* 1
[63] ibid
[64] ICISS *The Responsibility to Protect* 19

and Security Council in this regard. The Report of the Panel on United Nations Peace Operations for example, highlights the need for prevention in the effort to avoid armed interventions, while the 2001 report of the Secretary General on Prevention of Armed Conflict focused on cooperation for successful preventative efforts. A great number of organisations have become involved in establishing preventative mechanisms, including the African Union that established the Peace and Security Council, which attach particular importance to efforts preventing conflict and abuses.[65] However, according to the Carnegie Commission on Preventing Deadly Conflict, "the international community spent approximately $200 billion on conflict management in seven major interventions in the 1990s...but could have saved $130 billion through a more effective preventative approach.[66] The ICISS forwards three conditions for prevention, namely knowledge of the instability and risk associated with the situation, an understanding of "policy measures available" that are capable to be effective and the political will to apply these measures.[67] Along with support from the international community in the form of, for example, supporting local initiatives to advance human rights, the rule of law or good governance, mediation efforts and efforts to address the root causes of conflict,[68] it might be possible for these conditions to make a difference in situations of impending conflict.

In light of all these legal remedies and the increasing focus on prevention, it is debatable whether armed intervention outside of the UN system is a preferable protection mechanism in cases of gross human rights abuses, especially with the commitment of the UN to international peace and security and the controversy about the legality of the institution.

However, the fact is that armed interventions for the protection of human rights happen and that several problems exist with regard to such interventions. This thesis investigates the remedy of armed intervention in accordance with the

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[65] http://www.au2002.gov.za/docs/summit_council/secprot.htm [Accessed 30 January 2004]
[66] ICISS *The Responsibility to Protect* 20, These interventions were in Bosnia and Herzegovina, Somalia, Rwanda, Haiti, the Persian Gulf, Cambodia and El Salvador
[67] ICISS *The Responsibility to Protect* 20
[68] idem 19

classical definition, thus humanitarian intervention. More specifically, it deals with humanitarian intervention in human rights abuses not breaching international peace and security; but rather in cases where abuses pose a so-called threat to international peace. Although some argue that humanitarian intervention includes economic force[69] and other forms of coercion that do not include the threat of armed force, these kinds of force are liberally used to further states' economic and political interests. The decision of the United States of America (US) to suspend military aid to South Africa, because of South Africa's decision not to give Americans immunity from prosecution by the International Criminal Court in The Hague, is a case in point.[70] Even if such force were used to coerce states into observing human rights, it would not be illegal and thus is of no consequence to this study. However, the Secretary General in his Millennium Report did make it clear that such economic sanctions need to be smarter by targeting them better.[71] If for instance the aim of sanctions is to coerce a tyrannical leader into ending the human rights abuses of his people, the parties introducing the sanctions need to make sure that the sanctions are indeed targeting that leader. This is because vaguely defined sanctions against that state as a whole would hurt the already suffering people even more.

1 2 2 Humanitarian Intervention

1 2 2 1 Problems with Humanitarian Intervention

It has been mentioned that problems exist with regard to armed interventions without Security Council authorisation and thus humanitarian intervention. The first problem concerns sovereignty.

The international community of nations under the regime of the UN Charter is based on the equal sovereignty of states. This means that no state is superior to any

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[69] Ramsbotham & Woodhouse *Humanitarian Intervention* 114, 115

[70] http://www.iol.co.za/index.php?click_id=6&art_id=vn20030702044421419C243131&set_id=1 [Accessed 9 July 2003]

[71] http://www.un.org/millennium/sg/report/summ.htm [Accessed 2 March 2004]

other and, as such, one state cannot take decisions as to how another state must be governed. In the *Island of Palmas*[72] case the arbitrator described the meaning of sovereignty as follows.

> "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is a right to exercise therein, to the exclusion of any other state, the function of a state".[73]

Although this description begs the question as to what exactly the function of a state is, suffice it for the moment to recognize the dimension of independent governance. From this principle it follows that when states decide to launch an armed intervention into another state, the sovereignty of the latter state is breached. Although nothing prohibits any state to ask for help in the form of armed intervention from other states, such interventions will become a violation of sovereignty if it is done without consent or request from the state in which is intervened. This kind of action could undermine the whole system of states. Sovereignty is also protected by article 2(7) of the UN Charter, which prohibits intervention by the UN in matters falling within a state's domestic jurisdiction. Because of this principle of non-intervention, humanitarian intervention is illegal under the UN system.

Another problem with humanitarian intervention is that article 2(4) of the Charter prohibits the "threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Although force is allowed in two situations, it is enough to note here that one of the situations include self-defence.[74] Even though force could include both armed and economic force, the idea that 'force' refers to 'armed force' is strengthened by the qualification of force as armed force in the Preamble of the Charter, where it is stated that "armed force shall not be used, save in the common

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[72] *Island of Palmas Case (Netherlands v USA)*, 2 RIAA 829 (1928)
[73] Dugard *International Law* 112
[74] *UN Charter*, Article 51

interest..."[75] This study, as stated earlier, will look only at the use of armed force because of the role it plays in humanitarian intervention.

Although the classical definition refers to humanitarian intervention as intervention to protect citizens of another state,[76] the self-defence exception to the use of force is sometimes used to justify humanitarian intervention for the protection of a state's own citizens in another state.[77] Higgins argues that a state is harmed through injury suffered by its nationals. Thus, the right to self-defence can be utilised as a justification for intervention where a state's nationals in another country suffer injury.[78] Where armed intervention is used in these situations, it is uncertain whether these armed interventions constitute humanitarian intervention. Since the ground for intervention in such cases is self-defence and not the protection of human rights, these situations should probably be seen as situations of self-defence rather than humanitarian intervention. Because of the injury suffered by the state, however, it is accepted by some authors that intervention on the ground of self-defence in these cases is lawful. This lawfulness is not accepted in cases of humanitarian intervention, because the individuals being rescued have no such connection to the intervening state.[79]

Such a situation of intervention based on self-defence, occurred in the June/July 1976 Entebbe incident where an Israeli civilian airliner was hijacked and held hostage in Entebbe, Uganda. While the Jewish passengers were threatened, Ugandan president, Idi Amin, provided more weapons for the Palestinian hijackers. Israel's forcible intervention to rescue its nationals[80] satisfied the customary international law requirements for intervention in such circumstances. There was an immediate danger of injury to Israel's nationals, the territorial sovereign, Uganda,

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[75] idem Preamble
[76] See n 43
[77] Higgins *Problems and Process* 246
[78] ibid
[79] Ronzitti *Rescuing Nationals abroad through Military Coercion and Intervention on grounds of Humanity* (1985) XIV
[80] Dugard *International Law* 422

failed or was unable to protect Israel's nationals and the measures taken by Israel were confined to the protection of their nationals against injury.[81]

While such self-defence claims are made by individual states, self-defence pacts such as NATO collectively defend all their members. Such collective self-defence is accepted in article 51 of the UN Charter. The problem is that sometimes their interventions are launched in defence of non-members. One such an example is NATO's humanitarian intervention in Kosovo in 1998, which should be seen as humanitarian intervention and not self-defence.

It is clear that there are many uncertainties, opinions and problems regarding humanitarian intervention. The UN Charter itself does not mention humanitarian intervention. It does however make specific mention of the idea of non-intervention and the use of force.

1 2 2 2 The United Nations Charter and Humanitarian Intervention

The Charter states that force may only be used in two circumstances. The first is under the authority of the Security Council under chapter VII and article 53, which deals with regional arrangements, and the second is in circumstances of individual or collective self-defence under article 51.[82] Force under the authority of the Security Council is allowed after the council has decided two things. The first decision is that the situation poses a threat to international peace and security, or is a breach of such security, or is an act of aggression. The second decision is that force is the best way to deal with the situation.[83]

Of the three situations that justify the use of armed force, only acts that pose a threat to international peace and security are relevant here. The reason for this is that both acts of aggression and situations that breach international peace and security involve the use of armed force between states. This is indicated by attempts

[81] ibid
[82] idem 416
[83] *UN Charter,* Article 39

to define acts of aggression,[84] as well as by the different situations described as acts of aggression. These include military invasion, the deployment of bands of mercenaries and "a State allowing its territory to be used for attacks against another State's territory..."[85] In the case of situations that breach international peace and security, Security Council resolutions indicate that these are situations of invasions. The North Korean invasion of South Korea in 1950, the Argentinean invasion of the Falkland Islands in 1982 and the Iraqi invasion of Kuwait in 1990 are examples of such a breach.[86] Another situation regarded as a breach of peace as a result of Security Council resolutions, was the Iraq-Iran war in 1987.[87] Again it seems that a breach of peace includes military operations or the use of armed force between states.

As the gross human rights abuses relevant here are committed by perpetrators living in the same country as those whose rights they are violating, the acts described above fall outside the scope of this study. The only legal justification that remains for armed intervention under the Security Council therefore is a threat to international peace and security. Because gross human rights abuses happen within the borders of a single country, it would therefore necessarily have to be classified as a threat to peace for armed intervention to be legal.

Humanitarian intervention, which is not accounted for in the Charter, can never be legal under the current UN system while the basis of the intervention is the protection of human rights, as it happens without Security Council authorisation. Armed intervention authorised by the Security Council thus, does not constitute humanitarian intervention and remains the only legal form of armed intervention for the protection of human rights. The fact is however, that the classification of abuses as a threat to international peace and security is a legal fiction used to justify Security Council authorisation for armed intervention[88] in situations of which the desperate nature of the abuses happening is generally accepted. Because the second

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[84] UN *United Nations Consensus Definition of Aggression*, UN Doc. A/9890 (1974)
[85] Conforti *Law and Practice* 174
[86] Shaw *International Law* (1997) 858, SCR's 82, 502 and 660
[87] ibid, SCR 598
[88] Higgins *Problems and Process* 255

half of article 2(7) states that the non-intervention principle shall not "prejudice the application of enforcement measures under Chapter VII", this fiction is also used to overcome the non-intervention principle.

This anomaly means that the only legitimate legal protection for victims lies with the Security Council decision that the abuses in their country pose a threat to international peace and security. As stated earlier, it is this situation that led to the unauthorised NATO intervention in Kosovo. Yet even the decision that abuses pose a threat, can be vetoed by any of the permanent members of the Security Council. The present situation under the UN Charter is therefore that armed intervention is accepted only when a threat is posed to international peace and security and the intervention is authorised by the Security Council.

1 3 The Humanitarian Intervention Debate

Some of the problems regarding humanitarian intervention precede the UN Charter. One of these is the more than one hundred-year-old debate between pluralists and monists. This debate, which concerns the legitimacy of intervention, is at the core of the problems relating to humanitarian intervention.

Pluralists believe in a society where autonomous, interdependent groups exist as equals, all groups decide how to govern themselves and none are superior to the other. Monists, on the other hand, focus on unity in support of the common good between such autonomous groups. In the intervention debate, monists maintain that sovereignty is conditional to "the ends to which, in principle, all states, nations and peoples should be committed, and the means by which international society should be upheld."[89] Where humanitarian intervention is concerned, sovereignty will be conditional to the protection of the human rights of a state's citizens. In contrast, pluralists maintain that sovereignty demands "non-interference in the domestic affairs of other states."[90] There is merit in both arguments as seen by the previous

[89] Mayall *Introduction* in Mayall (ed) *The new Interventionism 1991 – 1994: United Nations experience in Cambodia, Former Yugoslavia and Somalia* (1996) 1 3
[90] ibid

discussion on sovereignty. In addition, the fact that interventions can cause considerable loss of life is not denied. Nevertheless, it cannot be disregarded that the lack of timely intervention brought about by the length and vehemence of the debate, has caused millions of lives that might have been saved, to be lost.

1 4 Conclusion

Against this background, the study attempts to bring greater legal certainty to a field in international law, where many opinions exist, but few definite rules. The lack of legal basis has caused a very pragmatic approach towards humanitarian intervention. Even in cases where the Security Council authorises armed intervention after deciding that the situation poses a threat to international peace and security, the form that intervention will take and the point at which it will happen is never certain. Even though the UN, according to Kofi Annan,[91] then United Nations Under-Secretary-General for Peacekeeping Operations, seems to want the flexibility of a case-by-case development, "pragmatism must have its limits if contributors and protagonists are to know what to expect".[92] It appears that everything is dictated by the politics of the moment and not by the importance that the community of nations attributes to principles of human rights.[93] Unless there is a legal basis for action, the law cannot be developed to solve this problem in a more structural and meaningful way.

Even where abuses are of such a serious nature that humanity cries out against it, legal commentators differ about what should be done. Having scrutinized the arguments in favour of and against the NATO intervention in Kosovo, Falk comes to the conclusion that:

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[91] http://www.nato.int/docu/review/1993/9305-1.htm [Accessed 2 March 2004]

[92] Higgins "Peace and Security, Achievements and Failures" 1995 Vol 6 *EJIL* 445 459

[93] Ramsbotham & Woodhouse *Humanitarian Intervention* 52, Tanzania was shunned by some African countries for the intervention in Uganda that led to the fall of Idi Amin. Furthermore, the OAU chairman ordered Uganda's President Binaisa's call for open discussions about human rights issues, to be deleted from the record at the sixteenth OAU summit. At the same time African countries voiced very different sentiments about action, including military action, against South Africa for the human rights abuses happening under the apartheid regime

> "Putting these two major lines of interpretation together leaves one with the disturbing impression that humanitarian intervention on behalf of Albanian Kosovars was *necessary* but, under the circumstances, *impossible*."[94]

This leaves some very uncomfortable questions. When do the right circumstances for humanitarian intervention exist? What exactly is the law regarding intervention in these circumstances? How are these rules currently applied, if at all and how can the law be refined?

1 5 Exposition

A vigorous debate is still being waged on what international law actually says regarding humanitarian intervention and how it should be applied and used. In an attempt to improve the present situation, this study applies a new perspective to a very old problem. The aim is to set out in stages of development, the law, related problems and cases of humanitarian intervention. In addition, it will be considered whether more adequate provision can be made to stop situations of grave human rights abuses sooner. It is further considered what adequate provisions might entail and under which circumstances intervention would be justified. Finally, the responsibilities of the intervening parties after intervention are explored.

Chapter Two examines the early development of humanitarian intervention until World War I. At this time, there was no real doctrine of humanitarian intervention, thus the focus is on the ideas that formed the basis for such intervention and the debate around it. The few instances of intervention that may qualify as humanitarian intervention are also discussed. In Chapter Three the development regarding humanitarian intervention between World War I and II is investigated, while Chapter Four explores the establishment of the United Nations and the Security Council along with their responsibilities. In Chapter Five an in depth examination of the influences of the United Nations Charter is made, after which

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[94] Falk "Kosovo, World Order and the Future of International Law" 1999 Vol 93 *AJIL* 847 852

the law and practices up to today are reviewed. In Chapter Six the present position is interpreted and some recommendations are made for developing the law.

CHAPTER TWO

Early developments until World War I

"[T]o regard the textual barriers to humanitarian intervention as decisive in the face of genocidal behaviour is politically unacceptable, especially in view of the qualifications imposed on unconditional claims of sovereignty by the expanded conception of international human rights."[1]
– Richard A. Falk

2 1 Introduction

According to Dugard, one of the principal aims of modern international law is the protection of human rights.[2] This is in fact a relatively new point of view. Although the protection of human rights through humanitarian intervention was recognized as early as 1625 by Hugo de Groot in his *De Jure Belli ac Pacis*,[3] international law principally concerned itself with the relations among states and not with individuals. Despite the fact that quite a few writers accept the idea of lawful humanitarian intervention, there was considerable confusion with regard to the legal basis of the institution, with a result that this situation persisted for almost three centuries. During the time prior to World War I, a minority of scholars explicitly rejected the institution on the grounds of the non-intervention principle.[4]

Only in the aftermath of the Second World War and the holocaust, did it become evident to the international community that in such grave circumstances the plight of individuals is too horrendous to feign either indifference or helplessness. With the developing human rights culture of the last century, the pressure on countries able to intervene in gross human rights abuses mounted. However, regardless of the amount of pressure there might be to intervene, the system of international law has been one of participation through consensus from the beginning. As such, a

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[1] Falk 1999 Vol 93 *AJIL* 853
[2] Dugard *International Law* 234
[3] ibid
[4] Beyerlin *Humanitarian Intervention* 927

consensus between states about humanitarian intervention would be a considerable victory over the uncertainty in this regard.

To understand some of the arguments and problems regarding humanitarian intervention today and why they exist, it is necessary to consider the development of the concept over time. Modern international law is generally agreed to have started in the late fifteenth,[5] early sixteenth century at the time when the influential works of Machiavelli and Bodin appeared, the European maritime powers started their overseas expansion and the theories of the late Spanish scholars emerged.[6] It is from approximately this time onwards that some of the influences, which would eventually lead to the idea of humanitarian intervention and the controversy surrounding such intervention, are explored. It should be noted that some of the factors causing problems with regard to humanitarian intervention, which include the "threat to international peace and security", the Security Council discretion and the veto, emerged out of the UN system itself. As this chapter only explores the developments until World War I, these problems will not feature as much here as some of the problems with a more explicit older history, such as the balance between protecting states' sovereignty and intervention, human rights, the use of force and the responsibilities of intervening forces after intervention.

2 2 The Development of Relevant Theories and Views

2 2 1 The Just War

The legitimate use of force and what exactly that might mean has been the subject of many debates. Before the just war theory, the use of force was not prohibited.[7] The just war theory seems to have been the classical attempt to determine when the use of force would be acceptable in a time when the international order that we have today did not yet exist. While the international order of today, "based on independent 'nation [s]tates' of equal rank", has been developed by the thirteenth

[5] Preiser *History of the Law of Nations: Basic Questions and Principles* in Bernardt (ed) *EPIL Volume 2* (1995) 716 717
[6] ibid
[7] Randelzhofer *Use of Force* in Bernardt (ed) *EPIL Instalment 4* (1982) 265 266

century,[8] medieval features including great numbers of lords, bishops, counts, kings and knights, existed instead of sovereign states.[9] At the time, the church had the role of "executive, judge and legislator" until at least the thirteenth century and in the absence of sovereignty, natural law obligations ensured a kind of "moral and legal unity".[10] By the early sixteenth century "Britain, France and Sweden all looked very much like sovereign states, while princes in Germany and the Netherlands" enjoyed many of the privileges of sovereignty.[11] However, it seems that the observance of certain rules and customs within communities was mainly due to religious sanctions.[12] Unfortunately, the just war theory did not have the long-lasting regulatory effect that might have been hoped for.

The focus of international law in the early middle ages was not really on the development of a system of sovereign equal subjects.[13] However, by the thirteenth century, the idea of sovereignty was incorporated in St Thomas Aquinas' writings on the justness of war in certain situations. According to St Aquinas there were three principles of, or conditions for, a just war. These were that:

> "[t]he war must be declared by a sovereign prince and waged by his order; the other party must have provided a *iusta causa* for the war by culpable conduct; and, to be able to rely on the *iusta causa* to justify the war, the prince must have a just intention…which only exists when the aim of the war is to punish the wicked, to help the good and thereby to restore peace as soon as possible."[14]

It should be noted that the "sovereign prince" St. Aquinas is talking about, did not have the same attributes as the leader of a sovereign state today. It was the church and not the sovereign for example, that could "guarantee treaties, devise principles

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[8] Preiser *History of the Law of Nations: Ancient times to 1648* in Bernardt (ed) *EPIL Volume 2* (1995) 722 739

[9] Philpott "Sovereignty: An Introduction and Brief History" 1995 Vol 48 No 2 *Journal of International Affairs* 353 362

[10] ibid

[11] ibid

[12] http://www.questia.com/PM.qst?action=openPageViewer&docId=14834136 [Accessed 19 November 2003]

[13] Preiser *Ancient times to 1648* 733

[14] idem 736

governing war, abrogate any law opposed to the natural law and mediate wars".[15] Thus, religious considerations played a significant role in law and politics and the just war doctrine "formed the core of the Christian international law of war."[16] Since the idea was that only a just war was permitted, the doctrine prevented private wars[17] as well as senseless violence between sovereigns. However, since the beginning the problem with a just cause, was that every person had a different idea of what such a just cause would be.

In the early sixteenth century the Spanish renaissance theologian, Francis de Vitoria developed a doctrine saying that it was lawful to take action against a state denying its own citizens their essential rights.[18] At the time this view was part of the development of the laws of war. Matías de Paz, a Spanish Valladolid professor, took this development further in his 1512 treaties, *De dominio regum Hispaniae super Indos*. While writing about the Spanish efforts to convert the Indians to Christianity, he stated:

> "that a war with those who were to be converted could be a just war for both sides: for the Spanish, because they were fighting for Christ, and for the barbarians because they were defending their country without knowing the Holy Name 'for [the] sake of which war was being waged against them'"[19]

Vitoria generalised this argument, after which it became an accepted idea that a "war could be just for both sides…" Although the theory was never really accepted as a valid and proper legal rule, any benefit of preventing war, which it might have had, was thus lost and the doctrine was abandoned in practice.[20] The use of force was therefore even without the little regulation provided by the just war theory, with a result that states could resort to war whenever they wanted to. This situation was supported by the legal positivistic command theory of John Austin in the

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[15] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 362
[16] Preiser *Ancient times to 1648* 736
[17] ibid
[18] Scupin *History of the Law of Nations: 1815 to World War I* in Bernardt (ed) *EPIL Volume 2* (1995) 767 771; http://august1.com/lectures/pil/lect-01/notes1.htm [Accessed 8 May 2003]
[19] Preiser *Ancient times to 1648* 741
[20] Randelzhofer *Use of Force* 265, 266

eighteen hundreds. His theory included the idea that the only positive law was the commands given by the sovereign or the subordinates of the sovereign.[21] This meant that the sovereign itself would be "legally despotic", as the sovereign power in any country would not be subject to any command.[22] Because the use of force was without international regulation, it is not surprising that the commands of sovereigns were the only law regarding the use of force at this time. This was the legal situation until almost 1919 after World War I.[23]

At the beginning of the twentieth century the scene was thus set for the use of force at any given time. In an attempt to remedy this situation, the Hague Peace Conferences were held in 1899 and 1907.[24] Attempts to restrict the use of force stemmed from an assortment of Conventions. Hague Convention III, for example, administered the Opening of Hostilities and stated that the contracting powers could not resort to war without issuing an explicit warning. This warning could be in the form of either "a reasoned declaration of war or of an ultimatum containing a conditional declaration of war." This meant that warfare was acceptable as long as a warning was given before the war commenced. Hague Convention II prohibited the use of force only for the recovery of specifically contract debts in Article 1. Here the use of force was not prohibited for the recovery of debts other than contract debts.[25] Declarations dealing with warfare on sea and land as well as peaceful settlement of international disputes were also made,[26] but reference to potential and present conflicts were avoided. Thus the potential problems "waited in vain for the difficulties to be lessened by [the] modernization of…law."[27]

In the light of the reason for holding these conferences, it seems strange that the attempts to restrict the use of force were at most modest.

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[21] Van Blerk *Jurisprudence: An Introduction* (1996) 30
[22] idem 32
[23] Randelzhofer *Use of Force* 266
[24] ibid
[25] ibid
[26] http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm [Accessed 28 May 2003]
[27] Scupin *1815 to World War I* 787

2 2 2 The Developing Conflict between Sovereignty and Intervention

2 2 2 1 The Sovereign State

While the idea of sovereignty was considered earlier, as seen in the work of St Aquinas, the concept of a sovereign state was actually given force by the fifteenth century writings of the Florentine, Niccolò Machiavelli. His political theory included the idea that "the maintenance of power internally or the preservation of the State against external enemies..." must have preference above morals and law.[28] While St Aquinas' approach would possibly support humanitarian intervention for the protection of individuals' rights as citizens of their state, Machiavelli's reference to the sub ordinance of morals and law to the preservation of the state would support the idea that the state and its sovereignty, rather than its obligations and responsibilities towards its citizens, comes first.

In the sixteenth century Frenchman Jean Bodin emphasized the internal and external independence of the state, the importance of upholding international agreements undertaken by states as well as the binding force of such agreements. This is in contrast with Machiavelli for whom the law seemed to be just a tool in the game of politics and who attached little value to international agreements and obligations when the maintenance of state power was involved.[29] While the writings of Machiavelli appeared before those of Bodin, it was nevertheless Bodin who was regarded as the theoretical founder of the idea of the state's unlimited power and from whose theory the modern concept of sovereignty was derived.[30] This modern concept of sovereignty was the notion that "there can only be one ultimate source of law in a nation".[31]

In the first half of the seventeenth century, the bloody religious wars in Europe reached their height in the Thirty Years War.[32] Extensive peace negotiations led to

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[28] Preiser *Ancient times to 1648* 740
[29] ibid
[30] ibid
[31] Luban *Just War and Human Rights* in Ishay (ed) *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (1997) 368 368
[32] Verosta *History of the Law of Nations: 1648 to 1815* in Bernardt (ed) *EPIL Volume 2* (1995) 749 749

the assembling of a conference of states that eventually drafted the 1648 Peace of Westphalia.[33] Through this treaty, members of the "so called Holy Roman Empire, whose princes had since 1452 consistently elected a Habsburg as German King and Roman Emperor..."[34] gained a status fast approaching today's sovereignty, in that they could form alliances with foreign powers. As such, the international community of states as it is known today, "based upon the ideas of territorial sovereignty, nationality, and the legal equality of states",[35] as well as a type of just war with regard to transgression of the treaty provisions, seems to date from the Treaties of Westphalia.[36] This treaty made sovereign statehood a legitimate and practiced norm and gave the sovereign princes, although still part of the Roman Empire, the power to make foreign alliances, the "freedom of action outside their borders" vital to sovereignty.[37]

At first only Christian states were accepted into the European Christian civilization, but after the acceptance of Turkey in 1856 into the community of nations that existed at the time, "international law ceased to be a law between Christian states only".[38] The notion of the sovereignty of states did not "emerge in a moral vacuum", but had to be justified. These justifications appeared to take the form of appeals to values defining the "identity or raison d'être of the state, whether they entail the pursuit of justice, the achievement of civic glory, the protection of a divinely ordained social order, or the advancement of individual's rights and the celebration of the nation".[39] Sovereignty is therefore a secondary principle based on existential values and not in itself, the basis of the society of states.[40]

In this time, many different views existed about the rights and duties of states with regard to their own citizens, as well as regarding other states. Hedley Bull

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[33] idem 750
[34] ibid
[35] http://www.questia.com/PM.qst?action=openPageViewer&docId=27948629 [Accessed 19 November 2003]
[36] Verosta *1648 to 1815* 749, 750
[37] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 363
[38] Dugard *International Law* 71
[39] Reus-Smit "Human Rights and the social construction of sovereignty" 2001 Vol 27 No 4 *RIS* 519 528
[40] ibid

compared the views of Thomas Hobbes, Immanuel Kant and Hugo de Groot in this respect.[41] The opposing views of Hobbes and Kant stem from their differences about a possible international society. Hobbes felt that in an international context, states were beyond any kind of society and thus the rules of society, including moral and legal obligations, did not apply to states. States were therefore free to pursue their goals without the restrictions imposed by such obligations. [42] Kant on the other hand, saw the citizens or the "peoples" of the later UN Charter[43] as the community of humankind. He emphasized the link between individuals the world over as nationals of states and saw the aforementioned community as the core of international politics and the "object of the highest moral endeavour." In stark contrast with Hobbes, Kant maintains that relations between states are inferior to the requirements of this morality.[44]

De Groot tried to find a middle ground between Hobbes and Kant. He described the international domain as a society of states and contended that states had to conform to the rules of this society, but that states and not individuals were the primary members of such a society. States were consequently bound by morals and law, but rather than the state system being overthrown by "a universal community of mankind…" as proposed by Kant's universalist tradition, states should yield to "the requirements of coexistence and co-operation in a society of states."[45]

In retrospect, the different views of Hobbes and Kant were a clear indication of the conflict to come in the debate about humanitarian intervention, which posed the claim to absolute sovereignty in protecting the state against intervention to protect the rights of citizens. The balance found in the views of De Groot shows the kind of compromise that is necessary for something positive to come out of this debate.

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[41] Bull *The Idea of International Society* in Williams, Goldstein & Shafritz (ed) *Classic Readings of International Relations* (1994) 20 20-23
[42] idem 21
[43] *UN Charter*, Preamble
[44] Bull *The Idea of International Society* 21
[45] idem 21, 22

2 2 2 2 Intervention

Before the Peace of Westphalia, non-intervention did not exist as a legal rule and interventions, including those aimed at protecting "religious brethren", were considered lawful. In truth, the admissibility of religious interventions was only terminated at the Peace of Westphalia.[46] The legal concept of intervention developed after the rise of the sovereign state,[47] after which it became the principal instrument in the power struggles between the European Powers during the eighteenth century. It was established early on that the right to self-preservation of intervening states was not an accepted justification for intervention.[48] The fact that some states continued to pursue their own interests in the name of humanitarian intervention, then led to the "abstractly formulated prohibition of intervention..." which developed as the non-intervention principle not long after.[49] This idea gained support through the writings of, among others, Emmerich de Vattel, an eminent advocate of sovereignty. The non-intervention principle was nevertheless subject to significant exceptions including "the right to intervene in order to maintain the European balance of power".[50]

In 1793 the French Constitution enshrined the non-intervention principle, but at the same time reserved the right to intervene by means of assisting other people in their struggle for liberty.[51] This is telling of the way governments tried to find a balance between respecting and protecting sovereignty, on the one hand, and trying to reserve the right to protect the rights of individuals. The doctrine of non-intervention has been the principal means of prohibiting the use of specifically armed force since this time.[52] This principle probably stemmed from one of the biggest concerns with regard to humanitarian intervention, namely that states would abuse the institution in an attempt to "coerce and dominate their neighbours..."[53] In truth, this concern included such attempts towards any country that might not be

[46] Steinberger *Sovereignty* in Bernardt (ed) *EPIL Instalment 10* (1987) 397 401
[47] Opperman *Intervention* in Bernardt (ed) *EPIL Volume 2* (1995) 1436 1436
[48] Scupin *1815 to World War I* 770
[49] idem 771
[50] Steinberger *Sovereignty* 403
[51] Schröder *Non-intervention, Principle of* in Bernardt (ed) *EPIL Instalment 7* (1984) 358 358
[52] idem 359
[53] Walzer *Just and Unjust War* 365

able to defend itself against abusing countries who had the ultimate goal of furthering their own political and economic interests. It should be noted, however, that the non-intervention principle was subject to exceptions from the beginning and was, whatever its advocates might have said, never an absolute rule.[54]

De Groot's take on the concerns regarding intervention in *De jure belli ac pacis* is that "[t]he right to intervene in order to enforce another's right, such as that of an oppressed people against their oppressor…does not cease to exist simply because 'evil men' might use it as a pretext to seek private ends".[55] In "The law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and Sovereigns" of 1758, even De Vattel approved of unilateral action by a foreign power against a tyrant to aid oppressed people in their uprising against such a tyrant.[56] It should be noted, however, that this was endorsed only if "good offices and mediation fail to be of remedy."[57]

Sovereignty and the nation state became inextricably linked in the nineteenth century when the institution of option of nationality came to an end. This institution developed out of the Peace of Westphalia in a time when territories were ceded and new states formed. People were given the option to "emigrate to any remaining part of their State of origin while retaining their old citizenship or acquiring the citizenship of a successor State of their choice."[58] In the early nineteenth century however, with the development of the nation state, rulers started to demand fierce national loyalty.[59] The state that demanded maintenance of absolute sovereignty was now the same entity that demanded national loyalty from individuals living within its borders.

One of the consequences of the modern nation state was that intervention by other states was seen as both hostile and an infringement of the right to self-

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[54] Schröder *Non-intervention* 359
[55] Polat "International Law, the Inherent Instability of the International System, and International Violence" 1999 Vol 19 (Nr 1) *OJLS* 51 62
[56] idem 63
[57] ibid
[58] Scupin *1815 to World War I* 778
[59] Younger *Intervention: The Historical Development I* in Jaquet (ed) *Intervention in International Politics* (1971) 12 16

determination.[60] Nevertheless, while governments were claiming the right to deal with their citizens as they pleased, external powers were progressively taking an interest in the world at large. This gave rise to the increased invoking of the protection of human rights and the right to self-determination, especially where minorities were involved, to intervene in domestic conflict.[61] At this time, arguments including "[c]onsent, self-help against breaches of international law, humanitarian grounds...and self-defence" were regarded as valid reasons for intervention.[62]

2 2 3 Human Rights and the Focus on the Individual

The weakening of the idea of absolute sovereignty increased through Jean Jacques Rossouw's "The Social Contract" of 1762. He shifted the focus from the ruler to the citizens and made sovereignty dependent on a social contract. This involved the idea that citizens continually reaffirm their consent to be governed by the democratically elected government. While the day-to-day running of affairs was in the hands of a few, "sovereignty was retained by the people..."[63] Government as executive power were exercised by those officers whose job it was to give expression to the will of the people[64] and to protect the people's rights. In doing so they ensured the government's continuing governance.

The idea of government being legitimised by giving effect to the will of the people was part of the movement towards focusing on the rights of the people and how governments should give effect to and protect these rights. This view itself was not in conflict with the relatively newly found sovereignty that leaders of the young nation states so jealously guarded. However, the protection of these rights by foreign powers, when the seemingly legitimate government violated the social

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[60] idem 17
[61] ibid
[62] Opperman *Intervention* 1436
[63] Kostakopoulou "Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?" 2002 Vol 22 (Nr 1) *OJLS* 135 141
[64] ibid

contract, formed the reason for the humanitarian interventions that breached this sovereignty.

The move towards focus on individuals and humanitarian principles reached its peak in the Geneva Conventions of 1864 and 1906[65]. These conventions dealt with the consequences of war and tried to make it as humane as possible in making provision for the handling of the wounded and sick in war situations. Another such humanitarian treaty is the Declaration of St Petersburg and dealt with the use of explosives in battle.[66]

In the nineteenth century the demands for the protection of minority rights and the treaties that followed, imposed conditions on states that wanted to enter into the European system. However, "it was not until the 1878 Treaty of Berlin that minority protection came to be a normal condition placed on new states", and while it did not mean that minorities were not persecuted anymore, it was still seen as a legitimate norm.[67]

2 3 Humanitarian Interventions

The concerns that existed about intervention as discussed above were not unfounded. Some of the interventions in this era displayed a use of force, which was entirely unproportional. One example occurred as a result of the ransacking of the house of a British citizen, Daniel Pacifico, in Athens in 1827. Greece paid no heed to his claims to reparation and referred him to the Greek courts. This ended in the British Mediterranean fleet turning up just outside of the Greek ports and this led to the citizen recovering damages from the Greek government.[68]

Despite the ulterior political motives often involved, some of these interventions indeed served humanitarian purposes. One such an intervention was carried out by

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[65] http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm [Accessed 2 March 2004]
[66] Scupin *1815 to World War I* 780, 781
[67] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 365; This treaty was concluded between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey
[68] Shwarz *Intervention: The Historical Development II* in Jaquet (ed) *Intervention in International Politics* (1971) 29 33

the Holy Alliance[69] in favour of Greece. Under the Ottoman administration the oppressed Christian population of Greece and the conquered Balkan countries were vanquished in a number of ways. Without revolt, they lived "within a context of relative liberty dictated by the Islamic Law principles..." which involved their children being Islamised and the able bodied integrated into the Turkish army's infantry. Furthermore the Greek farmers were subservient to the power of Turkish military feudalism, which was established at the best land properties. When the Ottoman Empire spread Islamization and "massacres, immigration and subjugation of entire areas..." increased, the Greeks had only the orthodox monastery mountains left.[70]

The rebirth of the classical definition of humanitarian intervention stemmed from the Holy Alliance intervention that followed. The Navies of Britain, Russia and France united and destroyed the Turkish/Egyptian Navy in Navarino in a synchronized naval battle that paved the way to the substantial liberation of Greece.[71] This kind of intervention once again became the doctrine of De Vitoria, which held that it was lawful to take action against a state denying its own citizens their essential rights.[72] Today this is known as Humanitarian Intervention.[73]

After the intervention, the Greek General Assembly approved the new Constitution and elected Ioannis Kapodistrias as the first President of the Greek Republic in 1827. Considering that Britain, France and Russia were part of the intervening forces; it is ironic that they recognized the sovereignty and independence of Greece only by 1830. This happened as a result of the London protocol, issued by the three major forces, which ensured Greece's independence. Only "[t]wo years later [were] the borders of the new state traced - far [more] restricted than what the Greeks had

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[69] Verosta *Holy Alliance* in Bernardt (ed) *EPIL Volume 2* (1995) 861 861 The Holy Alliance was part of a series of treaties concluded in 1814 between Austria, Great Britain, Prussia and Russia in an attempt to restore the balance of power in Europe and [ironically] bring an end to the interventions that laid Europe to waist

[70] http://www.mfa.gr/english/greece/through_time/history/ottoman.html [Accessed 22 May 2003]

[71] ibid

[72] Scupin *1815 to World War I* 771

[73] ibid

expected: the northern border [was] just over the Corinth Gulf". [74] When Greece became a monarchy under Otto of Bavaria, the 1827 constitution became obsolete.

The three mentioned European forces assumed the role of protectors of the new Greek administration, but while they guaranteed the borders of the country, this actually restrained its independence. The Greek State was now acknowledged, but the actual constitutional regime, degree of independence and exact territory remained obscure, since there was no legitimate constitution at this point. This led to political instability and despite an improved constitution accepted in 1864, the impact of royal interventions, appointed "minority governments and abusive dissolution of the parliament" destabilized the country bit by bit.[75] Only in 1897 was King George I forced to accept the 'Principle of Parliamentary Majority' officially, "a key issue, pertaining to the parliamentary system, which had been torturing the political life of the country for over 40 years."[76]

The conduct of the intervening forces after intervention did not arise out of any agreement between international parties, but was rather the outcome of decisions regarding only this situation and the interests of the intervening parties. When France intervened in Syria in 1860 to protect the Christians, this pragmatic approach was also taken.[77] The aristocracy and peasants from different groups retaliated after initial successes in a Christian peasant uprising in part of Syria.[78] Instead of just aiming to stop the uprising in its tracks, the Muslim retaliators started butchering Christians by the village. In Dayr-al-Qamar 2 200 Christians were slaughtered in a day. In Hasbayya, the Druzes besieged the resisting Christians. Because the Christians were without any help, they finally entrusted themselves to the Ottoman garrison, which disarmed them before handing them over to the Druzes, who killed every one of them. "In Lebanon alone, 360 Christian villages were destroyed in a premeditated attempt to alter the geographic repartition of the population: 250 Christians were killed in battlefield; 11 000 treacherously

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[74] http://www.mfa.gr/english/greece/through_time/history/ottoman.html [Accessed 22 May 2003]
[75] ibid
[76] ibid
[77] Beyerlin *Humanitarian Intervention* 927
[78] These groups consisted of among others Druzes, Shiis, Sunnis, Bedouins and eventually also some of the Ottoman contingent soldiers who were supposed to protect the Christians

butchered and 4 000 died of hunger; 6 000 widows and 10 000 orphans; 100 000 homeless. The Druzes had lost 1 300 men in battlefield and in contrast with the Christians, only 176 Druzes [had been] murdered".[79]

A French expeditionary force was sent to Lebanon to restore peace and protect the Christians and arrived in Beirut harbour in August 1860. After the intervention, the Europeans and the Ottomans "agreed to reorganize the Lebanese political system".[80] An autonomous entity, called Moutasarrifia, which "included a population of 300 000 with an overwhelming Christian majority (89%)" was established and ruled by a non-Lebanese Christian Ottoman official.[81]

As seen in these examples, as well as the previous discussion about developing theories that have an influence on humanitarian interventions today, the conduct and responsibilities of the intervening parties after intervention has never been a focus of development.

2 4 Conclusion

It seems that a large number of the influences on what would eventually become humanitarian intervention have a long history and were still fervently debated until World War I. The most important influence on the use of force in this era, however, seemed to have been the just war theory. As this theory had lost all its influence, the regulation of the use of force had reached an all time low directly before World War I. As wayward forcible interventions were wreaking havoc, the international community used the non-intervention principle as an instrument to stop interventions of any kind. This principle did not succeed, as there were no standards by which to judge the interventions that followed and no authority to enforce the non-intervention principle. Instead of trying to remedy the situation the international community claimed helplessness and looked on while the unregulated use of force drove the world to ruin. It became critical that some sort of review was

[79] http://www.lebanese-forces.org/lebanon/history.htm [Accessed 21 May 2003]
[80] ibid
[81] ibid

developed to determine when the use of force would be acceptable in international relations.

At the same time, the idea of sovereignty developed and states started to demand the rights to internal and external sovereignty. This meant that inside the state's territorial borders the sovereign unit had the exclusive law-making and law-enforcing authority. Outside the borders, independent states equal in status recognised one another as inviolable and authoritative bodies.[82] The Peace of Westphalia made the sovereign state "a legitimate political unit... It implied that basic attributes of statehood such as the existence of a government with control of its territory were now, along with Christianity, the criteria for becoming a state... [It] removed all legitimate restrictions on a state's activities within its territory."[83] However, the realization of these demands was severely limited because of the claimed helplessness with regard to unregulated interventions, with a result that the prospects for absolute sovereignty looked less and less likely. Ultimately it seems that the pre-World War I society of states and the existing concept of sovereignty did not pass the "test of the fundamental ideas of a universal international legal order", as it could not maintain international peace.[84] The conflict between protecting the sovereignty of states and humanitarian intervention did not look ready to be resolved.

Nevertheless, the awareness of the right of citizens to be protected by their own government and the growing denouncement of oppressing governments by state leaders left a need for some kind of intervention to relieve the plight of oppressed people. It also paved the way for the human rights culture and lifted the acceptable standard of treatment of a state's own nationals considerably. Even though the standard from which it was lifted was very low, the effect of the expanding humanitarian consciousness should not be underestimated. It is to be expected that many growing pains would accompany the birth of any institution with a potentially vast impact on international relations. Although the picture seemed

[82] Kostakopoulou 2002 Vol 22 (Nr 1) *OJLS* 135
[83] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 364
[84] Steinberger *Sovereignty* 407

structurally dismal, the idea of intervention for humanitarian purposes provided a possible meaningful addition to the international arena.

One of the things that had the potential to nullify any positive effect this kind of intervention could have was the uncertainty about the post-intervention responsibilities of intervening forces towards the people for the sake of whom they intervened. At the beginning of World War I there were no guidelines for how this would be done and questions regarding the responsibility of rebuilding institutions and/or the economy, promoting reconciliation and punishing war criminals were addressed only when they surfaced. Similar to the debates about the conflict between sovereignty and intervention, this issue was not the subject of furious debates, and thus left the world without a yardstick by which the process could be evaluated.

While the differences with regard to the influences on humanitarian intervention did not seem to be near any kind of resolution, other important developments were taking place. In the nineteenth century the intense focus on theory decreased, for example, and international law developed the characteristic of considering state practice.[85] This would become a very significant part of establishing customary international law, as explained in Chapter One.

The practice of states to conclude treaties did not seem to be of any immediate advantage to the future idea of humanitarian intervention. Many were concluded, most of which focused on keeping peace and on political and economic relations. None, however, seemed to focus on regulating intervention specifically for humanitarian purposes.

Another development that occurred in the debate between preserving state power and the place of morality and law in the international arena was the realization that law and adherence to it would play a central part in international relations. Especially the Hague Conventions, the first of which was initiated by Russia and the second by the United States (US), showed that even seemingly natural enemies realized the importance of a legal framework in the modern international law.

[85] Scupin *1815 to World War I* 769

Unfortunately these conventions were denied the role that they could have played in peaceful international relations. This was caused by the unwillingness of participants to address valid potential conflict in a relatively neutral environment where all relevant players were together.

It should be remembered, that in the beginning there was no real mention of humanitarian intervention by that name. Even though humanitarian intervention had been widely discussed, it carried the definition of the Encyclopedia of Public International Law,[86] and seemed to develop as just another specific reason for intervention. This is probably because the focus on human rights as we know it today only really came into being in the last century.

Most of the interventions that did happen were not truly humanitarian, but rather aimed at supporting states' own nationals abroad and was often not proportional to the injury suffered. Although they were never done in the name of humanitarian purposes, the possibility of abuse in the name of humanity clearly existed. It is possible to find a humanitarian approach in almost any situation where justification is necessary for intervention to actually further economic or political interests.

The examples of humanitarian intervention shown were nevertheless well justified and set a standard for the kind of situations in which interventions could be allowed. Even so, this standard was not fixed and would, for the time being, remain part of the discourse about when such humanitarian intervention was justified. The fact is that because our international legal order is based on a system of equal, sovereign states, it is neither possible nor desirable to allow intervention for all human rights abuses. The situation with regard to interventions and the use of force, as it stood before World War I is evidence of where such a policy would lead. However, before World War I it became clear that the world could not stand by and watch while an entire ethnic group was systematically being wiped out.

At the end of this era the influences, which would eventually lead to the idea of humanitarian intervention and the controversy surrounding such intervention, were thus still debated. Although this was true of the use of force and the conflict

[86] Beyerlin *Humanitarian Intervention* 926

between sovereignty and intervention, the reality was that another influence, the responsibilities of intervening forces after intervention, was hardly discussed at all. Nevertheless, one aspect saw some very positive changes in the midst of all this debate. This was the shift in focus from the state towards the rights of the individual. De Groot's vision for international relations as discussed above[87] might be seen as an ideal, but the reality is that if a balance between the state and the individual is not found, possible future humanitarian intervention could remain a problem instead of becoming the solution that it could be.

[87] Bull *The Idea of International Society* 21, 22

CHAPTER THREE

Developments from World War I until World War II

"How can I, as an advocate of human rights, resist the assertion of a moral imperative on states to intervene in the internal affairs of another state where there is evidence of ethnic cleansing rape and other forms of systematic and widespread abuse, regardless of what the Charter mandates about the use of force and its allocation of competence?"[1]
– Christine M. Chinkin

3 1 Introduction

Until World War I a strong commitment to the sovereign state as the only subject of international law was a basic quality of the international system. Further elements of this classic system were the recognition of war as the definitive weapon for law enforcement and protection of national interest, as well as the disorganised character of the international community. After World War I a new international law system developed. The international community was organised within the League of Nations and the League Covenant restricted war as an executive instrument. This system was more receptive to the idea of restricted sovereignty and sensitive to the individual's human rights and its protection.[2] Since the idea of sovereignty is an integral part of the history of international law, it is not surprising that some of the core elements of international law are of immense importance to the exploration of sovereignty itself. One of the elements of specific importance here is the question "...whether and to what extent interventions...by foreign powers are admissible".[3] This question became even more important after World War I when the community of nations, dismayed at the destruction brought about by The Great War, tried to prevent such use of force from ever happening again.

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[1] Chinkin "Kosovo: A 'good' or 'bad' war?" 1999 Vol 93 *AJIL* 841 843
[2] Grewe *History of the Law of Nations: World War I to World War II* in Bernardt (ed) *EPIL Volume 2* (1995) 839 839
[3] Steinberger *Sovereignty* 397

Although the Hague Peace Conferences, held for the very reason to prevent the kind of devastation brought about by World War I and therefore part of the efforts to limit and regulate the use of force, were commendable, they proved to be unsuccessful. The outbreak of World War I prevented a planned third conference,[4] in which the strategies of the Peace Conferences would have come together.

During this period a concept human rights which, according to Henkin, included those liberties, immunities and benefits that human beings should be able to claim "as of right" of the society in which they live, gained support.[5] Simultaneously, states claimed the indestructibility of their sovereignty with more and more vigour. Thus, in the time between the two world wars there seemed to have been a constant interchange between acknowledging the need to protect individuals and the need to preserve the state system.

As a newly formed global organisation, the League played a significant role in the changing views on the relationship between different states and their citizens. In explaining the value of the League, Rappard compared it with economic commodities.

> "Just as in economic theory the value of a commodity is determined by the intensity of the need it satisfies or of the privation that would result from its abolition, so the real nature of a political body is revealed by its actual contribution to the life of the collectivity or...the loss that the community would suffer in its disappearance."[6]

While the League did not last, its contribution to the communication between nations remains invaluable, as shown below.

An examination of the development of the notion of humanitarian intervention between the two world wars requires consideration of the influence and value of the League. The factors causing some of the problems with regard to humanitarian intervention identified in Chapter Two, namely the use of force, sovereignty,

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[4] idem 407
[5] Henkin *Human Rights* in Bernardt (ed) *EPIL Volume 2* (1995) 886 886
[6] Rappard *What is the League of Nations?* in The Professors of the Graduate Institute of International Studies (ed) *The World Crisis* (1938) 36 39

intervention and the responsibilities intervening forces might have after intervention, are also studied in this chapter. In addition, the roots of the problems arising from the United Nations system, including the Security Council discretion with regard to a "threat to international peace and security" are considered.

3 2 The League of Nations

3 2 1 Establishment of the League

When the League of Nations was established, it was intended to be a global undertaking for securing international peace and security "by a collective effort in the form of a permanent universal international organisation".[7] The origins of the League are to be found in various private and public schemes during World War I and in the Paris negotiations aimed at ending the war. The most significant example of governmental ideals about the organizing of states into an international body is found in the South African Jan Christiaan Smuts' leaflet, "The League of Nations: A Practical Suggestion".[8] While a committee established at the Paris Peace Conference[9] created the Covenant, it was an integral part of the Treaty of Versailles, which brought an end to Word War I. The Covenant, the product of "wartime planning and post-war negotiations" and of emerging trends in "international life", became effective on 10 January 1920.[10] The truth is that in the formation of the League, the victorious Principal Allied and Associated Powers were moulding the world under their "oligarchical direction", which meant that the world would be organized under the leadership of just a few great powers. This is seen from the provision of permanent membership for five of these great powers.[11] The rest of the members of the League did not have the influence that came with permanent membership. With its predominantly liberal tone, the League was

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[7] Steinberger *Sovereignty* 408
[8] Claude *Swords into Plowshares: The Problems and Progress of International Organization* 3rd ed (1964) 37
[9] ibid
[10] idem 38
[11] idem 44

intimately linked to the ideology and values of a democratic society,[12] which emphasized the existence of the will of all the people and affirmed the idea that governments are "merely the agents of the collective will..."[13]

The collective will of the people underpinning the democratic state is still an imprecise notion and not very clear. While democratic governments do take public opinion into account, it is a fictitious assumption that goverments' decisions are dictated by the will of the people.[14] Although the significance of democratic society should not be lessened, it is important not to forget that governments generally do what they think their people need and not necessarily what their citizens really want. Nevertheless, the League strongly defended this ideology and would not admit any nation that could not show that its institutions were free.[15] Despite the fact that these ideas about democracy were enforced on its members, the League was never intended to be the kind of revolutionary organisation that would change the international law system and structure of the time. Rather, it had as goal the creating of safety devices to prevent anything like the Great War to happen again.[16]

Nevertheless, the power that the League did have to resolve disputes between states was not necessarily that effective. When a dispute did occur, the League could essentially resort to one of three sanctions. In the first place, if arbitration or judicial settlement proved to be unsuccessful, the League could introduce a "verbal sanction", "warning an aggressor nation that she would need to leave another nation's territory or face the consequences".[17] If this had no effect "[t]he League could order League members not to do any trade with an aggressor nation..." by introducing economic sanctions, and failing this, military force could be authorised.[18] While this might seem very similar to the UN system, the difference is that while the League also did not have a military force at its disposal, "no member

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[12] idem 46
[13] Bourquin *The Crisis of Democracy* in The Professors of the Graduate Institute of International Studies (ed) *The World Crisis* (1938) 60 60
[14] ibid
[15] Claude *Swords into Plowshares* 46
[16] idem 49
[17] http://www.historylearningsite.co.uk/leagueofnations.htm [Accessed 26 November 2003]; League of Nations, *The Covenant of the League of Nations* (1920), Article 15
[18] ibid; *Covenant of the League of Nations*, Article 16

of the League had to provide [a military force] under the terms of joining" and thus the League could not implement any of its threats.[19]

3 2 2 Influence of the League

3 2 2 1 Sovereignty

Of importance with regard to sovereignty, is the concept of domestic jurisdiction that appears to have been adopted as a legal notion in article 15(8) of the League Covenant. The formulation of this notion includes matters "in which the state is free from international obligations of any kind".[20] It is thus clear that domestic jurisdiction is a relative concept, dependent on the number of treaties signed by the state, customary international law and the obligations that a state has freely agreed to.[21]

Except for the introduction of the concept of domestic jurisdiction, the League Covenant also introduced the mandate system. This system, under which the tutelage of Trust territories was assigned to advanced nations, was in truth disguised colonialism, as reflected in the Covenant's description of the colonies, "which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world".[22] Thus "the granting of mandates often represented nothing more than the granting of spoils to the different victorious allied governments".[23] According to article 22 of the Covenant, this system allowed a wide discretion regarding the implementation of different mandates: "The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances."[24] Furthermore, the "degree of authority, control or administration to be exercised by

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[19] http://www.historylearningsite.co.uk/leagueofnations.htm [Accessed 26 November 2003]
[20] Conforti *Law and Practice* 135
[21] ibid
[22] *Covenant of the League of Nations*, Article 22
[23] http://www.mideastweb.org/leaguemand.htm [Accessed 26 November 2003]
[24] *Covenant of the League of Nations*, Article 22

the Mandatory [were], if not previously agreed upon by the Members of the League…explicitly defined in each case by the Council. A permanent Commission [was additionally]…constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."[25] This system, however, did not last long in the progressive development towards the independence and sovereignty of colonies.[26]

In this time, the sovereignty of the advanced nations themselves was being limited as a result of the "only lasting significance of the peace process"[27] after World War I. This was a result of the minority clauses included in the peace treaties signed with enemy states, which required the signatories to grant civil and political rights as well as religious and cultural tolerance, to minority groups within their countries. These minorities included people who differed by race or language from the rest of the population in a country. The observance of these treaties were supervised by the Council of the League as well as monitored by the Permanent Court of International Justice (PCIJ), established in 1920. Where states had records of mistreatment of minorities, their admission to the League was made conditional on their protection of the rights of these people within their borders. The significance of the minority clauses was the fact that they were the first human rights limitations enforced by an international institution on sovereign states.[28]

While several aspects of the idea of absolute sovereignty was being criticised, the core elements of sovereignty were being codified in the Montevideo Convention on the Rights and Duties of States in 1933.[29] This was done to guide the process of recognition of states that was earlier heavily influenced by political considerations.[30] The problems regarding the influence of political considerations on the recognition of statehood by other states, is specifically seen in the conflict between the two schools of thought about this issue. While the declaratory school

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[25] ibid
[26] Grewe *World War I to World War II* 843
[27] Robertson *Crimes against humanity* 16
[28] ibid
[29] Dugard *International Law* 72
[30] idem 71

maintains that upon "meeting the factual requirements of statehood",[31] recognition by other states simply acknowledges statehood, the constitutive school argues that recognition by other states is one of the requirements of statehood.[32] This has the effect that a contender for statehood can be both a state and a non-state if it is recognized by some states and not by others. As a result Lauterpacht reasoned that when a contender for statehood meets the Montevideo requirements, states should have the duty to grant recognition.[33]

The elements in the Montevideo Convention included four requirements, which were a permanent population, a defined territory, a functioning government and the capacity to enter into relations with other states.[34] It seems that these requirements assisted in establishing one of the main elements of sovereignty; that a state can exercise "adequate" authority over its own territory to the exclusion of other states.[35] Hall's emphasis on the state's duty, as arising from the right to its own sovereign independence, to respect the independence of others, may have added to this development.[36]

Thus, although the idea of sovereignty was being established and supported by some writers, it was also "limited" by the increasing focus on the individual and human rights. This tension in international law caused by these conflicting values is still seen today.

3 2 2 2 Intervention and Responsibilities of Intervening Forces after Intervention

At this time, the international legal order developed into a political body, influenced by political interests and dictated by the values of the states part of this order, which was both more interdependent and more penetrable than its predecessors. These changes were particularly felt with regard to intervention, as they pierced the non-

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[31] idem 80
[32] ibid
[33] idem 81
[34] *Montevideo Convention on the Rights and Duties of States* (1933), Article 1
[35] ICISS *Supplementary Volume* 6
[36] Hall *A Treatise on International Law* 7th ed (1917) 54

intervention principle.[37] The international community began to see intervention as the business of the body of nations and not just the business of a single state,[38] and thus collective security was introduced. In theory, this meant that intervention by a single state as an instrument of foreign policy was prohibited, whatever its justification, while collective intervention under authority of the League of Nations or regional organisations such as the Pan American Union [PAU] and subsequently the Organization of American States [OAS], was accepted.[39] Article 10 of the Covenant for example, stated that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[40] While the Covenant of the League of Nations furthermore provided for collective intervention specifically to prevent disturbances of peace in article 11,[41] and some writers ascribed to the League the ability to protect nationals against their own government, the League was loath to exercise such powers.[42]

It seems that states had difficulty deciding where they stood with regard to intervention and the possible restriction of sovereignty in this era. At the 1936 Inter-American Conference in Buenos Aires, for example, the United States subscribed to the practice of absolute non-intervention, which all signatories had committed to. Two years later at the Lima Inter-American Conference, the US successfully pushed for a new practice of collective action to protect the security of the member states.[43]

Since much uncertainty existed with regard to whether and by whom intervention could take place, even some of the more vigorous advocates of non-intervention allowed for intervention in certain situations. Hall maintained, for example, that intervention as a result of "the prevalence of ideas which are opposed to the views

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[37] Grewe *World War I to World War II* 841
[38] Wehberg *Civil War and International Law* in The Professors of the Graduate Institute of International Studies (ed) *The World Crisis* (1938) 160 163
[39] Grewe *World War I to World War II* 841; Younger *Intervention* 19
[40] *Covenant of the League of Nations*, Article 10
[41] Wehberg *Civil War and International Law* 189
[42] Grewe *World War I to World War II* 841
[43] idem 842

held by the intervening state or its rulers"[44] ceases to be legitimate. Whether the prevalence of certain ideas in the governing state included the execution of these ideas is unclear. The fact is that if these ideas included the abuse of human rights, it would mean that intervention for the protection of human rights was illegal. This is because the mere fact of intervention would mean that the ideas of the intervening state about the protection of human rights would be different from the ideas of the governing state. At the same time, however, intervention with the aim of freeing people from tyranny, among other things, was acceptable.[45] Such a situation would form part of one of the four acceptable grounds for intervention, which is the "right of opposing wrong-doing…"[46] Because international law was only concerned with the relations between states, and massacres, tyranny and persecution were assumed not to have anything to do with the relation between states, these wrong-doings would fall under the ground mentioned above only if international law was competent to take notice of them.[47] These conflicting views on intervention and when it would be acceptable is telling of the hesitance regarding a focus on the individual in the early twentieth century.

It seems that the major powers in this era were more concerned about the legitimacy of intervention in civil war, which often occurred because of the tension between different political factions in newly recognized states, than about other kinds of intervention. This was because newly recognized states, jealously guarding their recently found independence, were frequently very sensitive about any kind of intervention by foreign states. Nevertheless, one of the grounds on which intervention in civil wars could happen then, seems to be closely related to the possible grounds for humanitarian intervention. This ground arose when a civil war was conducted "in defiance of all the principles of humanity…"[48] It appears that intervention for such humanitarian purposes, could only be undertaken if intervention were truly the only way in which the observance of humanitarian

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[44] Hall *A Treatise* 295
[45] idem 299
[46] idem 294
[47] idem 298
[48] Wehberg *Civil War and International Law* 190

principles could be ensured. In addition, it was considered that intervention could not be illegal if the rebels engaged in cruel and inhumane practices, such as the blinding and maiming of their prisoners, since such an intervention had as its purpose the protection of human beings and their basic rights. In truth, it seems that the more inhumane and appalling the practices, the greater the inspiration to intervene as a result of the revulsion of the international community for such atrocious behaviour in the waging of civil war. Even so, such inhumane practices did apparently not happen frequently,[49] something that cannot be said about contemporary practices, as the mutilation and maiming committed by the Revolutionary United Front (RUF) and the ousted Armed Forces Revolutionary Council (AFRC) in Sierra Leone demonstrate[50]. The idea that intervention could be lawful in the face of such inhumane practices is a possible standard for humanitarian intervention today; as such an idea would form part of the basis of human rights law.

Similar to humanitarian intervention before World War I, the responsibilities of the intervening forces after intervention were hardly considered in the time between the two world wars. Although the lack of consideration given to this issue might have something to do with the fact that humanitarian interventions were scarce, the main reason is probably simply that as the protection of human rights and the responsibilities it brings were not an accepted institution, the debate about intervention and sovereignty dominated the international legal field during this era.

3 2 2 3 The Use of Force

After the damage done by World War I, the need to prohibit or firmly regulate the use of force was an important purpose of the League. But, since it was never intended to be a super State, the League did not have any executive power in the form of collective armed force or peacekeeping units to enforce the decisions made under the Covenant. At the same time, however, the lack of provision for collective

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[49] ibid

[50] http://web.amnesty.org/library/Index/ENGAFR510151998?open&of=ENG-312 [Accessed 2 March 2004]

armed force rendered the prohibition of armed force as instrument of national policy deficient.[51]

An additional effort to regulate the use of force was the 1924 Geneva Protocol for the Pacific Settlement of International Disputes, which never became valid. It provided in article 2 that states could not resort to war, except in self-defence or as part of collective coercive measures.[52] Although these measures were vague, they seem to have constituted an attempt at regulating collective armed force. Had they been validated, this Protocol would have been more effective than the League.

Ultimately, it was the Kellogg-Briand Pact of 1928 that proved to be the most enterprising effort to regulate the use of force. However, while the Pact established a more comprehensive prohibition of specifically war as a form of armed force, the sanctions for contravening the treaty terms included only the denial of the treaty benefits. Added to this was the fact that states now used force that fell just short of war to escape the insignificant effect that contravention of the treaty terms had.

On the whole, it seems that although efforts were made to regulate the use of force, the political will to effectively enforce it was lacking where both the League and the Kellogg-Briand Pact were concerned and as such, neither succeeded in preventing the unregulated use of force.[53] Nevertheless, these efforts helped to transform the idea of war as an acceptable instrument into the idea of a more regulated use of force. The importance attached to these efforts is seen in existing opinions that the regulations of the Kellogg-Briand Pact, including the prohibition of war subject only to the exception of self-defence, are part of today's customary international law.[54]

3 2 2 4 Human Rights

The new world order was still cautious with regard to the protection of human rights. The concept was mentioned neither at the Versailles Peace Conference that

[51] Grewe *World War I to World War II* 845
[52] Randelzhofer *Use of Force* 266
[53] Grewe *World War I to World War II* 846
[54] Randelzhofer *Use of Force* 267

brought an end to World War I, nor in the Covenant of the League. The closest the Covenant came to mentioning human rights was in article 23, in which members "promised 'just treatment' to natives in Trust territories and [promised] that they would 'endeavour to secure and maintain fair and humane conditions of labour'".[55]

In this era the political will to protect human rights came second to the concern of the colonial powers that the recognition of such rights would render the people in "their" colonial domains restless. As such, these nations quashed a proposal made by Haiti at the League in 1934 to create a treaty guaranteeing the human rights of ethnic minorities,[56] which was probably the only time that the protection of minorities was ever mentioned at the League.

The virtual silence that existed on the subject of the protection of human rights in this time should not be mistaken for a portrayal of the degree of adherence to human rights. From 1936 to 1938 the so-called show trials in Moscow, which was used to justify the extermination of Stalin's political opponents, masked the elimination of more people than the six million Jews that died in the Holocaust. In Moscow alone 30 000 defendants, whose confessions were mainly obtained through torture, were sentenced to death by firing squad.[57] Regardless of the tentative moves toward a stronger focus on the rights of the individual, however, nothing was done to stop these atrocities.

International legal instruments regarding human rights were limited at this time and since the League did not comprise a central law-making authority, the codification of customary international law and the conclusion of law-making treaties increased as a kind of substitute. Two treaties that emphasized the focus on the growing humanitarian sentiment in particular were the Geneva Convention relative to the Treatment of Prisoners of War and the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field. Both were adopted in 1929.[58]

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[55] Robertson *Crimes against humanity* 16
[56] idem 21
[57] idem 17
[58] Grewe *World War I to World War II* 844

3 2 2 5 Roots of the United Nations

While the jury was still deciding on the acceptability of intervention by individual states, it seems that intervention by "the body of states, or...some of them acting for the whole in good faith with sufficient warrant" was tolerated.[59] The term "sufficient warrant" here seemed to refer strictly to international interests.[60] Even though intervention by international bodies in affairs of states was becoming tolerable, it is unclear whether the protection of human rights would necessarily have been included in such interests.[61] The idea that only international interests - and not the domestic affairs of states - could warrant intervention is an early sign of the principles found in the UN Charter.

Early signs of what would become a "threat to international peace and security", the justification for armed intervention under the Security Council relevant to this study, are found in the writings of Hall, who claimed that when the "safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there",[62] the self-preservation of a state could take precedence over its duty to respect the other state's freedom to do as it pleases within its borders. It seems that the threatened state could take the steps necessary to prevent such a threat, although it is not clear what such steps could include. While such a situation might look more like self-defence, it was clear that by this time threats to international peace and security were not tolerated any longer.

In addition to these early signs of some of the principles that would eventually be found in the UN Charter, the roots of two other principles are also found in the League system. The first of these is the provision for permanent membership of the five great powers to the League. This idea precedes the permanent membership of the five great powers to the Security Council today. Another principle involves the notion that only collective intervention is acceptable, while intervention by a single state would be illegal. While the League only existed until shortly after the Second

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[59] Hall *A Treatise* 303
[60] ibid
[61] Younger *Intervention* 19
[62] Hall *A Treatise* 55

World War, it played a valuable role in shaping the post-World War I international order.

3 3 Relevant Theories and Views

Towards the 1930's a new international human rights debate ensued. One of the prominent contributors was the British author H.G. Wells. In a series of letters written to The Times in 1939, he advocated the adoption of a Declaration of Rights. This seems to have played quite a significant role in the human rights revival. This document would be "a fundamental law defining rights in a democracy".[63] He and a few friends drafted a declaration existing of nine principles that were printed as a booklet, "H.G. Wells on the Rights of Man". According to Robertson, this debate and these principles so influenced the president of the United States that after America joined the Allies in the Second World War, the Allied powers stated that "complete victory over their enemies [was] essential...*to preserve human rights* and justice in their own lands *as well as in other lands*".[64] Wells was probably the first to demand the "New World Order" in which fundamental human rights of individuals would be protected against "governments of whatever political complexion."[65]

Another author of significance is the French jurist Georges Scelle. During the first half of the twentieth century he played an important role in removing the state from its central position in the system of international law. Scelle included the individual as a subject of international law and saw the world order as quasi-federal, with the League having a superior role in this order.[66] Under his influence, "the concept of sovereignty was all but banished from the research and teaching of the international law faculties of French universities".[67]

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[63] Robertson *Crimes against humanity* 22
[64] ibid
[65] idem 23
[66] Grewe *World War I to World War II* 843
[67] http://www.ejil.org/journal/Vol1/No1/art9.html [Accessed 17 September 2003]

In his 1932 work, *Précis du droit des gens,* he emphasized the futility of the desire to build international law on the idea of sovereignty and maintained that "[i]n practice, this concept only leads to the release of governments' will from the grip of law, to destroy the notion of competence, and with it the notion of legality".[68] Additionally he stressed the League and governments' responsibility to protect "individual rights". In the same work, while hinting at the persecution of Jews and other minorities in Germany, which was brought to the attention of the Assembly of the League of Nations, he wrote the following about individual freedom:

> "It may perhaps seem paradoxical to devote this first chapter to what the classic legal literature calls individual rights at a time when in many countries these rights are openly ignored or brutally violated by governments while other governments, and the League of Nations itself, which, it is submitted, have a duty to intervene and safeguard the law, do not appear willing to make the necessary effort to fulfil this legal duty. Their excuse can perhaps be found in their impotence. Without question, the law is in a period of regression. Is this a reason to refrain from setting forth the rules? Quite the contrary, it is important not to weaken their expression."[69]

Scelle's writings can be seen as a portrayal of the interest in human rights protection, which developed progressively under the influence of the reviving natural law.[70]

3 4 Humanitarian Interventions

In this era, it became clear that the non-intervention principle was unequipped to deal with the emerging nature of armed conflict. During the Spanish Civil War, Communist Soviet Union and fascist Germany and Italy clashed on Spanish territory in an international conflict under the guise of civil war. While Britain and

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[68] ibid
[69] ibid
[70] Grewe *World War I to World War II* 843

France tried to contain foreign infiltration, it became apparent that non-intervention restrained government support, but not volunteers or support through private channels.[71]

Since this is about the closest thing to humanitarian intervention in this era, it seems strange that in the midst of the debates about intervention and sovereignty and the increasing focus on human rights, there were no significant humanitarian interventions during this time. If anything, a blind eye was turned at gross human rights abuses such as the elimination of Stalin's opponents.

3 5 Conclusion

While debates were still being waged, especially on sovereignty and intervention, it seems that human rights definitely saw some progress in this era. In addition, the developments of some of the principles of the United Nations system are now clearly visible in the League structure.

While the potential value of the League of Nations and all its deliberative bodies was obvious from early on, even though the League did not comprise a central law-making authority, the inability of the different states to reconcile their political agendas could ultimately have paralysed the League.[72] This is seen in the fact that states accepted the international agreements after the Great War with great enthusiasm in so far as the agreements "offered obvious technical advantages and only slightly restricted their national freedom of action..."[73] However, "it was quite different when they were asked to sign political pacts directly involving their national sovereignty."[74] It seems that even after the devastation of World War I, the nations of the world had still not accepted the fact that peace and the promise of individual freedom would not leave their sovereignty untouched.

Another reason for the blows sovereignty was dealt is to be found in the Spanish civil war. Even though Britain and France's efforts to suppress the conflict of the

[71] idem 842
[72] Rappard *What is the League of Nations?* 42
[73] idem 52
[74] ibid

Spanish civil war were not in any way a humanitarian intervention, the uncommon features of the armed conflict they faced, gave the world a taste of the kind of conflict that would dominate the rest of the twentieth century. Unlike the Second World War in which conflict happened between states, most conflicts today seem to include gross human rights abuses and happen within the borders of a single state. Because of the nature of such conflicts, it becomes increasingly difficult to maintain the integrity of such borders if the human rights of its citizens are to be protected by the international community. It is the extent to which this kind of conflict would occur, which could not have been foreseen between the two world wars or right after the Second World War and has now caught the world legally unprepared to deal with its effects.

In commenting on the "foolish talk after 1918 about not interfering in internal affairs of...member[s] of the League of Nations",[75] Wells recognized the fact that the domestic affairs of states often have significance for the body of nations and argued that "[i]t is time we recognized fully that the making of any lethal weapon larger than what may be required for the control of big animals, is a matter of universal concern..."[76] Although this comment did not concern the gross violation of human rights, it was indicative of the development of the idea that sovereignty cannot be absolute in nature and should under certain circumstances, for instance in the interest of the international community, be subject to piercing.

One of the most important developments with regard to intervention at this time was the notion that it should be legal only if carried out by the community of nations or a group of states, and not by a single state. Other developments included that intervention should be the last resort and that it should be specifically for the well being of the country being intervened.[77] While it might be unrealistic to think that states will intervene if they do not have any interest in such an intervention,

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[75] Robertson *Crimes against humanity* 24
[76] ibid
[77] Wehberg *Civil War and International Law* 192

this can be seen as the humble beginnings of the notion of "the responsibility to protect" as promoted by the ICISS.[78]

While international law was coming to terms with the influence of the increasing focus on the individual and its rights, however, it continued to regard intervention as beyond the legal authority of states and to see the only justification for intervention, as a moral one.[79] Hall, who was an advocate for non-intervention, felt that a state that "grossly and patently violates international law in a matter of serious importance..."[80] should be prevented from continuing such violation by any state or the body of states. While the sensible standard was set that interference should not be unproportional to the offence,[81] the significance of this statement is its recognition of the necessity of protecting international values of serious importance. And is human rights not a value worth the protection of the international community?

While some writers maintained that there can be no exception to the non-intervention principle, others felt that the community of nations cannot refuse to take action in the face of "tremendous offences against justice and humanity..."[82] Even though it was supported by a majority of writers, it remains debatable whether humanitarian intervention was clearly established in this era,[83] as many regarded the earliest humanitarian interventions with much suspicion. It comes as no surprise that critics maintained that economic and political interests usually motivated such interventions.[84] This notion was supported by the fact that even when interventions were truly morally justifiable, "the paternalism of intervening powers – which were self-appointed custodians of morality and human conscience, as well as guarantors of international order and security – undermined the credibility of the enterprise."[85] This is especially true as the intervening powers were most likely the "advanced

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[78] ICISS *Supplementary Volume* 17 V
[79] Hall *A Treatise* 304
[80] idem 56
[81] ibid
[82] Wehberg *Civil War and International Law* 188, 189
[83] Beyerlin *Humanitarian Intervention* 927
[84] ICISS *Supplementary Volume* 17
[85] ibid

nations" of the mandate system that were assigned the tutelage of Trust territories. However, by the 1920s the protection of non-nationals and nationals abroad was included in the rationale for intervention and the institution was increasingly invoked against "a state's abuse of its sovereignty by brutal and cruel treatment of those within its power..." It seems that such an abusing state incurred the liability of action by any state willing to intervene in the abusing state.[86] This is echoed in Stowell's description of humanitarian intervention in 1921 as:

> "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from the treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."[87]

It is evident that at this time, the reference to humanitarian intervention as something done outside of the authority of the accepted international legal system has not existed yet. According to Duchêne the problem is not stopping intervention, but rather to change it from a "military or quasi-military force into a civilian process and from a civilian process in which there is a strong sense of exploitation into one of joint decision-making, which implies joint responsibility by consent."[88] On the eve of World War II it was clear that such growth, however necessary, was still a long way off. To reach it, international law possibly had to be viewed as legal decision-making that would become established practices and norms. As such, rather than being the objective application of rules, international law would be seen as a "process of authoritative decisions" and would be able to deal with changing ideas and societies more successfully.[89] In such a system it might be easier to change the nature of humanitarian intervention into a more acceptable form, while maintaining the integrity of the independence of states.

Right before World War II the situation thus stood as follows: While the focus on human rights gained more support, states were reluctant to give up their absolute

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[86] idem 16, 17
[87] idem 17
[88] Jaquet *Introduction* in Jaquet (ed) *Intervention in International Politics* (1971) VI VII
[89] Higgins *Problems and Process* 2, 3

sovereignty, even though the very act of setting up an international organisation such as the League of Nations dictated a compromise of sovereignty, as individual members would have to compromise if the international organisation of which they became members were to function properly. In addition, the League was the basis for some of the principles seen in the United Nations system today, such as the idea of collective security instead of intervention by a single state, the notion of permanent membership of the great powers and the additional authority that gave them in the international organisation, intervention for international interests only, and the idea of a threat to international peace and security. One subject that did not get nearly enough attention was the responsibilities of the intervening forces after intervention. Whether this would be regarded with the importance it deserved remained to be seen.

While no significant humanitarian interventions happened in this era, it did not stop writers from calling for intervention for the protection of human rights. According to Trotsky, "[a] means can be justified only by its end. But the end in its turn needs to be justified."[90] While we value the protection of human rights in a free and fair society, might we not to that end, intervene in some way to stop gross violations of human rights?

[90] Trotsky *Their Moral and Ours* in Ishay (ed) *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (1997) 338 342

CHAPTER FOUR

Developments after World War II: The Establishment of the United Nations and the Security Council

"War is an ugly thing, but not the ugliest of things: the decayed and degraded state of moral and patriotic feeling which thinks nothing worth a war is worse. As long as justice and injustice have not terminated their ever renewing fight for ascendancy in the affairs of mankind, human beings must be willing, when need is, to do battle for the one against the other."[1]

- John Stuart Mill

4 1 Introduction

After World War II, it seemed that almost the entire globe was focused on preserving international peace. People appeared to believe, as they still do, that as long as states did not violate the borders of foreign countries, the devastation and loss of life caused by the Second World War would not come to pass again. In striving towards this goal, the coexistence between states that was indicative of earlier relations was replaced by a more co-operative international law,[2] which was a consequence of the movement towards positive peace. This meant that instead of just avoiding conflicts to achieve international peace and security, states were joining forces to enhance the lives of people in attaining "international social justice",[3] and to do whatever was necessary to maintain peace.[4] It is this attitude that was probably the biggest incentive for the notion of collective security and that appears to have heralded the coming of humanitarian intervention.

This kind of intervention developed from the notion that individuals were included in international law as much as states were; one of the biggest changes in the time after World War II. The escalating number of refugees that were uprooted and

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[1] Holliday "When is a cause just?" 2002 Vol 28 Issue 3 *RIS* 557 562

[2] Kimminich *History of the Law of Nations Since World War II* in Bernardt (ed) *EPIL Volume 2* (1995) 849 850

[3] ibid

[4] Wolfrum *Chapter 1: Purposes and Principles* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 49 50

migrated "from their traditional homes where they suffer[ed]...political oppression and inadequate economic conditions", gradually banished the earlier notion that international law did not include individuals.[5] While states are generally seen as subjects of international law and thus as bearing rights and responsibilities under this law, there is much debate about what position individuals have under international law. Some authors maintain that individuals are objects of international law, thus part of the group of entities that are not subjects, while others claim that individuals, just as states, should be seen as subjects.[6] Higgins, on the other hand, argues that it would be better to see states and individuals as well as any other entity under international law, including international organisations, multinational corporations and private non-governmental groups, as participants in international law. Thus, instead of treating the claims of individuals to the protection of their rights as exceptions to a system in which only subjects have claims, the claims of individuals will be "part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction of state-participants".[7]

The growing focus on the individual that placed the debates about humanitarian intervention on the centre stage of international law after the atrocities suffered by many in World War I, was something in which South Africa played a considerable part. This was significant, as apartheid "forced states to choose between the supremacy of domestic jurisdiction and human rights".[8] In its attempt to block United Nations interference in its racial policies since the early days of UN existence, South Africa stated that the non-intervention principle in article 2(7) of the UN Charter took precedence over the human rights provisions in the Charter. As the discriminatory practices in South Africa increased, however, the international community became less eager to support this contention.[9] Therefore,

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[5] Kimminich *Since World War II* 853
[6] Higgins *Problems and Process* 49
[7] idem 50
[8] Dugard *International Law* 239
[9] idem 238, 239

when the UN decided to institute an arms embargo against the country in 1977[10] they chose human rights above the protection of the supremacy of domestic jurisdiction.[11]

This early attitude of the UN is supported by Falk, who in recent years stated that "genocidal behaviour cannot be shielded by claims of sovereignty, but neither can these claims be overridden by unauthorised uses of force delivered in an excessive and inappropriate manner."[12] It is regrettable that instead of moving towards criteria to offer some kind of legal footing for possible interventions, the UN today seems to rely on the circumstances, an ever-changing variable, to dictate the character of intervention.[13] While it is necessary to take the circumstances into account, according to Higgins, "[e]xessive 'flexibility' is a recipe for operational uncertainty and non-compliance...by the protagonists."[14] The argument in Falk's statement regarding unauthorised force 'delivered in an excessive and inappropriate manner', begs the question whether the non-excessive and appropriate use of force could be acceptable in situations of 'genocidal behaviour'. While there are many arguments about what criteria would be suitable to establish whether intervention would be appropriate, it seems that Falk's statement implies that if criteria such as proportional enforcement action focused on the protection of civilians and the ending of gross human rights abuses are met, intervention would be acceptable.

In light of all the new actors on the international stage, such as newly independent states, individuals and international organizations, the biggest challenge for international law after World War II seems to have been to find a balance between "repressing sovereignty in favour of international co-operation and maintaining it as a buttress of the political independence and cultural uniqueness of each nation."[15] Finding this balance would go a long way towards finding an answer to the debates

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[10] Spence "A New International Order: Lessons of Kosovo" 2000 Vol 7 Nr 1 *South African Journal of International Affairs* 139 140
[11] Dugard *International Law* 239
[12] Falk 1999 Vol 93 *AJIL* 848
[13] Higgins "Second-Generation Peacekeeping" 1995 in Hargrove (ed) *89 ASIL Proceedings: Structures of World Order* 275 278
[14] ibid
[15] Kimminich *Since World War II* 853

regarding humanitarian intervention. This has, however, proved to be a lot more difficult than may have been anticipated.

While considering the changes brought about by the UN and the Security Council, specifically with regard to human rights, sovereignty, intervention, the responsibilities of intervening forces after intervention and the role of regional organisations, it is necessary to remember that according to the definition used, the term humanitarian intervention describes action taken by states and not by the UN. Interventions for humanitarian purposes authorised by the Security Council do not amount to humanitarian intervention, even though they might be preferable to interventions outside of the UN system. It is therefore necessary to explore some of the issues that exist with regard to humanitarian intervention as a result of the UN structure itself, as well as the role of these UN authorised interventions. These issues include the use of force, the decision establishing a threat to peace and the use of the veto.

4 2 United Nations

In contemplating the United Nations and its influence, it is necessary to consider international organizations in terms of their connection with political ideas and forces of the time, "the configuration of power, the impact of technological developments, the sweep of political unrest, the urge for political stability, the drives for domination, [and] the clashes of interests and of ideologies".[16] Because these organizations are products of international politics, the shape of such politics determines the profile and development of these organizations.[17] This is especially true of the United Nations as it was established in the aftermath of a world war and expected to maintain international peace and security from then on.

The term "United Nations" developed during the Second World War among the Allied powers and was telling of the idea that a system of collective security was necessary to discourage aggression and promote co-operation in economic and

[16] Claude *Swords into Plowshares* 6, 7
[17] ibid

social matters.[18] While these matters are still very important, a wide range of new perspectives and interests have appeared as the member states grew from 51 in 1945 to 191 today,[19] with East Timor and Switzerland the latest to join.[20] Among these matters are human rights and the protection of civilians against murderous factions in their own countries. As the UN purports to promote "universal respect for, and observance of human rights and fundamental freedoms",[21] it is dangerous to ignore the status that these issues have acquired in the years after the establishment of the United Nations.

4 2 1 Establishment of the United Nations

The UN Charter seems to have been conceived because of the recognition that

> "without a clear, definitive, and mutually acknowledged system of objective rules to govern international uses of force, the entire system of ordered international interaction which international law has traditionally sought to provide becomes moot in its ineffectiveness to provide for the most basic protections of human life, freedom and prosperity."[22]

The Charter was supposed to provide a forum for dialogue and diplomacy between states and certainty in an area of law previously laden with ambiguity, by means of a set of rules.[23] More specifically, the structure of the UN reflects the influence of the League system, as is evident from numerous principles of the UN. The part played by the great powers in the formation of the UN shows not only the influence of American planning and leadership, but also the compromises reached in the midst of extreme conflicts of interest between the great powers.[24] The influence of the hopes of millions of ordinary people around the world to have a "just and

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[18] Conforti *Law and Practice* 1
[19] ICISS *The Responsibility to Protect* 3
[20] http://www.un.org/Overview/growth.htm [Accessed 29 October 2003]
[21] *UN Charter*, Article 55
[22] Joyner "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm" 2002 Vol 13 Issue 3 *EJIL* 597 604, 605
[23] idem 605
[24] Claude *Swords into Plowshares* 55, 58

durable peace" should also not be underestimated.[25] In spite of the hope that the Charter would prevent another war, the Charter itself was not to be identified as a symbol of the military triumph of the Allied forces as, for example, provisions excluded any concerns regarding the treatment of defeated states.[26] Even though the international juridical personality of the UN was not the subject of the text of the Charter, the UN does possess juridical personality in the fields of both international law and the national law of member states and therefore, is the subject of legal rights and duties and can perform legal transactions.[27] After a series of negotiations, the Charter was finally unanimously adopted and signed by all the participating states at the San Francisco conference in 1945.[28]

The signing of the Charter thus signalled the beginning of an era of co-operation between states with regard to political issues, economic and social issues and human rights, in an effort to collectively address matters that concerns states all over the world, such as the unregulated use of force and the maintenance of international peace and security. In April 1946, when the League was dissolved, the UN had already come into force.[29]

Despite the influence of the League system on the formation and structure of the UN, there are noteworthy differences between the two systems. The Assembly of the League became the General Assembly, but retained the same responsibilities while the Council became the Security Council, which acquired the exclusive responsibility to maintain international peace and security with a variety of sanctions to their disposal. The Economic and Social Council was created as part of the UN structure, with the specific responsibility to develop co-operation in social and economic matters.[30] It seems that with regard to the priority of obligations of member states, the League Covenant and the Charter had almost the same provisions. Of importance here is that under both the League and the UN, the

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[25] idem 58
[26] idem 59
[27] Kelsen *The Law of the United Nations: A Critical Analysis of its fundamental Problems* (1951) 329
[28] Conforti *Law and Practice* 6
[29] ibid
[30] idem 3

obligations of members to the respective organisations would prevail in the case of conflict between obligations members had towards the organisations and obligations under any other international agreement.[31]

These obligations include obligations regarding the purposes of the UN, counting the human rights purposes. It should be noted that the Charter bestowed all the "privileges and immunities as are necessary for the fulfilment of its purposes", on the UN.[32] While these purposes involve several political issues and action has been taken concerning almost all these issues, the focus of the UN has shifted from time to time.[33] Until 1950 the biggest concern was the maintenance of peace and security and after that great results were achieved with regard to de-colonization and the self-determination of peoples. From the seventies onwards the focus was progressively on the protection of human rights and the eradication of inequality and discrimination. In the midst of widespread domestic conflicts, international peace and security has become more important in the last few years.[34]

Part of the reason for the shifts in focus seen in the UN system is the effect of the Cold War on the functioning of the UN organs.

> "Because of the massive voting bloc of pro-Western, anti-communist Latin American republics in particular, there were always clear Western majorities in the [General Assembly] GA; the Soviet Union was isolated, and the [Secretary Generals] SG's were recruited from Western nations."[35]

Because of this initial isolation of the Soviet Union, "a bitter and protracted confrontation developed, namely the Cold War, in which the Soviet Union…gradually succeeded in manoeuvring itself over to the ranks of the majority through systematically supporting the Third World".[36] During this war, the Soviet

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[31] Kelsen *The Law of the United Nations* 111
[32] idem 337
[33] Conforti *Law and Practice* 8
[34] ibid
[35] Grewe *The History of the United Nations* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 1 13
[36] ibid

Union boycotted the Secretary General, specifically Secretary General Dag Hammerskjøld,[37] and the Security Council suffered severe paralysis as the West and the Soviet Union respectively vetoed decisions regarding the allies of these opposing parties.

Even without the strain of the Cold War, the interpretation of the Charter has been the focus of much debate. It seems that as it is an international agreement, the rules governing the interpretation of treaties should also apply to the Charter.[38] This is in particular true of article 5 of the Vienna Convention on the Law of Treaties,[39] which states that this Convention applies to any treaty constituting "the founding charter of an international organisation".[40] However, because of the fact that the Charter contains both contractual and normative elements, different rules of interpretation apply to these different elements.[41] The general rule with regard to the interpretation of treaties laid down in article 31(1) of the Vienna Convention, is that the meaning that is clear in the text and consistent with the object and purpose of the treaty should be assigned to the treaty.[42] The ICJ "now qualifies charters as 'constitutions' and employs the functional method for their interpretation".[43] This method is oriented towards the fulfilment of the purposes of the organisation.[44]

When these rules are applied, it appears that in its deliberations regarding its duties under the Charter, the Security Council should interpret the Charter in such a way as to give expression to the purposes of the Charter, including the human rights purpose. This is something that does not seem to be happening, as expression is mostly given to the purposes regarding the unregulated use of force threatening international peace and security. Furthermore, the Council should interpret the Charter in such a manner as to promote the fulfilment of its duties. Article 24(2) states that "in discharging these duties the Security Council shall act in accordance

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[37] idem 15
[38] Conforti *Law and Practice* 12
[39] Vienna Convention on the Law of Treaties (1969) article 5
[40] Ress *The Interpretation of the Charter* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 25 30
[41] idem 26
[42] Conforti *Law and Practice* 13
[43] Ress *Interpretation of the Charter* 27
[44] ibid; *Case of Certain Expenses of the United Nations,* Advisory Opinion, ICJ Reports (1962)

with the Purposes and Principles of the United Nations". It appears that the Council considered this when it became practice that non-procedural matters could validly be decided with the abstention of one or more of the permanent members, if the permanent member in question did not vote against the matter.[45] This happened despite the clear meaning in article 27 that non-procedural matters had to be decided with the concurring vote of all five the permanent members and had the effect that the Council could make decisions regarding more issues than would otherwise have been the case. According to Ress, this is the kind of "evolutionary dynamic interpretation" needed to ensure that the Charter stays able to fulfil its changing tasks.[46]

In light of the fact that the practice of the Charter has already been adapted to further the deliberations of some of its organs, as well as the fact that there has been considerable change in interests and global concerns since the UN was established, it has been argued for quite some time now that the Charter should be revised. This view is due to the number of states that have joined the UN since its formation almost 60 years ago, as well as the fact that the change in the ideological conflict between East and West has been substituted by the conflict of interest between the rich developed world and the poor developing markets.[47] As the Security Council, which has often been blocked from action by the use of the veto, plays an unavoidable role in any amendments as shown below, it will however not be as simple to amend the Charter.

While persistent non-compliance with an established norm may be sufficient to show that a specific norm is no longer valid and so account for changing global concerns, such persistent non-compliance will not provide the level of certainty that a revision of the Charter could do. In addition, because the Charter does not in all cases provide for changing global concerns such as the protection of human rights, states sometimes act unilaterally and, in doing so, undermine the authority of the UN in international matters, an alarming development, as the structure provided by

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[45] Conforti *Law and Practice* 66
[46] Ress *Interpretation of the Charter* 28
[47] Conforti *Law and Practice* 19

the UN plays an invaluable role in international law. The actions of one of the major organs of the UN, the Security Council, seem to give rise to many of these unilateral acts.

4 3 Security Council

In article 24(1) of the UN Charter, the primary responsibility of maintaining international peace and security is placed on the shoulders of the Security Council. In addition, the signatories of the Charter "agree[d] that in carrying out its duties under this responsibility the Security Council acts on their behalf."[48] The five great powers, Britain, China, France, the Soviet Union and the United States, were given permanent membership of the Security Council as well as the right to a veto vote, which is discussed below. With this vote any permanent member could block possible action taken by the Council regarding non-procedural matters, by withholding a concurring vote.[49]

While the Council emphasizes the need to respect and observe human rights and undertakes to "give special attention to the humanitarian consequences of armed conflicts", it fails to state clearly whether and how it is going to deal with gross human rights abuses.[50] It is the uncertainty created by the wide discretion of the Council, as well as the inability of the Council to take effective care of the horrendous humanitarian consequences of some armed conflicts, that seems to lead to unilateral state action. As such it is necessary to explore what exactly the responsibilities of the Council have become with regard to human rights.

4 3 1 The Use of Force

It is clear that humanitarian intervention cannot be justified in relation to the Charter's prohibition of the use of force or the exceptions to it, as it is not self-defence and does not happen under authority of the Security Council under Chapter

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[48] Joyner 2002 Vol 13 Issue 3 *EJIL* 599
[49] Claude *Swords into Plowshares* 133
[50] Steiner & Alston *International Human Rights in Context: Law, Politics, Morals* 2nd ed (2000) 652

VII of the Charter,[51] as shown in Chapter 1. Nevertheless, there are arguments that humanitarian intervention would not be in contradiction with the purposes, or spirit of the Charter if the human rights purposes were taken into account,[52] especially since article 2(4) not only prohibits the use of force against states, but also prohibits the use of force in "any other manner inconsistent with the Purposes of the United Nations". When the promotion of human rights is taken into account as one of the purposes of the Charter, the illegality of humanitarian intervention does not seem so unyielding any more. Indeed, according to Robertson, armed attacks launched to uphold the purposes of the Charter are not necessarily included in the uses of force prohibited in article 2(4), except if they are "...*contrary to* or *condemned by* a specific Security Council resolution".[53]

An interesting feature of the provisions in the Charter that prohibits the use of force is that it does not include the use of force within a state.[54] The articles in the Charter that concern the use of force, address the regulation of military hostilities between states and not conflicts within states.[55] The wording of the Charter thus seems to suggest that it is not unlawful under international law to wage a civil war; only wars between states would be unlawful in terms of this approach. This is unfortunate, as more than 90 percent of armed conflict today, including most gross human rights abuses, is internal[56] rather than inter-state, as it was when the Charter was conceived. It is therefore necessary to recognise that the Charter might have become legally inadequate to deal with the political realities of the present. Such internal conflicts include the "disintegration of the former Yugoslavia", state collapse in Somalia, the numerous civil wars in Africa and "political instability in Haiti, Indonesia and the former Soviet states..."[57] Consequently the ICJ

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[51] Beyerlin *Humanitarian Intervention* 927
[52] Welsh "From Right to Responsibility: Humanitarian Intervention and International Society" 2002 *Global Governance* 503 505; Ramsbotham & Woodhouse *Humanitarian Intervention* 62; IICK *The Kosovo Report* 186
[53] Robertson *Crimes against humanity* 408
[54] Randelzhofer *Use of Force* 269
[55] Higgins *Problems and Process* 239
[56] Steiner & Alston *International Human Rights* 651
[57] Thomashausen *Humanitarian Intervention* 2

emphasized the fact that the Charter does not cover "the whole area of the regulation of the use of force in international relations", in the *Nicaragua* case.[58]

As a result, it is necessary to establish how effective the regulation of the use of force through collective security within the UN system is. Collective security can be seen as the principle that "everyone is his brother's keeper", in that the use of force against one state, will bring about the combined enforcement action by *all other nations*.[59] The idea of such security is first mentioned in article 1(1) of the Charter as one of the purposes of the Charter.

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace..."[60]

The execution of these collective measures is governed by Chapter VII of the Charter, which makes provision for the authorisation of appropriate action by the Security Council in cases of threats to international peace and security, breaches of international peace and security and acts of aggression.[61] The different actions that can be authorised by the Council include provisional measures, as the sanction least likely to violate the rights of states, and usually comprise a call from the Council for "the suspension of hostilities, troop withdrawal, and the conclusion or adherence to a truce".[62] If such provisional matters are inappropriate or prove to be inadequate, the Council will normally call upon member states to employ measures that do not involve the use of armed force, including "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".[63] Only if these measures are deemed to be insufficient or prove to be ineffective can the Council take action "by air, sea, or land forces as may be necessary to maintain

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[58] *Nicaragua v US* ICJ Reports 4 (1986)
[59] Claude *Swords into Plowshares* 224
[60] *UN Charter*, article 1(1)
[61] idem article 39
[62] Frowein *Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39-43* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 605 619; *UN Charter*, article 40
[63] *UN Charter*, article 41

international peace and security".[64] While the value attached to the non-use of force is clear from the previous articles, in that only after all other measures have failed will armed force be instituted and only if the members of the UN, through the Security Council, approve it, the problems regarding the protection of human rights are evident. The fact is that in some cases, immediate armed action is necessary to end gross human rights abuses and the process of first instituting measures that do not involve armed force, may prove to be too long to prevent the death and torture of thousands.

Another problem with the collective measures in Chapter VII is the fact that the military contingents envisaged in article 43 for utilisation by the Security Council under international command, never materialised.[65] Member states were supposed to enter into agreements with the Council to establish the number, deployment and degree of readiness of the forces to be supplied by the members, but this has never happened.[66] This means that when the Council authorises action, it now delegates the use of force to member states while maintaining firm control of the undertaking.[67] This authorisation usually contains a call to member states to participate, although states have the freedom to decide whether they want to participate or not.[68] The fact that states have been able to rely legally, economically and politically on the unilateral use of force, seems to be a direct consequence of the UN failure to put the collective security forces envisaged in article 43 in place.[69]

The collective security system was supposed to be a substitute for the system of alliances that caused the devastation of the Second World War.[70] The latter system points to the maintenance of security by alliances in the framework of the interests of the alliance, while the collective security system indicates the maintenance of security through the collective effort of all nations. The effect of the failure of the military contingents to materialize has led to the fact that instead, in cases of

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[64] idem article 42
[65] Conforti *Law and Practice* 196
[66] ibid
[67] idem 203, 204
[68] idem 204
[69] Higgins 1995 Vol 6 *EJIL* 446
[70] Claude *Swords into Plowshares* 225

authorised action; the UN is relying on alliance-based enforcement action such as NATO.[71] In the light of Security Council resolutions, the UN clearly sees NATO as "one of the regional organizations which might be entrusted with specific enforcement actions".[72] The organisational character of NATO seems to transform the alliance into a more structured defence system[73] and thus enhances the ability of the organisation for the maintenance of security within the borders of the alliance. The fact remains however, that the reason NATO is useful, is because "it offers realizable alternatives to the currently unobtainable benefits of collective security".[74] And while NATO has now emerged as an international defence pact and even comes to the defence of non-members such as Kosovo, it was initially intended to be a selective security system and not a collective security system as many claim.[75] This means that in the context of UN collective security, which provides security for everyone, the NATO security system is selective in the sense that it only means security for members of NATO. Thus, to depend on NATO to enforce the resolutions of the UN, is to rely on the hope that the specific situation requiring enforcement action falls within the scope of NATO's interest.

Because the lack of article 43 forces made an "obligatory call upon members to participate in military enforcement" impossible, even though such enforcement was nevertheless sometimes needed, UN peacekeeping was born.[76] Military interposition was now still possible at the request of any receiving state and with UN member states volunteering to participate.[77] Peacekeeping operations, normally mandated by the Security Council, usually appear to have one of four basic functions. The first is observation, which "includes verification of cease-fire, disengagement, or withdrawal agreements and/or that SC [Security Council]

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[71] idem 243
[72] Ress *Chapter VIII: Regional Arrangements, Article 53* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 722 730
[73] Claude *Swords into Plowshares* 244
[74] idem 245
[75] idem 243
[76] Higgins 1995 Vol 6 *EJIL* 447
[77] ibid

Resolutions to that effect are being observed".[78] Additionally, there is the function of interposition, that is, to serve as a buffer between hostile forces with the aim to reduce tension and prevent fighting from breaking out and the function of maintaining law and order, which can be quite difficult in situations of internal dissension.[79] Peacekeeping forces are also occasionally expected to give humanitarian assistance, as well as perform any other function deemed necessary by the Security Council to successfully maintain the peace in a region.[80] While peacekeeping in itself seems to be a valuable instrument in the maintenance of international peace and security, the reality is that peacekeeping forces seem to be used where far more aggressive forces are needed. While for example, the United Nations Iran-Iraq Military Observer Group (UNIIMOG) played a valuable role in the winding-down of the Iran-Iraq war and the United Nations Angola Verification Mission (UNAVEM) was proficient in disengaging Cuban forces from Angola,[81] peacekeeping forces appear to suffer a large number of failures.

This is as much due to the fact that the financial commitment necessary for the success of these missions are lacking, as the fact that the mandates given to peacekeeping forces are occasionally wholly inappropriate. The cause of the first problem is that there does not seem to be formal agreements regarding the distribution of costs between the UN and participating states[82] and further that the payment of budgetary requirements are sometimes just not forthcoming. The UN Assistance Mission in Rwanda (UNAMIR), for example, received the first instalments of the budget deemed necessary to successfully support the mission, more than a month after the 1994 genocide had ended.[83] The mandates of peacekeeping forces are often meaningless, as SCR 836 that authorised the United Nations Protection Force in the former Yugoslavia (UNPROFOR), showed. Here it seemed that the safety of the peacekeepers became the sole consideration, as the

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[78] Bothe *Peace-Keeping* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 565 588
[79] idem 588, 589
[80] idem 589
[81] Higgins 1995 Vol 6 *EJIL* 454
[82] Bothe *Peace-Keeping* 594
[83] Jones *Peacemaking in Rwanda: The Dynamics of Failure* (2001) 107

mandate allowed the peacekeepers to take the necessary measures "to reply to bombardments against safe areas..." while acting in self-defence.[84]

As such, it appears that the band-aid of peacekeeping should carefully be considered before it is authorised in cases of gross human rights abuses, as such grave situations asks for well-equipped and appropriately mandated forces. Again, the absence of a collective security system causes that the forces and the money necessary for successful peacekeeping operations that can possibly contain or end gross human rights abuses, depends on the interests of coalition forces.[85] It is this situation that leads to the inability of peacekeeping contingents to be effective forces in the ending of gross human rights abuses.

Although the prohibition of the use of force in the Charter, which is aimed at preventing the devastation and injustice caused by war, is valid and necessary, it does not seem to make sense if it is upheld in the face of the grave injustice of gross human rights abuses. This is true, especially if the importance attached to human rights and its protection is considered, as well as the fact that armed intervention is often the only way to end gross human rights abuses. The challenge is then to reconcile the valid prohibition and regulation of the use of force under the present UN system, with the fact that gross human rights abuses can sometimes only be ended by armed intervention.

While deliberations about the regulation of the use of force continues in the face of state superpowers only taking note of the prohibitions in the UN Charter when it suits them, the question is whether the just war, which developed as a result of the "Christianisation of the Roman Empire and the ensuing abandonment by the Christians of their pacifism",[86] still has a place in the international order. Humanitarian intervention certainly seems to happen regardless of the prohibitions of the use of force and is instead justified by the justness of the cause, usually the gross violation of human rights. The fact is that when the idea of a just war was conceived, it was meant to deter and regulate the use of force in a time when there

[84] Higgins 1995 Vol 6 *EJIL* 457
[85] idem 459
[86] Shaw *International Law* 777, 778

was no international order such as the UN system of today. As a system exists today and different states have vastly different ideas about what is a just cause, it might be better not to rely on this principle to validate interventions. While the justness of intervention for humanitarian purposes is not denied, the point is that it is necessary to regulate these interventions within the current international law system, lest superpowers abuse the integrity of the institution for their own interests and lead the world into anarchy once again. In fact, "[t]he most effective way to deter change by violent means is to provide the procedures and institutions for change by peaceful means."[87] If this can be done, humanitarian interventions might not even be necessary to change situations of gross human rights abuses. Until such 'procedures and institutions for change by peaceful means' exist, however, regulated interventions for humanitarian purposes seem to be the best option to change these situations.

4 3 2 Discretion establishing a Threat to the International Peace and Security

When the United Nations was established, the authors of the Charter agreed that the Security Council should decide when the use of force would be acceptable and thus also when a situation would pose a threat to international peace and security. The three situations authorised by the Security Council that would justify force were therefore not defined in the Charter.[88] At the time of the San Francisco Conference a threat to peace was understood to be "limited to overt cross-border aggression" and civil wars were considered to be part of the domestic jurisdiction.[89] It seems that now any "serious violations of international law which could provoke armed counter-measures may generally be seen as a threat to the peace, even when the admissibility of counter-measures may be doubtful".[90]

The "threat to peace" justification for the authorisation of armed force can almost be seen as a safety net for situations that require the use of armed force but cannot

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[87] http://members.aol.com/benferen/unconsen.htm#_edn1 [Accessed 17 October 2003]
[88] Neuhold *Peace, Threat to* in Bernardt (ed) *EPIL Instalment 4* (1982) 100 100
[89] Thomashausen *Humanitarian Intervention* 10
[90] Frowein *Chapter VII Article 39-43* 612

be viewed as breaches of peace or acts of aggression. This concept seems to have been used to cover situations of internal conflict that would usually "be shielded from UN action by article 2(7) of the Charter".[91] As gross violations of human rights have to be categorised as a threat to international peace and security to enable the Security Council to authorise the use of force against such violations, the Security Council has become more willing to classify such violations as threats to peace.[92] The "somewhat questionable" hypothesis of the US Secretary of State in 1948 that international peace was reliant on the respect states had for human rights, as states abusing human rights would most likely do so through coercion and force,[93] was probably the beginning of the classification of human rights abuses as a threat to peace. Signs of this endeavour have already been seen at the San Francisco conference. In one subcommittee report it was maintained that although human rights are primarily a domestic concern, they will cease to have this characteristic if the "fundamental freedoms of individuals 'were grievously outraged so as to create conditions which threaten peace or...obstruct the application of the provisions of the Charter'".[94] It was also seen when the Security Council imposed the mandatory arms embargo on South Africa in 1977. When referring to the apartheid policies in South Africa, the Council stated that "the policies and acts of the South African government are fraught with danger to international peace and security".[95]

The interventions authorised in Iraq and Somalia, were furthermore not justified in humanitarian terms, but rather in terms of the threat posed to international and regional peace and security by the human rights abuses.[96] Although this would seem to mean that the Council is prepared to play a more "active role in redressing urgent humanitarian problems", the trouble is that the differences between the west and the Socialist bloc about human rights, still have the potential to derail any effort to protect individuals against gross human rights abuses through Security Council action.

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[91] Shaw *International Law* 855
[92] Beyerlin *Humanitarian Intervention* 932; Conforti *Law and Practice* 244
[93] Robertson *Crimes against humanity* 31
[94] Claude *Swords into Plowshares* 168
[95] SCR 418
[96] Henkin "Kosovo and the law of 'Humanitarian Intervention'" 1999 Vol 93 *AJIL* 824 825

The issue of determining a threat to peace came to a head when the Council imposed sanctions aimed at ending the white minority rule in the then Southern Rhodesia, now Zimbabwe, in 1966.[97] The parties opposed to economic sanctions maintained that the situation did not "menace international peace", while most observers, including the Security Council, insisted that the "violation of fundamental human rights…has international implications in today's interdependent world."[98] The Council furthermore described the situation as being a threat to international peace and security.[99] In truth, the answer to what would constitute a threat to peace depends largely on the position of the permanent members regarding the issue under consideration,[100] as the decision determining whether a position does constitute a threat to international peace and security includes wide discretionary powers.[101]

The fact is that some circumstances of gross human rights abuses do pose a threat to international peace and security, usually when they have escalated to the extent that neighbouring states have become involved. However, these gross abuses can go on for quite some time before they begin to threaten peace. Although they may not be perceived as a threat immediately, these abuses are not any less grave. Nevertheless, because the Security Council must classify human rights abuses as a threat to peace, already grave abuses must escalate even further for intervention to legally be authorised. This causes abuses to continue far beyond the threshold of a global community that values human rights so much.

The legal fiction of classifying human rights abuses as possible threats to international peace and security is strengthened by the fact that the Secretary-General can bring to the attention of the Security Council "any matter which in his opinion may threaten the maintenance of international peace and security"[102]. The General Assembly may also "call the attention of the Security Council to situations

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[97] SCR's 221, 232
[98] Neuhold *Peace* 100
[99] Thomashausen *Humanitarian Intervention* 11
[100] Shaw *International Law* 855
[101] Conforti *Law and Practice* 173
[102] *UN Charter*, article 99

which are likely to endanger international peace and security".[103] This means that if legal intervention in gross human rights abuses were not dependent on the abuses being classified as a threat to international peace, it would have been legally possible to intervene earlier.

Although the General Assembly does not play the primary role in maintaining international peace and security, the Assembly attempted to strengthen its authority regarding this issue by adopting the Uniting for Peace Resolution in 1950. The goal of this resolution was to enable the Assembly to make the suitable recommendations for collective measures in the event that the Security Council is "blocked" by the veto and consequently fails to fulfil its primary responsibility with regard to article 39.[104] This would include any situation that has been established as a threat to peace, such as the gross human rights abuses in Kosovo, where the Security Council is prevented from authorising the measures necessary to deal with the situation because of a veto vote. Although critics of this Resolution argue that the maintenance of peace is not the responsibility of the General Assembly, it must be noted that article 24 of the Charter does not say that the maintenance of peace is solely the responsibility of the Security Council. Thus, even though the members of the UN agreed that the Security Council would carry the primary responsibility for the maintenance of international peace and security, it does not mean that in the event that the Council fail to fulfil its duty, the General Assembly are helpless to take appropriate action. An affirmation of this resolution has developed during the last number of years in the argument that humanitarian intervention would be legal in the above situation.

Therefore, while the classification of gross human rights abuses as a threat to peace has lead to interventions in some situations of abuse, a negative aspect of this classification is that human rights abuses have to go on for so much longer before anything can be done about it. In addition, the protection of one of the most fundamental aspects of international law is now dependent on the political fancies

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[103] idem article 11
[104] Neuhold *Peace* 101

of five powers that hold vastly different ideas about the importance of human rights.

4 3 3 The Veto

According to article 27(2) of the UN Charter, decisions regarding procedural matters will be made by the affirmative votes of any nine of the fifteen members of the Council. Decisions regarding all other matters will be made by the affirmative vote of nine members including the five concurring votes of the permanent members.[105] Although in practice this rule has been adapted and today the abstention of a permanent member will not frustrate a decision any longer, the negative vote of a single member can still frustrate efforts to intervene. This veto system, called the 'Yalta formula' after the Yalta conference in 1945 when the voting procedure of the Security Council was discussed,[106] was granted to permanent members, and although it includes the power to abolish their own veto power by amendment of the Charter,[107] this is obviously not likely to happen as the permanent members would be reluctant to give up such an influential power.

It is important to understand why the veto was assigned to the Security Council in the first place. In the aftermath of a war in which the most powerful nations caused unthinkable devastation and destruction, it seemed necessary to make the use of force subject to the "collective consent" of these nations, which had the ability to tangle the world in another global conflict.[108] As such, uncommitted states would not be dragged, by way of their UN membership, into clashes between the great powers.[109] However, while it appears to be a feasible solution, the political reality was that both the US and the Soviet Union vigorously fought for the incorporation of the veto.[110] Since the establishment of the UN, this reality has overshadowed the possible guarantee "that whatever action is undertaken will be supported by the

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[105] Dugard *International Law* 399; *UN Charter*, article 27(3)
[106] Conforti *Law and Practice* 3
[107] Claude *Swords into Plowshares* 135; *UN Charter*, article 108, 109
[108] Joyner 2002 Vol 13 Issue 3 *EJIL* 608
[109] Claude *Swords into Plowshares* 146
[110] idem 135, 136

states which control the bulk of the world's economic, military, and political power, and that its success will therefore be almost a foregone conclusion".[111] As the interests of the permanent members have often played a significant role in whether action is undertaken to protect people from gross human rights abuses or not,[112] the fight was worth it for the permanent members, but not always for the people suffering abuses.

The initial idea of the veto, as understood between the five permanent members, was that it is to be used "only if the passage of a resolution could otherwise culminate in military action against one of them".[113] This was one of the compromises in the process of setting up the United Nations. At this stage, however, it has become a defence mechanism for the permanent members against any sanction directed against them or their respective allies.[114] Nevertheless, some commentators state that the inability to authorize intervention for humanitarian purposes because of a veto vote against it, does not constitute a paralysis of the Security Council, but rather is a sign that the Council is working exactly as planned.[115]

The problem with this assertion is that it is very dangerous to leave the responsibility of the protection of human rights to the ability of five of the most powerful nations in the world to agree on something,[116] as seen by the use of the veto during the Cold War. While even the most powerful nations deem international peace and security, the primary concern of the Security Council, of the utmost importance, they differ fundamentally about the importance and protection of human rights. This prevents effective protection of these rights, as indicated by some of the vetoes that have been cast. Those that blocked peacekeeping operations in Macedonia and Guatemala, those that protected North Korea "despite its breaches of the Nuclear Non-Proliferation Treaty" and those that protected Saddam

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[111] idem 139
[112] Thomashausen *Humanitarian Intervention* 11
[113] Higgins *Problems and Process* 174
[114] ibid
[115] Joyner 2002 Vol 13 Issue 3 *EJIL* 608
[116] idem 606

Hussein against UN weapons inspections throughout 1999[117] are among the most notable.

It is important to note that although the veto gives the permanent members the ability to block action regarding disputes involving themselves, except action relating to peaceful settlement of disputes,[118] the permanent members are not allowed to use the veto vote to "wilfully...obstruct the operation of the Security Council."[119] If the Security Council is therefore in a position to put a stop to human rights abuses, but the use of the veto prevents them from doing so, might this not constitute wilful obstruction of their operations? If the fact that a threat to international peace and security is progressively used to authorize intervention in human rights abuses is posed against the initial reason for the existence of the Security Council, maintaining international peace and security, the purpose of the Council and its actions are contradictory.

How legitimate are the outcomes of the deliberations of the Security Council, which has the "primary responsibility for the maintenance of international peace and security..." if it cannot protect people from gross human rights abuses?[120] Since norms such as the prohibitions on genocide and crimes against humanity have become part of customary international law, this question is particularly important. If the Security Council is unable to deal with the violations of such norms because of the veto, it appears that it has failed in the role assigned to it by the Charter.[121]

4 4 Conclusion

While the establishment of the United Nations brought much hope for a peaceful future, the fact that, when the UN was formed, it was structured so that the UN, and specifically the Security Council system, would work only if the five great powers were united in their political ideals has lead to many problems. A system forcing

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[117] Robertson *Crimes against humanity* 410
[118] Claude *Swords into Plowshares* 136, 137
[119] Four Sponsoring Powers *Statement of the Four Sponsoring Powers on Voting Procedure in the Security Council* (1945) Part I: 8
[120] *UN Charter,* Article 24
[121] Joyner 2002 Vol 13 Issue 3 *EJIL* 601

the great powers to co-operate was assumed to be the best chance the world had of preventing another world war.[122] However, since the formation of the UN, the notion that the international realm is governed by power certainly seems to have been true at times.[123] As a result of power politics, the UN has stood by as hundreds of thousands of civilians, such as those in Rwanda, were massacred and displaced.

It is as a result of such instances that for example, the International Association of Lawyers has called for reforms of the UN Security Council.[124] According to the Association, the Council does not mirror current geopolitical realities. In addition to the removal of the veto, which is "totally unadapted to the current reality of international society", the Council "should be expanded to include other nations..."[125] in order to be representative of the many countries that have joined the UN since its establishment, and of the changing political roles of these countries. While the changes called for by the International Association of Lawyers are not necessarily generally accepted, the Council definitely needs some reform if the protection of human rights is going to be one of its responsibilities. Additionally, the practice of abstention from voting by permanent members does not thwart decisions taken by the Council and has resulted in the adoption of resolutions that the Council would not have been able to adopt otherwise. Unfortunately it has also weakened the hope that the action authorised by the Council would almost always succeed, as it may often not have the support of all the major powers of the world.[126]

This is not the only flaw in the collective security system, as the failure of article 43 forces to materialise shows. While preferable to the alliance-based system that caused the world wars, the idea of collective security is still at times rejected in favour of the use of alliance interests to persuade clear alliance based organisations such as NATO, to take charge of maintaining international peace and security. In truth, an alliance such as NATO, offers only "a means of dealing with an immediate

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[122] Claude *Swords into Plowshares* 69
[123] Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2000) 4
[124] http://www.vanguardngr.com/articles/2002/national/nr201092003.html [Accessed 17 October 2003
[125] ibid
[126] Conforti *Law and Practice* 68

and specific situation, and not a pattern for a permanent and general system of world order".[127] The fact is that if there were to be forces under international command, the selectivity regarding humanitarian intervention would be much less, as the interests of alliances dictating if action is going to be taken or not, will not be an issue any more. Unfortunately, the lack of article 43 forces causes the UN to be dependent on military alliances, with their own agendas and interests, for enforcement action. Thus, the protection of human rights has become and issue of interests, regardless of the fact that it is one of the fundamental purposes of the UN and has become one the most important issues in international law today.

This is also the problem with UN peacekeeping forces, which often suffer from a lack of financial support and appropriate mandates to complete their missions successfully. According to Higgins, peacekeeping forces should in the first place be mandated to keep the peace and should be awarded responsibilities of monitoring human rights, additional to their peacekeeping responsibility and not in lieu of it, as it is this situation that leads to the kind of peace-keeping "which endeavours to provide food while allowing the slaughter to continue".[128]

Today conflict is very different from when the Charter was signed. It is also difficult to gain the support necessary for action to protect human rights. While the most common conflict then was between states, today it is within states. While the Charter therefore makes provision for the regulation of conflict between states, it is not legally capable to deal with conflict within states, let alone with human rights abuses within states. Since the Security Council has justified intervention for humanitarian purposes by maintaining that gross human rights abuses pose a threat to peace, it has not been able to intervene timely where gross abuses have not been seen to pose a threat. This does not mean that human rights abuses do not in some cases present a threat to international peace and security, especially since opposing factions in a state eventually do attract the alliance of foreign states and the conflict then spreads beyond the borders of the state. It only presents the unfortunate reality that until gross human rights abuses are seen to pose a threat, if ever, no action can

[127] Claude *Swords into Plowshares* 245
[128] Higgins 1995 Vol 6 *EJIL* 460

legally be taken to intervene. As the primary responsibility of the Security Council is the maintenance of international peace and security, the classifying of human rights abuses as a threat to peace has been inevitable, especially since the other main bodies of the UN, the General Assembly and the Secretary General can only bring matters regarding international peace and security to the attention of the Council. If these bodies wanted to bring human rights abuses to the attention of the Council, they would necessarily have to phrase it as a threat to peace.

Occasionally even being classified as a threat to peace does not guarantee the support of the permanent members. The case of Rwanda clearly shows that the financial and military means for intervention are sometimes still not forthcoming. The fact remains that the veto results in some countries being more sovereign than other countries, not because their governments are more legitimate or they protect the human rights of their citizens so much better, but because "[s]heer power still counts".[129]

It is evident that in the founding of the United Nations, the international community has gone a long way in reconciling differences and in doing so, seems to agree that the maintenance of international peace and security is of the highest importance. The structure given to international relations by the UN is invaluable; however, the warning of Secretary General Kofi Annan should not be forgotten:

> "If the collective conscience of humanity…cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and justice."[130]

The fact is that effective interventions for the protection of human rights do not seem to be forthcoming from the UN system. It is therefore necessary to ensure that interventions by other actors are appropriate and well managed in order to protect and promote human rights adequately. However, if the international community does not want to accept humanitarian intervention as a protection mechanism for

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[129] Steiner & Alston *International Human Rights* 588
[130] ICISS *The Responsibility to Protect* 2

human rights, the treatment by the UN of gross human rights abuses and in particular by the Security Council needs to be a lot more effective.

CHAPTER FIVE

Developments after World War II: Influence of the United Nations

"If, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?"[1]

- Kofi Annan

5 1 Introduction

As noted in Chapter Four, a new period in the history of international law commenced with the proclamation of the Charter of the United Nations, in which the protection of human rights is one of the principal aims. This is emphasized by the adoption of the Universal Declaration of Human Rights in 1948 in response, to among other things, the "disregard and contempt for human rights [that] have resulted in barbarous acts which have outraged the conscience of mankind..."[2]

The different types of treaties concluded to protect human rights constitute quite a long list, which include the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the European Convention on Human Rights (1950), the International Convention of the Elimination of All Forms of Racial Discrimination (1966), and the African Charter on Human and Peoples' Rights (1981).[3] While these treaties are binding upon the signatories that voluntary ratified them, none of the numerous human rights treaties seems to lay down any rules regarding humanitarian intervention.[4] This is probably because most treaties are deferential to the UN Charter, which itself does not say anything about humanitarian intervention. As shown in Chapter Four, the questions regarding the Charter's position on this kind of intervention have remained unanswered, as the frequent use of the veto by

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[1] Wheeler "Humanitarian Intervention after Kosovo: emergent norm, moral duty or the coming anarchy?" 2001 Vol 77 No 1 *International Affairs* 113 114

[2] *Universal Declaration of Human Rights* Preamble

[3] Henkin *Human Rights* 888

[4] JAL "Human Rights International Instruments: Chart of Ratifications as at 30 June, 1995" 1995 Vol 39(2) *JAL* 237 237 - 239

permanent members of the Security Council during the Cold War in situations of possible intervention, placed sovereignty in an almost unassailable position.[5]

This was possible because the members of the UN undertook to "accept and carry out the decisions of the Security Council in accordance with the present Charter".[6] Although resolutions of the UN General Assembly do not constitute sources of binding international law, they are recognized as forming international law, which is "still in its infancy",[7] as "an accumalation of resolutions...may amount to evidence of collective practice on the part of states"[8]. Since this kind of international law develops within the realm of supranational organisations,[9] its resolutions regarding human rights are very important in influencing international opinion regarding such rights. In the face of the ever-growing human rights culture, the ambiguities in the charter with regard to the relationship between human rights and sovereignty have already encouraged re-interpretation,[10] which in turn could lead to the much needed change in position regarding the protection of human rights.

In considering the influences of the UN system regarding human rights and its protection, specific mention is made of its influence on notions about sovereignty, intervention, the responsibilities of intervening forces after intervention, and the role of regional agencies in the protection of human rights. The state practice regarding some of the humanitarian interventions that did happen are explored, as well as contemporary views and theories about humanitarian intervention.

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[5] Mayall *Introduction* 5
[6] *UN Charter*, Article 25
[7] Kimminich *Since World War II* 852
[8] Dugard *International Law* 32
[9] Kimminich *Since World War II* 852
[10] Spence 2000 Vol 7 Nr 1 *SAJIA* 139 140

5 2 Influence of the United Nations

5 2 1 Sovereignty

With the growing importance attached to multi-lateralism and co-operation between states after World War II, the end of the nation state seemed to be in sight. Instead, while international law experienced an increasing unity on universal level, states became more diverse at regional level.[11] The rising numbers of independent states claiming their sovereignty after the defeat suffered by colonisation played a big role in strengthening the nation state, with membership of the United Nations seemingly still the ultimate symbol of sovereignty.[12] Unfortunately, in the effort to abandon the era of colonialism, the UN did not ensure that the newly decolonised states had a basis substantial enough to guarantee the continuing security of the system of sovereign states. The Declaration on the Granting of Independence to Colonial Countries and Peoples "gave the blessing of the United Nations to the rapid creation of new independent states, with little regard for compliance with the traditional requirements of statehood".[13] As a result, it is doubtful that the traditional Montevideo criteria for statehood, developed to ensure the birth of stable states competent to function on an equal level with other states, were observed.[14]

While many of these new states saw sovereignty as an absolute barrier against the colonial powers that used to rule them, Boutros Boutros-Ghali, in his Agenda for Peace, called to the leaders of states to accept that the theory of absolute sovereignty never could have been matched by reality. He appealed to them to find a balance between "the need [for] good internal governance and the requirements of an ever more interdependent world".[15] As it does not seem that this call will be answered soon, it is necessary to explore the concept of sovereignty and what it means.

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[11] Kimminich *Since World War II* 853
[12] ICISS *The Responsibility to Protect* 13
[13] Dugard *International Law* 86
[14] idem 87
[15] Boutros Boutros-Ghali *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-keeping; Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992* 1992 9

According to Ratner, sovereignty does nothing more than to describe claims made by states in terms of their independence.[16] The efforts to find a coherent definition for the changing sovereignty of today may therefore begin by stating which of these claims are legitimate and which are not.[17] Meanwhile, however, Steinberger sees the fact that sovereignty protects the independence and freedom of states as one of the fundamental principles of international law.[18] Nevertheless, the existence of sovereignty does not exempt a state from international law. In truth, it is the fact that a state is sovereign that enables it to conclude the international treaties that so often limit its freedom of action.[19]

The limitation of freedom of action experienced by states because of the numerous legal obligations flowing from international agreements does not deprive states of their sovereignty. Neither does it diminish the sovereign status of countries. It is merely a consequence of exercising sovereignty in a certain way. The political and economic effects of the conclusion of such agreements can even enhance the preservation of sovereignty.[20] As such, the argument, that the UN human rights covenants are illegal as they are in conflict with article 2(7), is unsubstantiated. When the government of Poland, which had signed the human rights covenants, was accused of committing gross human rights abuses in 1982, it advanced this argument.[21]

Although there are many views on what the functions and duties of states include, currently there are still no definite criteria of what they constitute.[22] The idea exists that the respect for the sovereignty of states is justified by the role of the state as guardian of the basic human rights and freedoms of its nationals,[23] and therefore, "governments that commit crimes against humanity within their borders should

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[16] Theme Panel IV "The end of Sovereignty?" 1994 in Hargrove (ed) *88 ASIL Proceedings: The Transformation of Sovereignty* 71 75
[17] ibid
[18] Steinberger *Sovereignty* 410
[19] idem 408
[20] idem 413
[21] Conforti *Law and Practice* 144
[22] Steinberger *Sovereignty* 408
[23] Reus-Smit 2001 Vol 27 No 4 *RIS* 520; Kostakopoulou 2002 Vol 22 (Nr 1) *OJLS* 149; Mertus "Assessing the NATO intervention under the UN Charter" 2000 in Stephan (ed) *94 ASIL Proceedings* 310 310

forfeit the protection afforded them by the rules of sovereignty and non-intervention."[24] This is a confirmation of the initial idea that sovereignty itself is not the basis of the society of states, but that sovereignty is based on certain existential values such as human rights, which is the true basis of this society.[25]

Presently it is widely believed that one of the basic functions of the state is to protect and observe the human rights of its citizens.[26] According to Kostakopoulou, the authority of the state depends on the effective performance of these basic functions. In addition, the state is "no longer … able to command the loyalty of its citizens, but [has] to purchase it through its capacity to meet societal needs [and]… fulfil the basic functions widely believed to be fundamental to its purpose."[27] Two questions remain: Does the international community has a responsibility to protect these citizens and their human rights if the state in question cannot or will not fulfil this duty and secondly, does such a government enjoy the right to non-intervention in its domestic affairs.

This forms part of the controversy about the requirements for attaining and maintaining sovereignty as the previously mentioned failing states will often not be able to protect the human rights of their citizens. According to Bodin, sovereignty means, "there can only be one ultimate source of law in a nation".[28] However, the legitimacy of the state, which seems to be at the centre of the UN non-intervention principle,[29] does not exist in failing states, where no ultimate source of law exists. These failing states seems to be a direct consequence of the hasty decolonisation process that did not ensure that prior to independence, potential independent state were developed and stable enough to successfully overcome the growing pains of new independence. As a result the difficulties these states progressively faced such as poverty, economic underdevelopment and an inability to ensure internal stability, were not foreseen.

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[24] Wheeler 2001 Vol 77 No 1 *International Affairs* 127; Welsh 2002 *Global Governance* 512; Ramsbotham & Woodhouse *Humanitarian Intervention* 38
[25] Reus-Smit 2001 Vol 27 No 4 *RIS* 528
[26] idem 520
[27] Kostakopoulou 2002 Vol 22 (Nr 1) *OJLS* 150
[28] Luban *Just War and Human Rights* 368
[29] idem 369

It appears that the "legitimate state has a right against aggression because people have a right to their legitimate state".[30] It should be noted that when Luban writes about the legitimate state, it is in reality a reference to the government of such a state as a government can cease to be legitimate but a state not. This is because once a state is recognized under international law its legitimacy cannot be disputed again. Only the legitimacy of its inevitably changing government can be disputed, something which usually happens when the change in government is not constitutional, but rather the result of for instance, revolution.[31] If then, a legitimate government of any state does not exist anymore, the right against aggression and intervention also falls away.[32] Philpott's notion that "[n]orms of sovereignty are not solely matters of legal freedom of action but also of basic authority", and that these norms "are not solely matters of power, but also of legitimate authority", is an affirmation of this idea.[33] In addition, there are views that the legitimacy of a government depends on its respect for the human rights of its own citizens.[34] According to Dugard, the respect for human rights and self-determination has become a criterion for statehood along with the traditional criteria set out in the Montevideo Convention.[35] Rather than being a limitation of sovereignty, human rights have thus become a qualification for it, along with the observation of the right to self-determination.

While this right to self-determination was traditionally closely associated with decolonisation, this right is now to be exercised within the borders of a state. Thus, with newly independent states appearing all over the world after the 1960 General Assembly Declaration, the right of people to "determine their political status and freely pursue their economic, social and cultural development" became an internal right. Rather than the right to secede and form an own state, the sovereign state became the framework in which the human right to self-determination, including

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[30] ibid
[31] Dugard *International Law* 97
[32] Luban *Just War and Human Rights* 368
[33] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 368
[34] Ramsbotham & Woodhouse *Humanitarian Intervention* 49; Falk *Sovereignty and Human Dignity: The Search for Reconciliation* in Steiner & Alston (ed) *International Human Rights in Context: Law, Politics, Morals* 2nd ed (2000) 581 582
[35] Dugard *International Law* 78

the right to freely exercise their political and social beliefs, could be exercised by the different peoples within the state.[36]

The idea that human rights have become a qualification for sovereignty is also seen in the fact that the UN can "block the acceptance of a state by means of collective non-recognition".[37] In the course of this practice, certain criteria, including the "prohibition of systematic racial discrimination and the suppression of human rights", have been acknowledged.[38] While consideration of the initial recognition of states does not produce any answers regarding the sovereignty of existing states abusing the human rights of their citizens, it does show the important link between legitimate governance and the respect for human rights.

The importance of this link is affirmed by Cassese who maintains that the gravest human rights abuses since 1945 have taken place in countries that lacked "the social structures and government machinery to mediate inner conflict.[39] The reality is that the preciously mentioned failing states, which can be described as states in which governments have lost the ability to enforce law and order, have become havens for terrorists. Lloyd, for example, writes, "The most obvious place for [terrorist] activities is in a state where authorities do not bother [them]; and these are likely to be states in which government and institutions have failed."[40]

In addition, domestic instability caused by cases of state collapse often leads to regional and international instability.[41] While it might be desirable to intervene in such states before the breakdown of law and order starts to claim lives, "the problem with going in before there is a collapse, is that there is rarely any apparent crisis, and thus to get people to intervene is very hard".[42] This problem remains even though the sovereignty of a state like Somalia, "which is a mere cartographic expression including two breakaway states and a "government" which cannot even

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[36] idem 94
[37] Dugard *International Law* 88
[38] idem 90
[39] Ramsbotham & Woodhouse *Humanitarian Intervention* 38
[40] Lloyd "Poverty, criminal networks, destructive leaders: when does a collapsing state create a haven for terrorists?" *Financial Times* (07/03/2003) 13 13
[41] Spence 2000 Vol 7 Nr 1 *SAJIA* 139,140; Welsh 2002 *Global Governance* 509
[42] Lloyd *Financial Times* (07/03/2003) 13

control all of the capital, Mogadishu" does not have much substance.[43] While there has been a call to establish rules for intervention and to prevent the collapse of states, and agreement exists on the fact that sovereignty cannot be used to justify the abuse of a state's own citizens, the commitments such an agreement might require, has not been made.[44]

An even bolder idea than that a state will lose the right of non-interference attached to sovereignty if such a state cannot or will not protect the human rights of its citizens, is the idea that human rights do not fall within the scope of domestic jurisdiction any longer. The debates about whether "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms",[45] should be a concern of the international community, were especially fierce between the west and the "Socialist bloc".[46] Part of this debate is about what such a "consistent pattern" would entail in the first place.[47] In the time of the Cold War, the political will and practical conditions did not allow for principles of human rights to translate into any kind of intervention for their protection. At the time, human rights standards had not been accepted as "internally binding" and humanitarian intervention was seen as just another name for Western domination.[48]

While these issues supposedly do not exist any more, the debates continue about whether the protection of human rights has become more important than the preservation of sovereignty. Although the legal basis of sovereignty is still stronger than that of human rights, there is overwhelming support for the contention that current legal grounds need revision to keep up with the enormous changes in the international arena, especially with regard to the importance of human rights and their protection. If such revision does not take place, the protection of human rights will be pursued outside of the present legal boundaries, as has already happened in Kosovo and Liberia.

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[43] ibid
[44] ibid
[45] Beyerlin *Humanitarian Intervention* 929
[46] ibid
[47] ibid
[48] IICK *The Kosovo Report* 189

5 2 2 Intervention

While the principal reason for the existence of the non-intervention rule is the protection of the sovereignty of states, the exercise of sovereignty can limit the "sovereign sphere… including 'domestic affairs'",[49] as shown above. When this has happened, other states acquire the right to intervene in those matters with regard to which sovereignty has been limited. UN Secretary General Pérez de Cuéllar therefore argued that the non-intervention principle could not be used as a "protective barrier behind which human rights could be massively and systematically violated with impunity".[50]

According to the Charter itself, any intervention by the UN in matters falling within the domestic jurisdiction of states is prohibited by article 2(4). Specifically armed intervention is effectively prohibited by article 2(7), which outlaws the use of force between states. The importance attached to non-intervention in the early years of the UN system, is also confirmed in the *Corfu Channel* case in which the court stated that "the alleged right of intervention [is] the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses" and that such a policy of force cannot find a place in international law.[51]

In later years, this notion was upheld in the Declaration on the Inadmissibility of Intervention adopted in 1965 by the UN, as well as the Resolution approving the Declaration on Friendly Relations adopted in 1970.[52] "This Resolution prohibits all forms of interference directed against the personality of a State or against its political, economic and cultural elements and especially lists, *inter alia*, economic, political and any other types of measures aimed at securing advantages of any kind".[53] As a result, some authors view the Resolution as the General Assembly's most damaging action against international law.[54] At the same time however, the Friendly Relations Declaration affirms that states "shall co-operate in the promotion

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[49] Opperman *Intervention* 1437
[50] Ramsbotham & Woodhouse *Humanitarian Intervention* 60
[51] *Corfu Channel (UK v Albania)* ICJ Reports 4 (1949)
[52] Opperman *Intervention* 1436, 1437
[53] idem 1437
[54] Robertson *Crimes against humanity* 41

of universal respect for and observance of human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance."[55] The same kind of conflict is caused by the 1981 Declaration on the Inadmissibility of Intervention adopted by the UN General Assembly.

While it seems that the non-intervention principle in article 2(7) of the Charter was included to avoid interventions regarding issues such as the human rights notions in article 55 and 56,[56] the phrase "essentially within the domestic jurisdiction" appears to provide for changing political ideas about what falls within domestic jurisdiction. Even though a significant number of authors argue that human rights now fall outside the domestic jurisdiction of states,[57] claims are still made to the contrary. Nevertheless, even the sources of these claims allow for the exception in cases of gross violations of human rights.[58]

Although the argument exists that humanitarian intervention has developed as a customary international law norm, because of the numerous examples of unilateral intervention to prevent or stop gross human rights abuses, this argument does not survive scrutiny. Although the alleged interventions that took place certainly provide sufficient evidence of state practice, the other criterion for the establishment of customary international law, *opinio juris*, does not exist to the same extent. The interventions that took place appear to be motivated by moral obligation rather than a sense of legal obligation, which is required to establish *opinio juris*.[59] The truth is that while the gross human rights abuses committed until about 1993 have been denounced by intervening forces, these forces seem to have been careful not to offer "'humanitarian intervention' justifications for their recourses to armed force".[60] Governments have been careful to prevent the creation

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[55] UN, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations* UN GA Res. 2625 (XXV) 1970
[56] Conforti *Law and Practice* 137
[57] idem 144
[58] idem 143
[59] Joyner 2002 Vol 13 Issue 3 *EJIL* 601, 602
[60] idem 602

of any custom that might make interventions in their own states easier. This position is reaffirmed in official statements by the NATO governments regarding the intervention in Kosovo, in which no mention is made of "prior state practice or…the long tradition of academic writing on humanitarian intervention".[61]

According to Joyner, the lack of reliance on an established legal right of humanitarian intervention causes a "fatal deficiency of relevant *opinio juris*"[62] and, as intervention authorized by the Security Council does not constitute state practice,[63] arguments for a customary international law principle of humanitarian intervention are unsustainable.[64]

Although the claims of a norm for emerging customary law thus appear to be a little too optimistic,[65] it does not change the fact that tolerance of UN authorized interventions for humanitarian purposes is growing[66] and that current state practice indicates that a promising guiding principle is developing regarding human rights protection.[67] This suggests that intervention would be acceptable in the face of gross human rights abuses if the state were unable or unwilling to end the abuses.[68] According to Welsh, wider Security Council definition of a threat to international peace and security, the revolution in information technology that creates a heightened awareness of human rights abuses and the increasing weight of human rights principles have caused this development.[69] The permission of the Security Council to "'use all means necessary' to secure humanitarian objectives" and the *ex post facto* endorsements of interventions by regional arrangements such as the Economic Community of West African States (ECOWAS) intervention in Liberia in 1990 have also contributed to a readier acceptance of humanitarian intervention.[70] However, most interventions for humanitarian purposes in the post-

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[61] ibid
[62] ibid
[63] ibid
[64] idem 603
[65] ICISS *The Responsibility to Protect* 15
[66] Welsh 2002 *Global Governance* 510
[67] ICISS *The Responsibility to Protect* 15
[68] idem 16
[69] Welsh 2002 *Global Governance* 510
[70] idem 506, 507

Cold War era involved Security Council resolutions that invoked Chapter VII and are therefore based on the existence of a threat to peace.

Even though case law does not play such a big role in decisions regarding humanitarian intervention, it seems that the courts have also been cautious about intervention. In the *Corfu Channel* case before the ICJ[71] for example, the court said that "from the nature of things, [intervention] would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself."[72] Although the legality of peacekeeping missions was confirmed in 1962 therefore,[73] various other kinds of interventions were still viewed as unlawful. However, in the *Barcelona Traction* case the ICJ stated, "all states have a legal interest of the protection of the international community from the perpetuation of those gross and systematic human rights violations that are recognised as being prohibited as a matter of *jus cogens*".[74] Thus it seems that international courts also struggles to find a suitable balance between the protection of human rights and the protection of sovereignty.

While it is of paramount importance that timely action is taken when reports are received of human rights abuses, Spence warns that third world countries may be loath to support intervention, which may be perceived as new Western imperialism.[75] Ayoob does in fact suggest that "humanitarian intervention carries shades of neo-colonialism".[76] However, the fact is that with humanitarian intervention comes a responsibility and duty "not to make conditions worse for a threatened population and the obligation to respect the civil, political, economic, social and cultural rights of all civilians."[77] In this light, the unfortunate bombing of Serb civilians taints the NATO intervention in Kosovo. [78] This kind of action calls the humanitarian qualifications of humanitarian intervention into question.

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[71] *Corfu Channel (UK v Albania)* ICJ Reports 4 (1949)
[72] Ramsbotham & Woodhouse *Humanitarian Intervention* 42
[73] *Certain Expenses of the United Nations Case* Advisory Opinion ICJ Reports 151 1962
[74] *Barcelona Traction, Light & Power Co Ltd* ICJ Reports 3 (1970)
[75] Spence 2000 Vol 7 Nr 1 *SAJIA* 143
[76] Welsh 2002 *Global Governance* 509
[77] Chinkin 1999 Vol 93 *AJIL* 844
[78] Wheeler *Saving Strangers* 1308

Because of possible abuse of the institution, most states are still uncomfortable with supporting intervention for human rights violations. It appears that when they undertake interventions they are careful not to establish any practice that might allow interventions in their own affairs later on. Nevertheless, there is mounting support for the argument that intervention should be legal in cases where the occurrence of gross human rights abuses are generally accepted, even without UN authorisation. While this debate is continuing, it appears that the issues regarding sovereignty have in fact been more problematic after intervention, when intervening forces decide how far their commitment in rebuilding the country should stretch.[79] The cost of the responsibilities that intervening forces face after intervention, seems to be a significant discouragement to intervention as the pressure on intervening forces to stay and rebuild becomes stronger.[80]

5 2 3 The Responsibilities of Intervening Forces after Intervention

When aiming to explore these responsibilities, it is necessary to consider the relevance of humanitarian law, as the law "governing the waging of war and the treatment of combatants and civilians in time of war.[81] Because the rights and duties of armed forces form an integral part of humanitarian law, also known as *jus in bello*,[82] the application of this law is relevant in the context of the responsibilities of intervening forces in the midst of intervention. Intervening forces have to comply with international law principles regarding warfare and the treatment of civilians and non-combatants, including the Law of Geneva that has its roots in The Hague Regulations of 1907, the Geneva Conventions of 1929 and subsequently 1949 and the additional Protocols of 1977.[83] The Law of Geneva aims to protect combatants no longer involved in the conflict.[84] However, as the responsibilities of intervening forces after intervention deal with the duties and responsibilities of these forces in

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[79] Welsh 2002 *Global Governance* 507
[80] Spence 2000 Vol 7 Nr 1 *SAJIA* 142
[81] Dugard *International Law* 431
[82] ibid
[83] idem 435
[84] ibid

the rebuilding and administration of a war torn country after intervention, humanitarian law is not specifically relevant in this context.

The basis for these responsibilities is found in Chapter XII of the UN Charter that deals with the international trusteeship system. Of specific importance is article 76 that dictates the aim of this system as the promotion of "political, economic, social and educational advancement of the people in the territory in question", the promotion and encouragement of respect for human rights, and the assurance of equal treatment of people in all matters.[85]

While decolonisation seemingly brought an end to "international tutelage", transitional administrations have increasingly been established after interventions that brought an end to previous regimes.

> "Narrow peacekeeping mandates have increasingly been replaced by 'peace-building' operations, which, besides keeping order, also involve (re)building institutions and the economy, fostering democracy, punishing war criminals and promoting reconciliation."[86]

In the midst of the seeming revival of temporary international administrations, it appears that the same questions with regard to "who should govern, with what power, with what aims, and for how long..." have to be answered every time.[87]

In some cases the role of temporary administrations is to smooth the path from "subjection" to independence, in others they "provide a cooling-off period before reintegration into another country" and in yet others they "pick up the pieces after civil war."[88] In East Timor, where the UN had full administrative and military powers, it was the sovereign legal power after Indonesia withdrew until East Timor became independent.[89] In Kosovo, on the other hand, the UN resolution provided for an interim autonomous administration until the final status of this administration

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[85] ICISS *The Responsibility to Protect* 43
[86] The Economist "Special Report: The lessons of experience" *The Economist* (12/04/2003) 27 27
[87] The Economist *The Economist* (12/04/2003) 27
[88] ibid
[89] idem 28

had been decided.[90] Here the interpretation of resolution terms such as "democratic development" and "substantial autonomy" was left to the interim authorities that consisted of UN and NATO officials.[91] While in Bosnia a relatively clear deadline existed for elections within "six to nine months after the Dayton agreement" and for the exit of foreign troops within twelve months, the representative of the transitional authority "increasingly made use of his discretionary powers and, among other things, ended up sacking more than 70 elected officials." This is an example of what happens in the case of disagreement between transitional authorities and the local population about "economic and political reconstruction".[92]

Such problems and uncertainties can further be seen in the recent intervention launched by the United States to find weapons of mass destruction in Iraq. This intervention happened after the UN weapons inspections teams were authorised to "remove, destroy, or render harmless all prohibited weapons..."[93] The authorising resolution did make provision for the fact that Iraq might not cooperate, in which case, the weapons inspections teams would report back to the Security Council, which would then consider the appropriate way to respond.[94] However, the United States intervened outside of this process. Although this intervention was initially not humanitarian, the humanitarian angle was later emphasized as the US began losing public support when the weapons of mass destruction did not materialize. As such, this intervention is sufficient to show the unease that accompanies many humanitarian interventions.

Intervening forces usually end up "remaking human lives"[95] after ending the reigns of terror responsible for gross human rights abuses. In Iraq, for example, the group of Americans responsible for creating a democracy are attempting to return the workforce to work and restore order by reinstating the police force. As many police officers are products of the old regime and thus not trusted by Iraqi's to enforce law

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[90] SCR 1244
[91] The Economist *The Economist* (12/04/2003) 27, 28
[92] idem 28
[93] SCR 1441
[94] ibid
[95] Bennett, Ghosh, Robinson & Rosen et al "Who's in Charge?" *Time* (28/04/2003) 31 31

and order in the new regime, this is very difficult to achieve. This kind of problem leads to administrative confusion. When Kurdish children with "rocket-propelled grenades" told Arabs, for example, to move out within two days or die, the intervening forces directed the Arabs to the "civilian administration" for help. Since neither accepted responsibility, however, the Kurdish "civilian administration" sent the Arabs back to the American forces.[96]

In contrast with East Timor, Kosovo and Bosnia, the new Iraqi government will progress in three stages of which the first is an American-led military administration. The second will be an interim authority that will gradually take over the day to day running of the administration, while the third will consist of the elections of a permanent Iraqi government.[97] However, while the uncertainty continues about what exactly the responsibilities of the intervening forces are, the people of Iraq are increasingly rejecting the foreign control and are calling for the American-led forces to leave.[98]

It is therefore important that occupation by intervening forces only continues for as long as is needed to establish good governance, peace and security. These forces should take sufficient notice of the cultural practices and should include local personnel to prevent the impression that the local population is the enemy.[99] The aim of intervening forces should be to "do themselves out of a job" by supporting and rebuilding war torn communities and enabling them to gain control of the political processes in their country.[100] As members of the international community, states are likely to accept and "internalise" principles such as human rights only if their "national soils" become receptive to it, which is "primarily a business for insiders, not outsiders."[101] The fact is that despite the efforts of intervening forces to convert a country to democracy or to respect for human rights; these values will only become a reality if the citizens of a country choose to accept them. However,

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[96] idem 31, 32
[97] The Economist "Special Report: Fighting for authority" *The Economist* (12/04/2003) 24 24
[98] Bennett et al *Time* (28/04/2003) 32
[99] ICISS *The Responsibility to Protect* 44
[100] idem 45
[101] Best "Justice, international relations and human rights" 1995 Vol 71 No 4 *International Affairs* 775 794

if humanitarian intervention fails to address the underlying conflicts that caused the humanitarian disaster, it is likely to conclude without the guarantee of "no recurrence".[102]

One of the issues that need to be addressed to prevent recurrence of human rights abuses is the punishment of the perpetrators of crimes against humanity. In the agreement of 9 June 1999 in which the Serbs agreed to leave Kosovo, there was no provision for the punishment of the perpetrators of Operation Horseshoe. "Security Council Resolution 1244 of 10 June, concluding the war, asked only 'full co-operation of all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia'."[103] NATO diplomats failed to insist on the surrender of the perpetrators, as a condition for the end of the war, even while the object of the agreement was the supposed punishment of these individuals. As a result of this lack of justice, the KLA murdered hundreds of Serbs as a part of reprisal killings, something that could have been prevented had the intervening forces fulfilled the responsibility of restoring justice, which had been promised.[104]

The notion of a "responsibility to protect" forwarded by the ICISS, includes the implication of rebuilding peace and "promoting good governance and sustainable development".[105] This rebuilding involves a commitment to provide sufficient funds and resources.[106] In the 1998 report 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa', UN Secretary General Kofi Annan described the "nature of and rational for post-conflict peace building".[107]

> "By post-conflict peace-building, I mean actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation…Peace-building does not replace ongoing

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[102] Wheeler *Saving Strangers* 170
[103] Robertson *Crimes against humanity* 419
[104] ibid
[105] ICISS *The Responsibility to Protect* 39
[106] ibid
[107] idem 40

> humanitarian and development activities in countries emerging from crises. Rather it aims to build on, add to, or reorient such activities in ways that are designed to reduce the risk of a resumption of conflict and contribute to creating conditions most conducive to reconciliation, reconstruction and recovery."
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> "...emphasis must be placed on critical proprieties such as encouraging reconciliation and demonstrating respect for human rights; fostering political inclusiveness and promoting national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displace persons; reintegrating ex-combatants and others into productive society; curtailing the availability of small arms; and mobilizing the domestic and international resources for reconstruction and economic recovery. Each priority is linked to every other, and success will require a concerted and coordinated effort on all fronts."[108]

Further issues of vital importance that need to be addressed after intervention are the security and protection of all members of a population, justice and reconciliation, and development.[109] A need therefore exists for the establishment of some kind of standard of responsibilities intervening forces should have after intervention, adaptable to the particular situation to ensure maximum efficiency. Intervening states should realise that intervention is not a quick fix, but only the beginning of a long, difficult and costly road in rebuilding a state. If they are not prepared to carry this burden, they should not undertake an intervention.

5 2 4 Regional Arrangements or Agencies

When Boutros Boutros-Ghali became the UN Secretary General in 1992, he sought to make regional arrangements central to the workings of the UN system.[110] The

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[108] ibid
[109] idem 40-42
[110] Higgins 1995 Vol 6 *EJIL* 450

"new complementarity" he proposed between the UN and regional organizations in the Agenda for Peace had a dual basis. Firstly, regional organizations were to increase the military capabilities of the UN and secondly, the involvement of regional arrangements in matters of international peace and security were to contribute to "a deeper sense of participation, consensus and democratisation in international affairs".[111]

First of all, it is necessary to consider what exactly would constitute a regional arrangement or agency as provided for in article 52 of the Charter. It seems as if these terms should be seen as alternatives, as states need to have the discretion to decide which kind of organisation is most suitable "for their secure political union".[112] As article 52 provides for the existence of regional arrangements "for dealing with such matters relating to the maintenance of international peace and security, it seems as if such arrangements have to have the same purpose as the Charter, to qualify as a regional arrangement.[113] Thus, the term regional arrangement or agency,

> "refers to a union of states or an international organisation based upon a collective treaty or a constitution and consistent with the Purposes and Principles of the UN, whose primary task is that maintenance of peace and security under the control and within the framework of the UN. Its members, whose number must be smaller than that of the UN, must be so closely linked in territorial terms that effective local dispute settlement by means of a specially provided procedure is possible."[114]

It appears that by 1994, the list of organisations unanimously accepted as such regional agencies in the literature included the OAS, the League of Arab States and the OAU, now the African Union (AU).[115] This would probably mean that now, the

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[111] idem 451
[112] Hummer & Schweitzer *Chapter VIII: Regional Arrangements, Article 52* in Simma (ed) The Charter of the United Nations: A Commentary (1994) 679 694
[113] Kelsen *The Law of the United Nations* 320
[114] Hummer & Schweitzer *Article 52* 699
[115] ibid

European Union (EU) would qualify as such a regional agency as well. Furthermore, the UN accepted the claims of the Conference on Security and Cooperation in Europe (CSCE) to be a regional arrangement, because it shows all the characteristics of such an arrangement,[116] even though it is not based on an international treaty. All these organisations would thus have valid claims to an active part in regional peace and security, including, according to Security Council conduct, intervention in cases of gross human rights abuses posing a threat to regional peace. In light of the criterion for regional arrangements, it is not surprising that the legitimacy of interventions by some regional organisations is under attack by the argument that they are sub-regional rather than regional, and therefore falls outside of the framework for regional arrangements in Chapter VIII of the Charter.[117] However, it seems that at least one of the organisations open to this critique, has made the necessary arrangements to allow it to take an active part in regional peace and security. ECOWAS signed the Protocol on Non-Aggression in 1978 and the Protocol Relating to the Mutual Assistance of Defence, in 1981 and thus made itself "both a defensive alliance and a regional system of collective security under Chapter VIII".[118]

The African Union is also taking steps to ensure an active part in maintaining peace and security by adopting the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. This Council will be the "standing decision-making organ for the prevention, management and resolution of conflicts".[119] While staying mindful of the provisions of the Charter and the position of regional arrangements according to the UN Charter as discussed below, the principles of the Protocol include both the respect for sovereignty and "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly [of the heads of state of the African Union] in respect of grave circumstances, namely war crimes, genocide and crimes against humanity..."[120] Since the 2000

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[116] idem 705
[117] Thomashausen *Humanitarian Intervention* 19
[118] Hummer & Schweitzer *Article 52* 707
[119] African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, Article 2(1)
[120] idem Article 4(e), 4(j)

Constitutive Act of the African Union itself does not significantly focus on prevention of conflicts and human rights abuses, it is clear that this focus only developed afterwards. At least one of the later calls for an active part by the African Union in maintaining and establishing peace and security in the region included specifically the need for preventative efforts.[121] This call was answered in the Protocol establishing the Peace and Security Council where "early warning and preventive diplomacy" is part of the functions of the Council.[122]

Something that is of further importance is that both the Constitutive Act and the Protocol establishing the Peace and Security Council make specific mention, not just to the promotion and encouragement of respect for human rights, but specifically to the protection of human rights as an objective.[123] It is apparent that the protection of human rights is part of the progressively active part the African Union plan to take in the security of the region, as the principles of the Peace and Security Council regarding the respect for sovereignty, as well as the right to intervene in grave circumstances, are also found in the Constitutive Act.[124] The specific reference to the protection of human rights and the right to intervene in grave circumstances increases the responsibility of both the Union and the Council regarding human rights and paves the way for initiating intervention in such circumstances. This idea is further affirmed by the envisaged establishment of an African Standby Force, consisting of standby contingents from member states "for participation in peace support missions decided on by the Peace and Security Council or intervention authorised by the Assembly" of the Union.[125] As such, it is noteworthy that specifically the Council have the function of "peace-building and post-conflict reconstruction",[126] something that many intervening forces still has trouble with.

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[121] http://www.justiceafrica.org/issues_paper_african_union_symposium.htm [Accessed 2 February 2004]
[122] *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, Article 6(b)
[123] idem Article 3(f); African Union, *Constitutive Act of the African Union*. Article 3(h)
[124] *Constitutive Act of the African Union*. Article 4(a), 4(h)
[125] *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, Article 13(1), 13(2)
[126] idem Article 6(e)

In general, however, it seems that the role of regional arrangements in the protection of human rights is still uncertain. The reason for this is that while regional arrangements are progressively taking an interest in the security of their regions, most are not "fitted for military collective security".[127] In addition, while these arrangements may be more intimately familiar with the problems of the region, they may inevitably be in cahoots with one of the parties.[128] The Arab League would for instance not be the best entity to resolve the Palestinian-Israeli dispute.[129]

Further disadvantages exist with regard to the actions of regional arrangements in conflict situations within their regions. History has shown that in several conflict situations, regional arrangements did not or could not contribute towards the conflict resolution. The Gulf Cooperation Council, for example, did not play a significant role in the Iraq-Kuwait dispute, the OAU was unable to assist in Somalia and Angola and the Association Of Southeast Asian Nations (ASEAN) has made "a negligible contribution to the problems of Cambodia".[130]

Another problem with a focus on regional solutions for regional problems is that more often than not international organizations such as the UN will become involved anyway. This is illustrated in Georgia where a UN Observer Mission in Georgia (UNOMIG), the CSCE and the UN High Commissioner for Refugees were already involved when the Security Council *ex post facto* approved the peacekeeping activities of the Commonwealth of Independent States (CIS).[131]

According to article 53 of the Charter, the Council may utilize "regional agreements or agencies for enforcement action under its authority". It further states that "no enforcement action shall be taken under regional arrangements…without the authorization of the Security Council…"[132] Although the earlier restrictive interpretation of article 53 required prior Security Council authorization for

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[127] Higgins 1995 Vol 6 *EJIL* 451
[128] Ramsbotham & Woodhouse *Humanitarian Intervention* 161
[129] Higgins 1995 Vol 6 *EJIL* 451
[130] idem 452
[131] ibid
[132] *UN Charter* article 53

enforcement action by regional arrangements, the Council has recently deferred its authorization of such action by regional arrangements until after the event.[133] Interventions by ECOWAS in Liberia and Sierra Leone have for example not been authorized by the Security Council, but have been "treated with implicit approval afterwards".[134]

The role that NATO has been assigning itself with regard to the execution of UN enforcement action is also problematic[135]. In article 5 of the North Atlantic Treaty,[136] the NATO members agreed "that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all". In doing so, the treaty was affirmed as a self-defence pact and NATO as a self-defence organisation. However, during the nineties, NATO adopted the role of supporting peace operations. When Secretary General Boutros-Ghali asked for the assistance of NATO in future UN resolutions regarding the former Yugoslavia in 1992, NATO confirmed their preparedness to support peace-keeping operations under authority of the Security Council and stated that they "are ready to respond positively to initiatives that the UN Secretary-General might take to seek Alliance assistance in the implementation of UN Security Council resolutions".[137] While NATO only assisted implementation of Security Council resolutions here, the NATO bombing in Kosovo in 1999 was undertaken unilaterally. Because NATO claims to be a regional arrangement, this, together with its association with UN enforcement actions, leads to uncertainty about the place of regional arrangements in conflict resolution.

According to Charney, a change in the existing regime can pave the way for responsible regional involvement.[138] This could include the following process: After proof has been established of widespread grave international crimes, which could include gross human rights abuses, the regional arrangement of that area should call upon the state in which the crimes is being committed to take action to

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[133] Wedgwood 1999 Vol 93 *AJIL* 832
[134] ibid
[135] Higgins 1995 Vol 6 *EJIL* 453
[136] NATO *North Atlantic Treaty*, Article 5
[137] ibid
[138] Charney "Anticipatory humanitarian intervention in Kosovo" 1999 Vol 93 *AJIL* 834 838

end the crimes. Once the regional arrangement has exhausted all remedies such as "negotiations, political initiatives, non-forcible countermeasures such as economic sanctions",[139] the situation should be brought to the attention of the General Assembly and the Security Council. If the Council does authorize action under Chapter VII, the action should remain under the control of the Council, but if the Council fails to authorize such action and neither the Council nor the Assembly expressly prohibits action by the regional arrangement, a UN-based remedy should "be deemed exhausted".[140] Only then should the regional arrangement be permitted to take action, starting with notifying the target state of impending use of force against it. Before intervening, the states participating in the intervention should have to consent to ICJ jurisdiction with regard to any violation of international law that may occur in the course of the intervention. The intervention itself should only be to stop the violation of international law and should be undertaken with proportional means. In addition, the intervening forces should be required to withdraw once the objective has been achieved.[141]

While Charney's proposal seems reasonable, two problems remain, the first of which is that by the time the process has been completed and a regional arrangement intervenes, gross human rights abuses have been going on for far too long. The second problem is that if the Security Council or the General Assembly expressly prohibits enforcement action by the regional arrangement, the channels through which assistance can be given are blocked again.

Because of the unwillingness of states to intervene where they have no interest, however, some authors think that, "the most promising experiments in multilateral peace operations are likely to remain at the regional level" in the foreseeable future.[142] Since states share this interest at regional level, "sufficient unity of

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[139] ibid
[140] ibid
[141] idem 838, 839
[142] Stremlau "The 1999 Kosovo War through a South African Lens" 2000 Vol 7 Nr 1 *South African Journal of International Affairs* 131 137

political values" might be created to surpass the usual disagreements about the legitimacy of intervention.[143]

5 2 5 Human Rights

The big difference between human rights law and other fields of international law is that obligations arising from human rights law are owed to individuals themselves instead of to states, or more accurately, the governments of states.[144] 'Human' rights are held by virtue of being human and are not dependent on the fact that different states or groupings of states behave differently with regard to politics, economics and social issues.[145] While states may implement the rights differently, the content of these rights should not vary as they depend on an international standard.[146]

When the Charter was compiled, the inclusion of the human rights purpose was the source of much disagreement between the great powers. While some insisted the United Nations be an organization solely concerned with international peace and security, others felt that human rights should also play a significant role.[147] This was possibly part of the conflict between Western and socialist ideas of human rights. While the Western tradition "emphasizes civil and political rights as liberal fundamental rights and freedoms in the sense of negative rights directed against the states and the abuse of power",[148] the socialist concept focused on collective aspects such as those concerning social and economic rights, which had to be guaranteed by the state.[149] Nevertheless, the reconstruction of the international community after 1945 was done with reference to western liberal democratic values and it is these values to which the promotion and respect for human rights became linked.

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[143] Kaiser *The Political Aspects of Intervention in Present Day International Politics I* in Jaquet (ed) *Intervention in International Politics* (1971) 76 86
[144] Higgins *Problems and Process* 95
[145] idem 96, 97
[146] idem 98
[147] Thomashausen *Humanitarian Intervention* 8
[148] Malanczuk *Akehurst's Modern Introduction to International Law* 7th ed (1997) 210
[149] ibid

Although various human rights clauses were included in the Charter, they have several defects, such as their vagueness with regard to the rights protected, except for the right to non-discrimination, and their lack of clarity regarding whether any legal obligations are in fact created.[150] In addition, no enforcement machinery was provided, except when "the denial of human rights assumes such egregious proportions that it constitutes a threat to international peace…" Article 2(7) is also in conflict with the human rights clauses.[151]

Article 56, on the other hand, is normative. In this, "[a]ll members pledge themselves to take joint and separate action in co-operation with the [UN] for the achievement of the purposes set forth in article 55". The purpose that is relevant here is the promotion of universal respect for human rights and fundamental freedoms and the observance of these rights. While the exact scope of this responsibility is the subject of much debate, it seems that at least "deliberate, gross violations of human rights by a UN member would appear to be a violation by that state of its pledge."[152] This is why the ICJ condemned apartheid as a "flagrant violation of the purposes and principles of the Charter".[153]

As the development of international human rights law were frozen to a standstill by the Cold War, the focus that human rights did enjoy after World War II was short lived. Although the "power blocs" did not seem to deny the idea of universal human rights, meaningful enforcement was prevented by the use of the veto in the Security Council.[154] In truth, the violations of human rights were frequently used as a "propaganda weapon against the other side".[155] The great powers were not prepared to be subject to international standards where the treatment of their own nationals was concerned and thus, the human rights clauses did not impose any legal duty on member states.[156] Similarly, the Universal Declaration,[157] which

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[150] Dugard *International Law* 237
[151] ibid
[152] Henkin *Human Rights* 887
[153] *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* Advisory Opinion ICJ Reports 16 (1971)
[154] Robertson *Crimes against humanity* 406
[155] idem 407
[156] idem 26
[157] see ch 1 n 33

includes the right to life, liberty and security of the person, non-discrimination, freedom from torture of cruel, inhuman or degrading treatment and punishment, freedom from arbitrary arrest, detention or exile, equality before the law and equal protection of the law and the right to a fair trial,[158] is not a legal guarantee.[159] Nevertheless, the Declaration that was compiled by the UNCHR, chaired by Eleanor Roosevelt, is still valid today. According to article 28, "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized." In the light of this right, which called for an enforcement system in the event of the abuse of human rights,[160] the inability of the Security Council to act effectively in the face of gross human rights abuses is a bleak image.

However, it seems that within the unenforceable traditional "future-directed 'soft law'" a growing mass of hard international human rights law exists that is considered observable and is "equipped with institutions of supervision and jurisdiction to make sure that it is observed."[161] Despite this growing hard law, many countries that have signed numerous human rights treaties are still guilty of human rights abuses. One of the reasons for this hypocrisy is the importance states attach to their sovereignty and non-interference by other states.[162] Human rights are furthermore usually exercised against the state, while the state itself is the power that has to protect these rights. Another reason is the continuing charge that human rights are a western value being forced on non-western states.[163]

Despite this critique, the increasing belief that the observance of human rights by states is not considered to fall within the domestic jurisdiction of states anymore, is telling of the growing importance of human rights after World War I.[164] According to Malanczuk there is no doubt that at least "severe human rights violations no longer belong to the 'domain reservé' of states, irrespective of [a]rticle 2(7) of the

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[158] Henkin *Human Rights* 888
[159] Robertson *Crimes against humanity* 27
[160] idem 30
[161] Best 1995 Vol 71 No 4 International Affairs 786
[162] idem 787
[163] idem 788
[164] Steinberger *Sovereignty* 411

UN Charter..."[165] This growing importance is also seen in the fact that the human rights provisions of the Charter is increasingly linked to the Universal Declaration of Human Rights.[166]

Another much debated issue is whether the protection of human rights must be the sole reason for an intervention to qualify as a humanitarian intervention. While the influence of political and economic interests tends to result in expeditious intervention in certain situations and no intervention in others, "[a]n absolute singular motivation, a pure good will, is a political illusion."[167] The truth is that interventions of any kind are "essentially...instruments of power politics".[168] Morgenthau even goes further to say that as states only intervene when it is in their interest to do so, "moral and legal arguments serve no other function than to 'discredit the intervention of the other side and to justify one's own'".[169]

While it is thus clear that human rights have gained tremendous support, the legal basis for its protection remains precarious. This is, among other things, a consequence of the conflict caused by the efforts to find a global consensus concerning human rights in the midst of the cultural, political and economic diversity of the growing interdependent international community.[170] The UN Charter does not really provide for it and it does not seem as if member states are prepared to revise the Charter to reflect the importance that the world has come to attach to the protection of human rights. This in itself continues to display the lip service paid to human rights by world leaders. Until human rights are given the place they deserve in the UN Charter, the time and energy necessary for their protection will be wasted on debates and arguments.

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[165] Malanczuk *Akehurst's Modern Introduction to International Law* 220
[166] Henkin *Human Rights* 887
[167] Holliday 2002 Vol 28 Issue 3 *RIS* 568
[168] Friedman *Intervention and International Law I* in Jaquet (ed) *Intervention in International Politics* (1971) 40 66; Ramsbotham & Woodhouse *Humanitarian Intervention* 56, 57
[169] Ramsbotham & Woodhouse *Humanitarian Intervention* 59
[170] Malanczuk *Akehurst's Modern Introduction to International Law* 211

5 3 Contemporary Theories and Views

In a General Assembly debate in 1999, some states claimed that human rights have become more important than sovereignty and that the international community should intervene to end gross human rights abuses with or without Security Council authorization. Other states argued that the institution can potentially destroy the Charter, undermine sovereignty and overthrow legitimate governments, and that the protection of human rights is a duty that falls within the context of state sovereignty. Yet other members maintained that intervention could only happen with Security Council authorization.[171]

It seems that the ethical objections to humanitarian intervention fall into two categories, the first of which contains the non-intervention arguments considered earlier[172] and the second the possibility of negative outcomes of interventions. The truth is that the outcomes of interventions are virtually impossible to predict because of the wealth of variables involved in every intervention.[173] Nevertheless, Wheeler argues that the exchange between enemy and intervening soldiers cannot be "a 1:1 exchange, because the consequentialist ethics that justify humanitarian intervention demand that any loss of life, as a consequence of intervention, be outweighed by the number of lives saved as a result of it."[174]

Further objections relate to the apparent conflict between protecting human rights and engaging in devastating armed force to do it. The connection between two seemingly contradictory concepts, 'humanitarian' and 'intervention' as enforcement action, is problematic. The contradiction follows from the fact that the idea of humanitarianism suggests compassion and assistance for people in need, whereas intervention would imply the occurrence of violence associated with military force. This would be the exact opposite of what humanitarianism stands for. While 'humanitarian' describes a range of activities "that aspire to improve lives and well-

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[171] Steiner & Alston *International Human Rights* 653
[172] see 5 2 2
[173] Welsh 2002 *Global Governance* 508, 509
[174] idem 512

being of individuals",[175] intervention points towards a use of force, that is inconsistent with the explicit prohibition of such force in the UN Charter.[176] For critics of the institution, this inherent conflict in the term, points to the unlawfulness of the institution. While there is truth in this critique, the fact remains that sometimes if diplomacy and coercion have failed, swift and proportional armed intervention is the only way to protect human beings.

The argument of Higgins that international law should be seen as a process rather than rules and that all parties in such a model should be seen as participants rather than subjects or objects of the law, seem to provide some answers in this constantly changing field.[177] According to her, if international law is seen as unchanging formal rules, it is condemned to "stagnation and absurdity in the face of the variety of phenomena and changing circumstances".[178] In addition, she maintains, a rule-based approach ignores the fact that in international law new norms are formed through the persistent violation and rejection of existing norms.[179]

While this argument might seem to mean that the constant abuse of human rights is leading to a new norm, the fact is that states abusing the human rights of their citizens have never justified their actions by claiming that a new norm has been formed.[180] The justifications have always been that the treatment of their nationals was a domestic affair and therefore not open to interference from foreign states or international organisations. This claim has always been countered by the developing norm of the respect and observance of human rights. Thus, while new norms can be formed by consistent actions to the contrary, these actions will not form new norms if they are justified on the basis of being an exception to the norm, but rather will strengthen the existing norm.[181]

As advocates of humanitarian intervention are finding new arguments to strengthen their cause, one particular argument seems to persist between the advocates

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[175] Thomashausen *Humanitarian Intervention* 1
[176] ibid
[177] Higgins *Problems and Process* 50
[178] Polat 1999 Vol 19 (Nr 1) *OJLS* 59; Wheeler *Saving Strangers* 5
[179] ibid
[180] Higgins *Problems and Process* 20
[181] ibid

themselves. Some authors maintain that an intervention based on humanitarian motives would be a legitimate humanitarian intervention. Thus the only incentive for the intervention must be to prevent or stop gross human rights abuses. Others argue that humanitarian incentives cannot be used as legitimating factors for humanitarian interventions as such incentives will never be the only kind of incentive for intervention. Therefore, the legitimating factor should rather be whether a humanitarian outcome has been wielded by the intervention. In truth, the end of gross human rights abuses is often an inevitable outcome of interventions that did not have humanitarian incentives as their sole motive. This is because the regime, against which intervention is put into operation, is usually also the regime responsible for the abuses and the abuses come to an end because of the intervention. A case in point is Vietnam's intervention in Cambodia. Although humanitarian purposes were never used as justification for the intervention, one of the inevitable outcomes of the intervention was the end of the genocidal regime of Pol Pot.[182]

Wheeler further maintains that an intervention based on non-humanitarian motives should only be legitimate if the motives and the enforcement action taken do not undermine a humanitarian outcome.[183] In support of this contention, he forwards four criteria that a legitimate humanitarian intervention would have to meet. First of all, there has to be an extreme human rights violation, such as will "shock the moral conscience of humanity".[184] Then it must be certain that all non-violent remedies have been exhausted. The force used in the intervention must be proportional to the violations and a strong belief must exist that the intervention will render a positive humanitarian outcome.[185]

He further tries to "tip the balance away from pluralism and toward a solidarist understanding of international society".[186] In such a society the state would accept

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[182] Wheeler *Saving Strangers* 106
[183] Wheeler 2001 Vol 77 No 1 *International Affairs* 122
[184] ibid
[185] ibid
[186] Welsh 2002 *Global Governance* 510

the responsibility of protecting the security and human rights of their citizens[187] and would look to find ways to overcome the conflict between inter-state order and justice by "developing practices that recognize the mutual interdependence"[188] between these issues. This is in stark contrast with the pluralist view that states and not individuals are the primary subjects of international law and that the pursuance of individual justice in the face of gross human rights abuses is unsuitable, as it will endanger the "structure of inter-state order".[189] Pluralists are further concerned that because states have conflicting claims of justice and will act "on their own moral principles",[190] it will weaken the international order built on state sovereignty. Their arguments against humanitarian intervention include that the institution will be abused and that it will be selective as it will be dependant on the shifting political views of states.[191] However, while the non-humanitarian motives behind an intervention may suggest the abuse of the institution, the claims of abuse will only survive if these motives undermine the humanitarian purposes and outcomes.[192] The "solidarist" or monist argument for humanitarian intervention includes the idea that to be a legitimate intervention, an intervention has to satisfy certain criteria,[193] as it has never been advocated that interventions should be made without standards.

Wheeler states that while the recognition of a right to humanitarian intervention might allow previously prohibited actions, it is no guarantee that intervention will take place if and where it is necessary, without delay.[194] The right to intervene puts the interests of the intervening states at the centre of the intervention, while that place should be reserved for the interests of the victims suffering grave violations of their human rights.[195] The reason for this is that the focus on a right to intervention does not take the need for preventative efforts and assistance after

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[187] ibid
[188] Wheeler *Saving Strangers* 11
[189] ibid
[190] idem 29
[191] idem 29, 30
[192] idem 39
[193] idem 33
[194] Wheeler 2001 Vol 77 No 1 *International Affairs* 126
[195] Wheeler *Saving Strangers* 38

intervention into account.[196] This is the rationalization of the 'Responsibility to Protect' as suggested by the ICISS[197]

The idea that obligations are owed to human beings is also found in the InterAction Council's idea of A Universal Declaration of Human Responsibilities and is supposed to serve as a balance between freedom and responsibility.[198] "[W]hile rights relate more to freedom, obligations are associated with responsibility" and as such freedom and responsibility are interdependent.[199] Part of the ICISS notion of the responsibility to protect, is that sovereignty should be seen as a responsibility. The significance of this is that it implies that state authorities have the responsibility for the protection of the safety and lives of their citizens and that the "national political authorities are responsible to the citizens internally and to the international community through the UN".[200] It also means that state agents will be accountable for their actions or the lack of action. The growing human rights norms play a particularly big role in putting sovereignty in a context of responsibility.[201]

This context is expanding in a time when the anger and compassion of people around the world has been rekindled by media coverage of gross human rights abuses.[202] When this is taken into account, it is shocking that the superpower of our time, the United States, is jeopardizing the humanitarian efforts of the UN by threatening to stop payments to the UN budget "if the ICC ever indicts an American or the UN ever acquires its own military force".[203] The obstruction of the first permanent international tribunal able to bring the leaders of genocidal regimes to justice is yet another example of the lip service world leaders pays to the protection of the rights of human beings around the world. Nevertheless, from current views

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[196] ICISS *The Responsibility to Protect* 16
[197] Welsh 2002 *Global Governance* 511
[198] InterAction Council *A Universal Declaration of Human Responsibilities* in Steiner & Alston (ed) *International Human Rights in Context: Law, Politics, Morals* 2nd ed (2000) 351 351
[199] ibid
[200] ICISS *The Responsibility to Protect* 13
[201] ibid
[202] Robertson *Crimes against humanity* 438
[203] idem 446; http://www.hrw.org/press/2003/08/belgium080103.htm [Accessed 2 March 2004] The jeopardising of humanitarian efforts is further seen in the fact that the US threatened Belgium that it could risk losing its status as host to NATO headquarters if it did not rescind its universal jurisdiction legislation. The Belgian parliament repealed the 1993 legislation in 2003

and theories it is clear that the protection of human rights have become far too important for states that are able to help, to accept being frustrated by the inability of the Security Council to authorise effective protection, especially since the notion of the responsibility to protect is gaining so much support.

5 4 Humanitarian Interventions

From previous humanitarian interventions, it seems that intervention will only happen in the face of a humanitarian emergency, as "it has never been suggested that a state's poor human rights record could justify armed intervention".[204] However, it appears that some states have been allowed to get away with grave abuses for longer than is tolerable, before the international community would take action to protect the abused civilians.

5 4 1 Liberia

The relevance of the ECOWAS intervention in Liberia is the fact that it illustrates the role of regional organisations in the protection of human rights. In 1980, after an era of democracy in which 20 consecutive presidents were democratically elected, the Armed Forces of Liberia (AFL), led by Samuel K. Doe, overthrew the government of William V.S. Tubman in a *coup d'état*. The autocracy that followed was toppled in 1989 by a "popular but excessively destructive insurgency" led by the National Patriotic Front of Liberia (NPFL) with Charles Taylor at the head. This marked the start of the civil war. Taylor's forces soon had control of significantly more territory than the government and when the AFL, at this time the forces of government, suffered severe losses, Doe appealed for help to the UN and the United States. When no help was forthcoming, he appealed to ECOWAS, who established the ECOWAS Cease-firing Monitoring Group (ECOMOG) in 1990, to stop Liberia from descending into further anarchy.[205]

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[204] Robertson *Crimes against humanity* 406
[205] ICISS *Supplementary Volume* 81

While ECOMOG did restore law and order in Monrovia, the capital of Liberia, and an Interim Government of National Unity (IGNU) had been formed under the auspices of ECOWAS,[206] ECOMOG could not broker a peace deal. Five months after the intervention, the Security Council commended the efforts of ECOWAS to promote peace. Shortly after, as the NPFL started killing and torturing ECOMOG troops, the Council adopted Resolution 788, which stated that the situation in Liberia posed a threat to international peace and security. After 1992, the Security Council established the UN Observer Mission in Liberia (UNOMIL) in cooperation with ECOMOG.[207] In 1996 conflict erupted once more and atrocities and displacements were extensive even though ECOMOG eventually restored their control. At least 200 000 Liberians were killed throughout the conflict, and almost 800 000 became refugees.[208] Through a series of peace accords that did not hold, ECOMOG seems to have been the only constant force in Liberia.

After the disarmament and demobilisation of warring factions as a result of negotiations involving the OAU, ECOWAS, UN and the United States,[209] Charles Taylor was elected as president of Liberia in 1997, perhaps primarily because of the fear that war would once again erupt if Taylor should lose.[210] In this context, it is not surprising that the problems of Liberia were not at an end after the ECOWAS intervention and that the Taylor administration did little to better the lives of Liberian people. Rather, it supported the bloody RUF in Sierra Leone that created much unrest in the region, behaviour for which the United Nations imposed sanctions on Liberia in 2001.[211] On August 11, 2003 President Taylor resigned office and departed into exile in Nigeria under intense US and international pressure. This move paved the way for the deployment by ECOWAS of what became a 3 600-strong military peacekeeping mission in Liberia (ECOMIL).[212]

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[206] http://www.state.gov/r/pa/ei/bgn/6618.htm [Accessed 12 November 2003]
[207] ICISS *Supplementary Volume* 83
[208] idem 83, 84
[209] http://www.state.gov/r/pa/ei/bgn/6618.htm [Accessed 12 November 2003]
[210] ICISS *Supplementary Volume* 81
[211] http://www.state.gov/r/pa/ei/bgn/6618.htm [Accessed 12 November 2003
[212] ibid

Regardless of the concern expressed for the "wanton destruction of human life and property",[213] the intervention by Liberia was controversial, as it was neither authorised by the Security Council, nor backed by all the ECOWAS members.[214] Furthermore, the ECOWAS treaty does not require ECOWAS to provide any regional-security mechanism to deal with internal conflicts. However, the 1981 ECOWAS Protocol Relating to the Mutual Assistance of Defence does provide that "internal armed conflict that is likely to endanger security and peace in the community would be dealt with by the authority of the member states concerned".[215]

The situation in Liberia was clearly not breaching international or regional peace and security, and by the time ECOMOG intervened in 1990, was not even seen as a threat to peace by the Security Council. It was nevertheless clear that Liberia were in need of outside intervention, which is why ECOMOG intervened and its intervention is seen as justified. The fact that ECOMOG was familiar with the situation in Liberia, made this regional organisation suitable to intervene, even if it was without Security Council authorisation. While this kind of intervention might be used as a standard by which to measure intervention by regional actors, the problem however, is that the same critique of selectivity aimed at the UN, is true of regional actors. The relatively speedy intervention in Liberia stands in stark contrast to the non-intervention in Rwanda, although granted as a result of a UN decision.[216]

5 4 2 Rwanda

The genocide in Rwanda will remain a testament to the inefficiency of the UN system to protect the "peoples of the United Nations"[217] it purports to represent and stands as a warning of the outcome of indifference. The country's civil war should be seen in the context of the superior treatment the Tutsi people received throughout the German colonisation from 1897 to 1919 and the Belgian

[213] ICISS *Supplementary Volume* 81
[214] ibid
[215] ibid
[216] Wheeler *Saving Strangers* 301
[217] *UN Charter*, Preamble

colonisation from 1919 to 1962.[218] In truth, the Hutu people were severely repressed with specifically Belgium equating the Tutsis with a "ruling class".[219] As Rwanda was awaiting independence after World War II, a group of Hutu emerged as elite after being given access to jobs. In the last part of the Belgian administration, these people started calling for Hutu freedom, "not only from Belgian colonisation but from Tutsi overlordship (sic)".[220]

What is described by Jones as the "first phase" of Tutsi genocide started as the Tutsi elite made plans to eliminate members of the emerging Hutu elite. When these plans collapsed, the Hutu targets retaliated and sparked the killing of an estimated 20 000 people and the displacement of an estimated 160 000 Tutsi's in 1959.[221] After independence in 1962 the Party of the Movement and of Hutu Emancipation, Parmehuith, won the first elections.[222] It is from this ethnic competition and the long years of Tutsi rule that the mobilization towards the genocide, for which Rwanda has become known, would grow.[223]

In 1973 Juvénal Habyarimana lead a *coup d'état* that shifted power from the Southern Hutu clans to the Northern clans[224] and after that, the superior place in commercial, intellectual and cultural life, of especially the Bushiru Hutu, was maintained during the one party administration until at least the late 1980's.[225] It is said that the civil war really began when the rebel group, the Rwandese Patriotic Front (RPF), invaded Rwanda from Uganda in the South in 1990.[226] Sporadic fighting, claiming the lives of tens of thousands of Hutu's and Tutsi's,[227] continued between the RPF and the Rwandan government army through the next three years[228] until the Habyarimana government finally reluctantly agreed to a multi-

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[218] Jones *Peacemaking in Rwanda* 17
[219] idem 19
[220] ibid
[221] idem 20; Wheeler *Saving Strangers* 210; ICISS *Supplementary Volume* 97
[222] Wheeler *Saving Strangers* 210
[223] Jones *Peacemaking in Rwanda* 20
[224] Wheeler *Saving Strangers* 25
[225] Jones *Peacemaking in Rwanda* 26, 27
[226] idem 15
[227] idem 36
[228] idem 15

party constitution.[229] This happened under pressure to democratise as the price of coffee, the main export of the Rwanda at the time, collapsed and foreign assistance all but dried up.[230] Although opposition parties signed a peace agreement, the Arusha Accords at the Tanzanian town of Arusha in 1993, the terms of the agreement was not conducive to reconciliation, as it significantly favoured the minority Tutsi group,[231] something that the Hutu's found almost impossible to accept.

When a Neutral International Force (NIF) was contemplated to oversee the transition process after the signing of the Arusha Accords, it was argued that the neutral force should be provided by the OAU. This was resisted by the UN that seemed to feel that if they were to provide the financial and logistical support the OAU would need from them, they should command the force. In effect, the UN rejected a regional lead force and preferred UN lead forces,[232] which led to the deployment of the UN peacekeeping mission, UNAMIR, in 1993.[233] On 18 April requests for $61 million, the budget approved on 6 April and estimated necessary to successfully support UNAMIR, were issued to contributors by the UN. The first instalments were received on the 26th of August, more than a month after the genocide, which lasted from 6 April to 17 July 1994, had been ended.[234]

The genocide started when the aeroplane carrying both the presidents of Rwanda and Burundi after peace talks was shot down.[235] Militant Hutu's claimed that it was the deed of Tutsi rebels and retaliated by killing the prime minister and seizing the government. In this way, they provoked action against the Tutsi population.[236] In the almost 100 days of well-planned and coordinated genocide,[237] the estimates of

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[229] Wheeler *Saving Strangers* 211
[230] ibid
[231] Jones *Peacemaking in Rwanda* 93
[232] idem 104
[233] Sunga "The First indictments of the International Criminal Tribunal for Rwanda" 1997 Vol 18 Nr 9-12 *HRLJ* 330 330; SCR 872
[234] Jones *Peacemaking in Rwanda* 1, 107
[235] idem 37
[236] ICISS *Supplementary Volume* 97
[237] Jones *Peacemaking in Rwanda* 39

Tutsi's and moderate Hutu's killed ranged from 500 000 to 1 000 000.[238] Estimates of women raped ranged from 250 000 to 500 000.[239] Out of a population of 7 million, more than 2 million fled to neighbouring countries and around 3 million were internally displaced.[240]

> "If we consider that probably around 800,000 people were slaughtered during that short period... the daily killing rate was at least five times that of the Nazi death camps."[241]

At the time the genocide started, UNAMIR, assigned to monitor the Arusha process, consisted of 2 500 peacekeepers.[242] The UN Secretary General, stating that the position of UNAMIR had become inadequate, outlined a few alternatives for the Security Council and advocated the alternative of the deployment of 5 500 troops in Kigali, the capital of Rwanda. The Council issued Resolution 912 and "adjusted the mandate of UNAMIR".[243] While the force commander of UNAMIR "pleaded for 5 000 well trained soldiers"[244] and requested the mandate to be adjusted to include the protection of civilians, the Council voted to reduce the numbers of UNAMIR to 270 troops on the 21st of April in Resolution 912 and denied the adjustment requested.[245]

When reports of genocide continued, the Council imposed an arms embargo and authorised the expansion of UNAMIR to 5 500 troops with the first phase existing of 150 unarmed observers and "an 800-strong Ghanaian battalion to secure the Kigali airport" on 17 May.[246] It seems that this expanded mission, known as UNAMIR II, did not attract the troops necessary for the second phase, let alone all the troops for the first phase.[247] "In the absence of Western intervention",[248]

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[238] Sunga 1997 Vol 18 Nr 9-12 *HRLJ* 331
[239] ICISS *Supplementary Volume* 98
[240] idem 101
[241] Sunga 1997 Vol 18 Nr 9-12 *HRLJ* 332
[242] ICISS *Supplementary Volume* 97
[243] idem 98
[244] ibid
[245] ibid
[246] SCR 918
[247] ICISS *Supplementary Volume* 101
[248] Wheeler *Saving Strangers* 229

Secretary General Boutros-Boutros Ghali called on African states to supply the troops necessary for the second phase of UNAMIR II.[249] However, UNAMIR II never really succeeded as by the 1st of August, at approximately the time when the mission was to leave Rwanda, its force still had fewer than 500 troops.[250]

The first time the Council named the situation in Rwanda genocide, was in Resolution 925, in which "the reports indicating that acts of genocide have occurred in Rwanda" were noted "with the gravest concern".[251] On the 22nd of June the Council authorised intervention by France, who requested Chapter VII authorisation from the Council when it declared in a letter to the Secretary General that it was prepared to intervene.[252] Operation Turquoise, as the French mission was called, was authorised to use all necessary means to "improve security and protect displaced persons, refugees, and civilians".[253] While this intervention is seen by some as primarily to secure French interests in Rwanda, it did slow down the genocide in parts of the country.[254] A government of national unity was finally formed on July 19[255] and Resolution 955 providing for the establishment of the ICTR, was adopted by the Security Council on November 8, 1994.[256]

It seems that several early warning signs pointed to a growing threat of genocide, almost all of which were ignored. By early January 1994 an informant reached UNAMIR with reports of a Hutu extremist plan to oppose the Arusha peace process and to attack UNAMIR in a effort to force them to withdraw. This informant also revealed that lists of Tutsi throughout the country exist and that the people behind these lists had the capacity to commit full-scale genocide. Although a cable with this information was sent to UN headquarters in New York, no action was taken.[257] While this particular informant may have been considered suspect, other warning signals were also ignored, notably those from Tanzania and Belgium that warned of

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[249] ibid
[250] ICISS *Supplementary Volume* 101
[251] idem 100
[252] SCR 929
[253] ICISS *Supplementary Volume* 100
[254] ibid
[255] ibid
[256] idem 101
[257] Jones *Peacemaking in Rwanda* 113, 114

brewing violence. It seems that the aspirations of international actors for success at Arusha, blinded them for the mounting evidence of opposition to the negotiations, with the result that they were unprepared to prevent or stop the subsequent genocide.[258]

> "The combination of political indifference, poor intelligence, and lack of cultural awareness meant that the direction of the political war, and signals of impending violence, went unheeded in New York. Even as signals grew louder, and civil violence in Kigali and throughout the country increased…[n]o proactive measures to block Arusha opponents were taken; no contingency planning occurred."[259]

The first time the Security Council named the situation in Rwanda a threat to peace and security, was in SCR 929 on 22 June, after more than two months of genocide. If the protection of the human rights of people is thus to be dependant on the decision of the Security Council establishing a threat, the protection of these rights seem to be no more than an illusion. It is little wonder then that states will intervene without Security Council authorisation, as would have happened in the case of Rwanda. This is clear from the fact that only a day after the request for Chapter VII authorisation from France was brought to the Security Council, France already started to move its troops from African bases to Goma, which were to be the rear base for Operation Turquoise.[260]

5 4 3 Somalia

While the Security Council was unwilling to authorize intervention in Rwanda after the lesson learned in Somalia, namely that it is dangerous to cross the line from Peacekeeping to Peace enforcement, the fact is that Somalia and Rwanda were two very different situations.[261] The United Nations Operation in Somalia (UNOSOM), existing out of 500 peacekeepers, was deployed in 1992 as a peacekeeping

[258] idem 114
[259] idem 116, 117
[260] idem 124
[261] idem 128

mission,[262] after the Security Council noted the human suffering caused by warring clans and named the situation a threat to international peace and security in Resolution 746.[263] As no government existed that was capable of maintaining law and order, however, UNOSOM was unable to implement its mandate.[264] While civil war almost destroyed agricultural and livestock production, UN humanitarian agencies withdrew from Somalia for fear of personnel security.[265] When the United States decided to offer troops to assist the UN in delivering humanitarian aid,[266] one set of motivations was that the operation would be "at not too great a cost and, certainly, without any great danger of body bags coming home".[267]

The Security Council authorized US intervention, for the first time on the grounds that the *human suffering* is causing a threat to international peace and security.[268] It seems that the lack of any mention of article 2(7) of the UN Charter in Security Council Resolution 794 is a reflection of the fact that because the Somali government as legitimate authority had ceased to exist, the UN action did not breach the non-intervention principle in article 2(7).[269] This reflection supports the idea that only legitimate states are afforded the right to non-interference.

Operation Restore Hope, headed by the United States, was undertaken by the United Task Force (UNITAF) and was mandated to "use all necessary means" to create a secure environment for delivering humanitarian aid.[270] At the start of 1993, UNITAF handed over to a second UN operation, UNOSOM II, which had the mandate to rebuild, disarm factions and arrest leaders of the warring factions.[271] As fighting continued between UNOSOM II and Somali militia, 18 US and 1 Malaysian troops died at the infamous "Olympic Hotel Battle".[272] Even though few

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[262] Wheeler *Saving Strangers* 176
[263] ICISS *Supplementary Volume* 94
[264] ibid
[265] Wheeler *Saving Strangers* 174
[266] idem 183
[267] idem 181
[268] idem 183; SCR 794
[269] Wheeler *Saving Strangers* 200
[270] idem 189; SCR 794
[271] ICISS *Supplementary Volume* 96
[272] ibid

of their mandated objectives had been achieved, the last of the UN troops withdrew within six months.[273]

Thus, while Somalia was a situation of "diffuse conflict between a fractious set of warlords" and a population unsympathetic to containment efforts, Rwanda harboured a leadership tightly controlling the genocide against its unarmed population.[274] As the UN and US forces withdrew from Somalia when the fighting with warlords claimed lives that had not been anticipated, the real lesson from Somalia was learned by Rwandan extremists. That UN peacekeeping was a bluff called to the detriment of the Rwandan population.[275]

While the case of Somalia was at first seen as a triumph as it was the first time states had intervened in the face of gross human rights abuses without there being any apparent political interest, it soon became clear that states were not willing to pay the price for intervention by seeing their initial commitment through. It appears that the US could afford to be generous and intervene, only because political leaders thought no real disadvantage would be suffered in terms of lives. As it had prior Security Council authorisation, after the Council established that the situation did pose a threat to international peace and security, the US intervention was not a humanitarian intervention. Of the interventions considered, it is the only situation in which the human rights abuses not breaching international peace and security, did receive relatively timely Security Council authorisation for the intervention that was evidently needed.

5 4 4 Kosovo

The situation in Kosovo, on the other hand, is probably the first time that NATO intervened in a non-member state and without Security Council authorisation. The UN neglected to authorize intervention as violence mounted between the Kosovar Albanians and the Serbs. The growing polarization between the Albanians in

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[273] idem 97
[274] Jones *Peacemaking in Rwanda* 128
[275] ibid

Kosovo and the rest of Yugoslavia after 1981 was the product of various factors, the first of which was progressive poverty, despite the large amounts of tax money supposed to be used to further development in Kosovo.[276] While the Albanian Kosovars believed their monetary plight was due to insufficient control over their own economic life, Serbs demanded that economic control be recentralised, away from Kosovo.[277] Another factor was that owing to the out-migration of Serbs and Montenegrins and the high Albanian birth rate, almost 80% of the population of Kosovo was Albanian by the eighties.[278] The Albanians consequently felt justified in demanding republic status. Added to these factors, were Serb claims of discrimination and harassment, as their community became smaller and began losing its privileges.[279] The 1986 memorandum by the Serbian Academy of Arts and Sciences that claimed the "'physical, political, legal and cultural genocide' of Serbs in Kosovo", was received with shock throughout Yugoslavia. At this stage, however, official figures did not substantiate the wilder claims of rape and murder.[280]

After 1989, by which time Yugoslavia's President Slobodan Milosevic had revoked Kosovo's autonomy,[281] legislation made it illegal for Kosovar Albanians to buy or lease property from Serbs and widespread arbitrary arrests, torture and detention without trial occurred.[282] As the human rights violations continued and faith in the passive resistance withered by the mid-nineties, the initial relatively non-violent resistance[283] was progressively replaced by armed attacks by the radical Kosovo Liberation Army (KLA).[284]

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[276] IICK *The Kosovo Report* 37, 38
[277] idem 37
[278] idem 38
[279] ibid
[280] idem 40
[281] Wedgwood 1999 Vol 93 *AJIL* 828
[282] IICK *The Kosovo Report* 42
[283] idem 44 – 48, At this time a parallel state was instituted by the Kosovar Albanians who were now subject to double taxation to maintain their 'shadow' state. This parallel state had its own education system, trade unions, organizations for culture and sport and even transport initiatives but the burden of maintaining the parallel state became almost too much to bear as double taxation took its toll on the already impoverished Kosovar Albanians.
[284] IICK *The Kosovo Report* 50 - 52

Human rights abuses and violence between the Federal Republic of Yugoslavia (FRY) and the Kosovar Albanians, especially the KLA, escalated. About 12 000 refugees spilled over the Albanian border, and while OSCE was establishing an active presence on the Albania-Kosovo border, NATO publicly considered military intervention by June 1998.[285] When Milosevic rejected the Rambouillet peace negotiations that started in February 1999,[286] NATO started their bombing campaign in March 1999. By this time, it was clear that abuses committed by Yugoslav forces far outstripped those committed by Kosovar Albanians or the KLA,[287] and that it was part of Operation Horseshoe, an operation meant to "ethnically cleanse" the province of Kosovo of its 1.7 million Albanians.[288] The NATO bombing campaign was strictly an air campaign with no forces on the ground,[289] which left the Kosovar Albanians, who were by now the target of extensive FRY retaliation, unprotected.[290]

The report of the IICK notes that the international community was aware of the imminent conflict since the early nineties, but "failed to take sufficient preventative action" before 1998.[291] By this time, "a threat to regional [and international] peace and security..." had arisen according to Security Council resolutions.[292] However, as it became clear that Russia would veto any Security Council resolution to authorize such intervention, the NATO intervention was never directly authorised by the Security Council.[293] Having failed to prevent massive atrocities because of the time it took to intervene and the form it assumed, it was now also in breach of the UN Charter, the *bona fide* legal basis of modern international law.

After the end of the hostilities, NATO deployed a 20 000 force that operated "within the UN Interim Administration Mission in Kosovo" to provide security.

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[285] idem 72, 73
[286] idem 82
[287] idem 67 - 85
[288] Robertson *Crimes against humanity* 413
[289] IICK *The Kosovo Report* 85, 86
[290] idem 88, 89; see ch 1 for the human rights abuses that took place
[291] IICK *The Kosovo Report* 1
[292] Wedgwood 1999 Vol 93 *AJIL* 829, SCR's1199, 1203, 1244
[293] Wedgwood 1999 Vol 93 *AJIL* 829 – 831; Steiner & Alston *International Human Rights* 654

This mission was responsible for interim administration and capacity building.[294] As Kosovo is a region of the FRY, it was treated as such while under the UN military protectorate."[295]

It is notable that despite the critique about the air strikes, the majority of the members of the Security Council rejected a draft resolution condemning the NATO intervention.[296] In addition, the Secretary General, Kofi Annan, declared in his Statement on NATO military action against Yugoslavia, that "[i]t is indeed tragic that diplomacy has failed...but there are times when the use of force may be legitimate in the pursuit of peace".[297] At the same time however, he maintained that "actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations".[298] As in the case of the Tanzanian intervention in Uganda,[299] the NATO intervention seemed to have been accepted eventually even if amid ongoing debates. The IICK for example, noted that the intervention was illegal but legitimate.[300]

The NATO action seems to have been justified by the failure of FRY to comply with Security Council Resolutions, the imminent humanitarian disaster in Kosovo, the inability of the Council to take adequate steps to deal with the disaster, and the threat to regional peace and security posed by the Serbian action.[301] These justifications seem satisfactory, as FRY had a record of ethnic cleansing and violence against parts of the civilian population, the actions of FRY has been identified as threats to peace, and FRY had refused to comply with the demands of the Security Council.[302] There were furthermore reason to believe that a political compromise would not be sufficient to protect the Kosovar Albanians given

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[294] ICISS *Supplementary Volume* 113
[295] ibid
[296] idem 112
[297] Wedgwood 1999 Vol 93 *AJIL* 831
[298] Wheeler *Saving Strangers* 294
[299] see ch 1
[300] ICISS *Supplementary Volume* 114
[301] Matheson "Justification for the NATO air campaign in Kosovo" 2000 in Stephan (ed) *94 ASIL Proceedings* 301 301
[302] Murphy "The Intervention in Kosovo: A law shaping incident?" 2000 in Stephan (ed) *94 ASIL Proceedings* 302 304

"Milosevic's past record of war crimes and illusory reassurances..."[303] While there are still debates about whether the NATO action was proportional, it appears clear that intervention was necessary to stop the humanitarian disaster and additionally, the "Security Council did not pass a resolution condemning the intervention".[304] Supporters of the Kosovo intervention argue that because the Council has admitted the existence of a threat to international peace and security and after the fact, did nothing about it, the action taken by NATO was justified.[305] Simma endorses this:

> "[W]hile the threat of armed force employed by NATO against the FRY in the Kosovo crisis since the fall of 1998 is illegal due to the lack of a Security Council authorization, the Alliance made every effort to get as close to legality as possible by, first, following the thrust of, and linking its efforts to, the Council resolutions which did exist, and, second, characterizing its action as an urgent measure to avert even greater humanitarian catastrophes in Kosovo, taken in a state of humanitarian necessity."[306]

Nevertheless critics of this intervention point to the selectivity practiced with regard to humanitarian interventions. In the face of the inaction of Western powers in the cases of Rwanda and East Timor, the intervention that in effect ignored the Security Council, reeks of hypocrisy.[307] Further criticism includes the fact that the moral high ground claimed by NATO would be more legitimate, if the "humanitarian intervention would have been worth the lives of Westerners as well as Yugoslavs", as the NATO air strike stayed at 15 000 feet to prevent casualties on their side.[308] In the face of this criticism, there are arguments that the General Assembly should have used the Uniting for Peace Resolution, to add some legitimacy to an intervention unauthorized by the Security Council.[309]

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[303] IICK *The Kosovo Report* 172
[304] Murphy 2000 in Stephan (ed) *94 ASIL Proceedings* 304
[305] IICK *The Kosovo Report* 170
[306] Steiner & Alston *International Human Rights* 654
[307] Wheeler 2001 Vol 77 No 1 *International Affairs* 120
[308] ICISS *Supplementary Volume* 114
[309] Wheeler 2001 Vol 77 No 1 *International Affairs* 121

The human rights abuses in Kosovo did not breach international peace and security, but were established as a threat to peace in SCR 1199. However, this did not compel the Security Council to authorise intervention. As NATO intervened only after the Council established the situation as a threat to peace, and it became clear that an authorisation to intervene would not be forthcoming, this intervention appears to be one of the most "legitimate humanitarian interventions" after the Cold War.

After looking at these four interventions, it is evident that no consistency exists within the UN regarding the manner in which interventions are handled and even less consistency with regard to the responsibilities of the intervening forces after intervention. It seems that the mandate given to UN forces often do not reflect the gravity or requirements of the situation and that the financial and political commitment to provide intervening forces with the necessary means to effectively fulfil their mandate, sometimes lacks even after the intervention has been authorised by the Security Council. It appears further that the states that do volunteer troops for UN authorised forces, are not always prepared to pay the price and to make the commitment to rebuild, which situations of gross human rights abuses ask. Finally it seems that states that intervene of their own accord do not always do the job so much better than a UN authorised force could have. Thus while UN interventions are not always effective, unilateral interventions are not necessarily more successful. Nevertheless, the truth is that without these interventions, the human catastrophe in all the mentioned cases would have been even greater. All the situations considered above, although not seen as a breach of international peace and security, were at some point established as a threat to peace by the Security Council, and thus valid motivations for intervention to end gross human rights abuses. Despite this, authorisation for intervention was not always forthcoming from the Council and in most cases happened without authorisation, even though it was evident that intervention in all the cases was necessary and well justified.

5 5 Conclusion

From the abovementioned presentation of the law and opinions regarding humanitarian intervention in human rights abuses not breaching international peace and security, it is clear that there is much uncertainty, different opinions and seemingly still no decisive efforts to determine the content of humanitarian intervention.

The fact that this is not just a debate about law, but also about morality, makes it even more complex. While there is much disagreement about the place of morality in the arguments about such intervention, the view of some writers is that humanitarian intervention "belongs in the realm not of law but of moral choice..."[310] According to Honoré, "The difference between legal and moral duties and rights is not the difference of meaning. It is a difference between formal, institutionally recognized duties and rights and their informal, non-institutional equivalents."[311] Thus the connection between morality and law here is the fact that morality is a persuasive rather than an authoritative source of law. Therefore, while the connection of law with morality will not necessarily result in law that is morally reputable, it will provide the pressure to make law morally more reputable. [312] It is therefore necessary for the international community to come to some kind of consensus about how much the value of the protection of human rights means to them. Only after such a consensus is reached, will it be possible for this value to have the influence in international law that will allow it the legal basis necessary for its preservation.

The present debate about humanitarian intervention takes place in the context of new actors and new circumstances. The most important for this study, is probably the tendency of "proliferation of armed conflict within states".[313] "The weakness of state structures and institutions"[314] has posed new challenges for the protection of

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[310] Walzer *Just and Unjust War* 365
[311] Honoré "The Necessary Connection between Law and Morality" 2002 Vol 22 Nr 3 *OJLS* 489 491
[312] idem 493, 494
[313] ICISS *The Responsibility to Protect* 4
[314] ibid

human rights and nation building after interventions. The fact is that in an international order dependant on stable sovereign states, "the existence of fragile states, failing states, states who through weakness or ill-will harbour those dangerous to others, or states that can only maintain internal order by means of gross human rights violations, can constitute a risk to people everywhere".[315] It is therefore necessary to prevent states falling into such disorder, if human rights are to be protected successfully.

This is especially important since "[l]ying at the heart of prevailing ideals about the moral purpose of the state, human rights have increasingly provided the justificatory foundations for sovereignty."[316] As such it seems that any situation within a state that constitutes violations of human rights, are now to some degree of interest to the UN, although only gross violations of human rights would probably justify intervention. This position is supported by the growing idea that human rights have become a qualification for sovereignty, rather than a limitation of it.

Nevertheless there are still arguments favouring a rigid observance of non-intervention. In truth, it is easier to compel the adherence to an absolute rule than to have to decide when intervention would be just and to construct the relevant constraints to make such a decision valid. This is because such decisions are often influenced and distorted by politics and they tend to favour the stronger players, who had more influence when the decisions were taken. It is also because some writers argue that constraints are ignored. The problem however, is that if an absolute rule is ignored, there are no standard "by which to judge what happens next."[317] A purely pragmatic approach is thus out of the question, also where the responsibilities of intervening forces after intervention are concerned. The building of stable states after intervention remains a great challenge and current UN peacekeeping strategies, created to assist in situations of war between nations, seem sometimes not suitable to protect civilians in conflicts between governments and

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[315] idem 5
[316] Reus-Smit 2001 Vol 27 No 4 *RIS* 537
[317] Walzer *Just and Unjust War* 366

rebels[318] and neither to provide the security after intervention. This is as much a result of the lack of commitment to the protection of human rights, as it is a consequence of the pragmatic approach to intervention.

The responsibilities of regional actors are also still debated. As states do seem to only intervene if there is significant state interest involved, the argument has been made that as such, regional arrangements should have the responsibility of "humanitarian law enforcement".[319] This is because regional actors would have a more direct interest in peace and security in the region.[320] The UN certainly seems to "welcome, encourage, and support regional and sub-regional action" and the message from the office of the UN High Commissioner for Human Rights (UNHCHR), is that regional organizations "have a leading role to play" in the practical work that needs to be done to promote the human rights culture.[321] However, it appears that the UN still sometimes prefers to take control of situations of human rights abuses. This is probably as a result of the fact that regional actors occasionally do not have the means to take successful action regarding such situations.

Human rights now seem to focus more on the effective implementation of the commitment of governments to human rights.[322] This focus is important, as despite all the writings on such intervention in the last two decades, no effort has previously been made by the international community to systematically develop a theory of humanitarian intervention.[323] "[T]he inability of that community to reconcile the question of legitimacy of an action taken by a regional organization without a United Nations mandate, one side, and the universally accepted

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[318] ICISS *The Responsibility to Protect* 5
[319] Wheeler *Saving Strangers* 301
[320] ibid
[321] Ramcharan "Complementary between Universal and Regional Organizations / Perspectives form the UN High Commissioner for Human Rights" 2000 Vol 21 No 8 *HRLJ* 324 326
[322] Ramcharan 2000 Vol 21 No 8 *HRLJ* 324
[323] Wheeler *Saving Strangers* 12

imperative of effectively halting gross and systematic violations of human rights, on the other, could only be viewed as a tragedy" according to Kofi Annan.[324]

According to the ICISS there should be a move away from humanitarian intervention as the consequence of a "right to intervene", to the "responsibility to protect". This will shift the focus from "the claims of the interveners" to the "requirements of those who need or seek assistance".[325] It seems as if this reforming opinion might just be the basis of the new perspective that this study is looking for, especially if the changing scope of international law is then taken into account. The fact is that international law is dynamic in nature and "is a continuing process of creative adjustment of old rules and principles to rapidly changing societal interests and expectations",[326] and that the field of human rights protection is in need of change. This can for example be seen in the fact that, as a direct result of the lack of "long-term commitment" and the non-acceptance of the casualties it required, a humanitarian outcome could not be secured in Somalia. It seems that the reason the US government administration intervened in the first place, was because it was believed that these risks and costs could be avoided.[327]

In line with the change in focus proposed by the ICISS, the IICK maintains that an emergent doctrine of responsible humanitarian intervention can be conceived in a process of three phases. These include the set up of a framework of principles with regard to where humanitarian intervention would occur, the adoption of these principles by the UN as a Declaration on the Right and Responsibility of Humanitarian Intervention, accompanied by the interpretation of the Charter by the Security Council to reconcile the provisions of the Charter with these principles, and an amendment of the Charter to incorporate these principles.[328]

In the midst of all these changing ideas about human rights, sovereignty and intervention, there has also been a definite shift in focus in the state practice of

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[324] Annan *Implications of International Response to events in Rwanda, Kosovo; Examined by Secretary General* in Steiner & Alston (ed) *International Human Rights in Context: Law, Politics, Morals* 2nd ed (2000) 658 658
[325] ICISS *The Responsibility to Protect* 18
[326] Kimminich *Since World War II* 855
[327] Wheeler *Saving Strangers* 204
[328] IICK *The Kosovo Report* 187

humanitarian intervention. This can especially be seen in the writings of Wheeler.[329] The cases of humanitarian intervention in the Cold War, notably the Indian intervention in Pakistan, the Vietnam intervention in Cambodia and the Tanzanian intervention in Uganda, all happened without Security Council authorisation.[330] In the case of the Tanzanian intervention in Uganda, the issue were not even discussed by the Security Council.[331] In the other two cases the pluralist norms of non-intervention and the protection of sovereignty had overwhelming support in the Security Council as well as the UN and were found to be more important than the protection of human rights, which did not justify unilateral intervention.[332] Of these three interventions, humanitarian norms were only invoked by India after the slaughter of over a million Bengali people in East Pakistan.[333] Nevertheless, while the primary motive for all three interventions were the growing security threat on the borders of the respective states, caused by the conflict in neighbouring states,[334] an inevitable outcome of all the interventions was the end of gross human rights abuses.[335] These interventions were "justifiable because the use of force was the only means of ending atrocities on a massive scale, and the motives/means employed were consistent with a positive humanitarian outcome".[336]

The interventions after the Cold War, including the examples in this study, on the other hand, showed a shift in focus towards humanitarian justifications. The Security Council were involved in some or other way in the US/UN intervention in Somalia, the Rwanda genocide, the ECOWAS intervention in Liberia and the NATO intervention in Kosovo. The Council has referred to these situations of gross human rights abuses and genocide as either threats to international peace and security[337] or regional peace and security[338]. It is clear that after the Cold War the

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[329] Wheeler *Saving Strangers*
[330] idem 286
[331] ICISS *Supplementary Volume* 62
[332] Wheeler *Saving Strangers* 74, 97
[333] idem 74
[334] idem 74, 106; ICISS *Supplementary Volume* 62
[335] Wheeler *Saving Strangers* 107
[336] idem 295
[337] Somalia, SCR 794; Liberia, SCR 788

Security Council widened the scope of what would constitute a threat to peace and security by including gross human rights abuses as threats. Nevertheless, action has not always been forthcoming, even after the abuses have been classified as threats. While the use of force was authorised in the case of Somalia,[339] ECOWAS was authorised to enforce the terms of Security Council Resolution 788 under Chapter VII of the Charter only after its initial unauthorised humanitarian intervention.[340] The Council did not authorise the NATO intervention in Kosovo, but nevertheless rejected a proposed resolution to end the air strike,[341] and did not call for armed intervention to end the Rwanda genocide, but did, at the request of France, gave permission for a French intervention.[342] Thus it seems that humanitarian interventions in gross human rights abuses are more acceptable, if only after the fact. However, prior Security Council authorisation for interventions for humanitarian purposes, is still plagued with non-intervention arguments or appeals that authorisation is an exceptional occurrence.[343] It appears that while the media presentation of human rights abuses have played a big role in influencing political decisions regarding intervention,[344] the factor impeding intervention today has become the price of interventions in terms of lives and money, as opposed to the strong pluralist arguments before the Cold War.[345]

While at present, the dilemma of humanitarian intervention without Security Council authorization is inescapable, it is nevertheless clear that organisations committed to the protection of human rights are making the effort to facilitate change. In truth, there is no clear-cut solution reconciling the tension between the rule of international law that prohibits the use of force and the "political and moral desire and aspiration of many states to act in the face of atrocities causing large-scale human suffering within another state".[346] Faced with this dilemma, it seems

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[338] Rwanda, SCR 929; Kosovo, SCR 1199
[339] ICISS *Supplementary Volume* 96
[340] idem 83
[341] idem 112
[342] Wheeler *Saving Strangers* 239
[343] idem 166; ICISS *Supplementary Volume* 96
[344] ICISS *Supplementary Volume* 87; Wheeler *Saving Strangers* 201
[345] Wheeler *Saving Strangers* 202, 240
[346] http://www.dupi.dk/webdocs/proj_15_chp7.pdf [Accessed 23 October 2003]

that the paramount question is how to "balance the wish to uphold and strengthen the existing international legal order against the refusal to accept gross and massive human rights violations without international reaction".[347] The challenge, it seems, is "to leave open the option for humanitarian intervention in extreme cases of human suffering, where the reasons for action seem morally imperative and politically sound but the Security Council is unable to act, while at the same time to avoid jeopardising in a fundamental way the existing, hard-earned, international legal order, including the central role of the Security Council".[348]

[347] ibid
[348] ibid

CHAPTER SIX
Conclusion

"It is not free of danger, it will not be free of difficulty. There will be some days you wish you were somewhere else. But never forget if we can do this here, and if we can say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it's within our power to stop it, we will stop it."[1] *– Bill Clinton*

6 1 Introduction

The aim of this study was to set out, in stages of development, the existing law regarding humanitarian intervention, problems in respect of this law and cases of intervention. This information was to be used to consider whether more adequate provision could be made regarding circumstances of intervention to stop situations of grave human rights abuses sooner. To reach a conclusion, a few questions needed to be answered. Is humanitarian intervention without Security Council authorization an acceptable option in cases of gross human rights abuses? If so, how can it be reconciled with principles of international law such as sovereignty, non-intervention and the monopoly of the Council on the use of force?[2] Further, what exactly is the law regarding this kind of intervention? How is the law currently applied, if at all, and how can these rules be refined?

While humanitarian intervention is used as a means to protect human rights, the UN has developed several other protection mechanisms, including the UNCHR, the Universal Declaration of Human Rights, the ICCPR and ICESCR. Another protection mechanism that developed in the aftermath of the Second World War is the notion of international criminal prosecution that has led to the establishment of the ICTR, ICTY and, more recently, the ICC, which aims at bringing the

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[1] Joyner 2002 *EJIL* 598
[2] Steiner & Alston *International Human Rights* 653

perpetrators of crimes against humanity to justice. Despite these numerous legal remedies, humanitarian interventions continue to happen.

6 2 Development of Humanitarian Intervention

The analysis has shown that in the time before World War I the most important influence on the use of force was the just war theory, but this theory had lost all its influence when it became an excepted idea that a war could be just for both sides. The legal concept of intervention therefore developed as the principal instrument in the power struggles between the European Powers during the eighteenth century. After this, wayward forcible interventions wreaked havoc, while the international community supposedly used the non-intervention principle as an instrument to stop interventions of any kind until World War I.

Despite the fact that the Peace of Westphalia made sovereign states legitimate political units, the pre-World War I society of states and the existing concept of sovereignty did not pass the "test of the fundamental ideas of a universal international legal order",[3] because it could not maintain international peace. At the same time the focus on individuals and humanitarian principles, which reached its peak in the Geneva Conventions of 1864 and 1906, weakened the idea of absolute sovereignty. The protection of minorities was increasingly accepted as a legitimate condition to place on states that wanted to enter into the European system after the 1878 Treaty of Berlin. Despite these laudable intentions, however, minorities were not free from persecution.[4] At this time the questions regarding post-intervention responsibilities such as the rebuilding of institutions and/or the economy, promoting reconciliation and punishing war criminals, were addressed only when they surfaced.

The study has also revealed that greater awareness that the law and adherence to it could play a central part in international relations emerged only at the Hague Conventions. While most of the interventions in this time were not truly

[3] Steinberger *Sovereignty* 407
[4] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 365

humanitarian, but rather aimed at supporting states' own nationals abroad and were often not proportional to the injury suffered, interventions were nevertheless well justified. As it became clear that the world could not stand by and watch an entire ethnic group being wiped out systematically, this set a standard for the kind of situations in which interventions could be allowed.

As the international community was organised within the League of Nations after World War I, a new international law system, which tried to regulate the use of force by restricting war as an executive instrument, developed. Even though the League failed, it formed the basis for some of the principles seen in the United Nations system today, such as the idea of collective security instead of intervention by a single state, the notion of permanent membership of the great powers, intervention for international interests only, and the idea of a threat to international peace and security.

The Spanish civil war gave the world a taste of the kind of conflict that would dominate the rest of the twentieth century: conflicts within the borders of a single state coupled with gross human rights abuses. Since the extent to which this kind of conflict would occur was not foreseen between the two world wars or even after the Second World War, it caught the world legally unprepared to deal with its effects.

Finally, the idea developed between the two world wars that, in the interest of the international community, sovereignty should be subject to piercing. However, only collective intervention, carried out by the community of nations or a group of states, was viewed as legal and only a moral justification could be used.[5] Even though intervention was supported by a majority of writers, it remains debatable whether it was clearly established as a legal institution in this era.[6]

The signing of the Charter in 1945 signalled the beginning of an era of co-operation between states with regard to political, economic and social issues and human rights. However, the UN was structured so that it, and more specifically the Security Council system, would work only if the five great powers were united in

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[5] Hall *A Treatise* 304
[6] Beyerlin *Humanitarian Intervention* 927

their political ideals, which has of course led to many problems. The influence of the Cold War on the functioning of the UN organs is a case in point. The subjection of force to "collective consent" in the aftermath of World War II[7] was supposed to prevent uncommitted states from being dragged into clashes between the great powers by way of their UN membership.[8] However, authorization for intervention was withheld for "politically squalid reasons, which have nothing to do with justice or morality".[9]

While the primary motive for intervention in all the cases of Cold War humanitarian interventions contemplated was the growing security threat on the borders of the respective states caused by the conflict in neighbouring states,[10] an inevitable outcome of several of the interventions was the end of gross human rights abuses.[11] These interventions were "justifiable because the use of force was the only means of ending atrocities on a massive scale, and the motives/means employed were consistent with a positive humanitarian outcome".[12] The interventions after the Cold War showed a shift in focus towards humanitarian justifications. It is clear that after the Cold War the Security Council widened the scope of what would constitute a threat to peace and security by including gross human rights abuses as threats. Thus it seems that interventions, including unilateral interventions, in gross human rights abuses are more acceptable, if only after the fact. However, prior authorisation is still plagued with non-intervention arguments or appeals that authorisation is an exceptional occurrence.[13]

6 3 Evaluation of the Law regarding Humanitarian Intervention

The existing legal basis within the UN system for dealing with human rights abuses is enforcement action authorised by the Security Council. For the purposes of this

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[7] Joyner 2002 Vol 13 Issue 3 *EJIL* 608
[8] Claude *Swords into Plowshares* 146
[9] Robertson *Crimes against humanity* 444
[10] ibid 74, 106; ICISS *Supplementary Volume* 62
[11] Wheeler *Saving Strangers* 107
[12] idem 295
[13] idem 166; ICISS *Supplementary Volume* 96

study, this action can only happen once it has been established that the human rights abuses pose a threat to international peace and security. Once this has been established, the Security Council first need to authorise the appropriate mandate to enable the intervening force to effectively bring an end to the abuses and then find the means necessary to successfully fulfil their mandate. Apart from calling on member states to provide the forces necessary for the intervention, the Security Council can also utilize relevant regional organisations for enforcement action. It should be noted that no regional enforcement action can legally be taken without the authorisation of the Council at any time.

When the nature of the UN enforcement system is taken into account, it is clear that, as humanitarian intervention cannot be authorized by the Security Council and cannot be defined as self-defence, it cannot be justified under the Charter and thus, the institution is illegal.[14] Even though no clear rules exist according to which humanitarian intervention can be authorized, however, the growing importance of human rights has led to arguments that the Charter does not render humanitarian intervention illegal in cases of gross human rights abuses.[15]

The rationale behind this kind of intervention is that legal enforcement action is not forthcoming from the UN system for the protection of human rights. One reason for this is the problem relating to the Charter's regulation of the use of force. Since the Charter only regulates force between states and not within states, it is not legally capable of dealing with conflict within states, let alone with human rights abuses within states. Another problem is that the envisaged collective security system did not materialise. This means that the UN is dependent on military alliances, with their own agendas and interests, for enforcement action. These alliances only intervene if it serves their interests, or if they are sure that the price in terms of casualties will be almost zero.[16] As a result, UN peacekeeping forces often suffer from a lack of financial support and appropriate mandates to complete their missions successfully.

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[14] Beyerlin *Humanitarian Intervention* 927
[15] Welsh 2002 *Global Governance* 505; Ramsbotham & Woodhouse *Humanitarian Intervention* 62; IICK *The Kosovo Report* 186
[16] Wheeler *Saving Strangers* 300, 301

Another reason for the existence of humanitarian intervention is the fact that the Security Council justifies intervention for humanitarian purposes only in terms of the legal fiction that gross human rights abuses pose a threat to peace. Consequently, the Council has not been able to intervene in time where gross abuses have not been seen to pose a threat. This does not mean that human rights abuses do not in some cases present a threat to international peace and security. It only presents the unfortunate reality that until the Security Council decides that gross human rights abuses pose a threat, no enforcement action can legally be taken to intervene. Furthermore, the use of the veto by the permanent members of the Security Council, has led to situations where gross human rights abuses have been established to be a threat to peace, but the financial and military means for intervention have not been forthcoming, as enforcement actions were not authorised.

It is clear therefore that in the current legal system, the provision for the protection of gross human rights abuses is wholly inadequate. As a result states, groups of states and various regional arrangements have taken the liberty of intervening without Security Council authorization. While these humanitarian interventions were clearly not legal under the UN system, the growing importance of human rights has influenced various factors that come into play when enforcement action is used against states that violate the rights of their citizens. The influences of these factors have already brought about an urgency regarding efforts to protect human rights in the absence of effective UN action and further positive changes in these factors may lead to a more adequate system of protection of human rights. A problem that nevertheless exists is that human rights are perceived as a western norm that is forced on all cultures and nations. This is especially true since the traditional western state form of democracy is almost automatically linked to the protection of human rights. Nations and cultures that do not have democratic state forms therefore find it easier to reject pleas to respect, observe and promote the human rights of their citizens.

As the existing international legal order is based on sovereign states, sovereignty is also still regarded as a very important factor. In addition, the understanding of

sovereignty as containing dual responsibilities, to respect the sovereignty of other states and to respect the rights and freedoms of a state's own nationals, is growing.[17] Instead of limiting sovereignty, therefore, human rights have become a qualification for sovereignty, shifting the focus from power based "on relations of domination and force" to "power that is legitimate because it is predicated on shared norms".[18]

As intervention is open to abuse, the inevitable infringement on the sovereignty of states is another factor that leads many to be uncomfortable with supporting intervention for human rights violations. Thus, it appears that when states do intervene they are careful not to base their intervention on the protection of human rights, for fear of establishing a practice that might allow interventions in their own affairs later on. In truth, in the existing international legal order of sovereign states, it is neither possible nor desirable to allow intervention for all human rights abuses. Nevertheless, there is mounting support for the argument that intervention should be legal in cases where the occurrence of gross human rights abuses are generally accepted, even without UN authorisation.

The third factor, that regional organisations are progressively making the necessary arrangements to allow them to take an active part in regional peace and security within the UN system, has lead to questions about the place of such organisations in the protection of human rights. Because of the unwillingness of states to intervene where they have no interest, some authors maintain that since states share an interest at regional level, "sufficient unity of political values"[19] might be created to surpass the usual disagreements about the legitimacy of intervention for the protection of human rights.

While there is truth in the statement that "the human rights rhetoric of international treaties, 'a plaything of governments and lawyers', has only had the adverse affect of perverting the idea of human rights",[20] it does not mean that human rights need

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[17] ICISS *The Responsibility to Protect* 8
[18] Wheeler *Saving Strangers* 2
[19] Kaiser *The Political Aspects* 86
[20] Polat 1999 Vol 19 (Nr 1) *OJLS* 64

any less protection. International courts have done much for human rights in the face of this cynical and regrettably true statement, in bringing perpetrators of crimes against humanity, such as those responsible for gross human rights abuses, to justice.

The signatories of the Charter cannot ignore that human rights and their protection have become far more important than they were at the time of the signing of the Charter. As international law should be "responsive to the needs of the system",[21] it is necessary to contemplate the idea that the Charter might need to be revised to be able to handle the factual realities of our time effectively.

From the law regarding humanitarian intervention, it is evident that the institution is illegal under the present UN legal system. Yet, effective interventions authorised by the Security Council are not forthcoming. In order to protect and promote human rights adequately, therefore interventions by other actors must be appropriate and well managed. Since the international community does not seem to accept humanitarian intervention as a protection mechanism for human rights, however, they should at least ensure that the treatment of gross human rights abuses by the UN and specifically by the Security Council becomes a lot more effective.

6 4 Recommendations

Wheeler submits that "legal theory must march alongside political reality"[22] and the fact is that the political reality regarding armed conflict today is very different from when the Charter was conceived. To enable the existing system to deal effectively with present-day conflict, which often includes gross human rights abuses, it is necessary to make some adjustments. One possible solution might be to attribute more importance to the Uniting for Peace Resolution. While it is true that the authority claimed by the UN General Assembly in this Resolution may not be in line with the structure in the Charter, the majority of states in the Assembly should carry some weight if it is generally accepted that human rights violations of major

[21] Higgins *Problems and Process* 49
[22] Kostakopoulou 2002 Vol 22 (Nr 1) *OJLS* 146

proportions are continuing and the Council is unable or unwilling to do something about it. Even though humanitarian interventions happen outside of the UN system, intervening forces still have to adhere to the customary law principles that have developed with regard to the methods and tactics of warfare. These include necessity "(the use of force must be essential to achieve goals of war)",[23] proportionality "(relation of means to ends; avoidance of excessive force)",[24] distinction or discrimination "(methods and tactics must be directed at military targets)"[25] and humanity "(methods and tactics must not inflict superfluous suffering on people…)",[26] and should be the first criteria for decisions on humanitarian intervention. An intervention aimed at ending present humanitarian disaster needs to be "coupled with a long-term commitment to address its causes through a commitment to conflict resolution and social reconstruction".[27]

Human rights will also benefit from dependence on legitimate authority. According to Philpott, such authority is legitimate "when it is rooted in law, tradition, consent or divine command, and when those living under it generally endorse this notion."[28] Since it is not impossible to find this authority in state forms other than democracies, the protection of human rights is as valid in non-democracies, as in any democratic state form. As most citizens of countries torn by gross human rights abuses are usually eager to make sure that human rights are observed and protected after intervention, it makes more sense for intervening forces to secure the idea of human rights and legitimate authority than to force democracy on such a state.

Finally, the time has come for the members of the UN, to afford human rights protection the importance it presumable has in the existing international order. If the place of human rights and its protection in the Charter has been given more significance as the importance of the human rights culture developed, the legal protection afforded by being enshrined in the Charter could to an extent have prevented the uncertainty that now exists with regard to human rights protection.

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[23] IICK *The Kosovo Report* 177
[24] ibid
[25] ibid
[26] ibid
[27] Wheeler *Saving Strangers* 306
[28] Philpott 1995 Vol 48 No 2 *Journal of International Affairs* 355

Instead, as no changes have been made in the Charter to make explicit provision for human rights protection, this idea that became part of the base of international law, was left without proper legal protection. A possible way to remedy this situation, is to make the protection of human rights an explicit part of the duties of the Security Council in the Charter, instead of subjecting its protection to the Security Council's duty of maintaining international peace and security. While the maintenance of international peace and security remains as important as ever, human rights will then finally have the legal protection needed to ensure the participation of member states in its protection.

If the existing system cannot be made more effective, the actions that actors inevitably will take outside of the system, needs to be well managed and at least subject to certain standards of conduct. Any new approach to humanitarian intervention needs to meet at least a few basic objectives, which include clear procedures and criteria to determine when, where and how to intervene and to establish the legitimacy of humanitarian intervention when all other tactics have failed.[29] To prevent the problem that if an absolute rule is ignored, there is no standard "by which to judge what happens next," [30] these criteria should not constitute absolute rules, but rather guidelines. The aim is not to find an alternative source of authority for the Security Council, but to find ways to make the system work better.[31]

In the light of the findings of this study, the most useful criteria as part of the process of taking action outside of the UN system, seem to be the following:

- General acceptance that gross human rights abuses constituting a crime against humanity, have been committed in a particular instance;[32]

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[29] ICISS *The Responsibility to Protect* 11
[30] Walzer *Just and Unjust War* 366
[31] Welsh 2002 *Global Governance* 516
[32] Wheeler *Saving Strangers* 34, 42; ICISS *The Responsibility to Protect* 32; IICK *The Kosovo Report* 192, 193; Robertson *Crimes against humanity* 421; Cassese *Ex Iniuria Ius Oritur: Is International Legitimation of Forcible Humanitarian Countermeasures taking shape in the World Community?* in Steiner & Alston (ed) *International Human Rights in Context: Law, Politics, Morals* 2nd ed (2000) 660 660

- intervention must only be in the event that the Security Council had considered the situation, but failed to authorise the action necessary to end the abuses; [33]
- armed force must be used only as a last resort, but as soon as it is evident that any further delay will cost many lives;[34]
- the force used must be proportional and for the sole purpose of ending the human rights atrocities;[35]
- a possibility of success must exist;[36]
- the intervening forces must strictly adhere to the laws of war[37] and
- they must be willing to help rebuild the country for as long as is necessary.[38]

While it might be true that the Charter protects sovereignty much more explicitly than it does human rights, the intention was never to justify the protection of sovereignty in the face of gross human rights abuses. Except for the fact that human rights abuses of any kind should be exposed, it is necessary that governments responsible for human rights abuses pay "a heavy price in diplomatic, political, and economic terms"[39] for such atrocities. The fact is that, as the international human rights bodies cannot fight the battle alone, the protection of human rights is everybody's business. States should not observe human rights only in their own territories, but should also put their treaty commitments into practice by providing the sources needed to protect these rights everywhere.[40]

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[33] Wheeler *Saving Strangers* 34, 42; *The Kosovo Report* 192, 193; Robertson *Crimes against humanity* 421; Cassese *Ex Iniuria Ius Oritur* 660
[34] Wheeler *Saving Strangers* 34; ICISS *The Responsibility to Protect* 32; Robertson *Crimes against humanity* 421
[35] Wheeler *Saving Strangers* 34; ICISS *The Responsibility to Protect* 32; IICK *The Kosovo Report* 192, 193; Robertson *Crimes against humanity* 421; Cassese *Ex Iniuria Ius Oritur* 660
[36] Wheeler *Saving Strangers* 34; ICISS *The Responsibility to Protect* 32; Robertson *Crimes against humanity* 421
[37] IICK *The Kosovo Report* 193; Robertson *Crimes against humanity* 421
[38] IICK *The Kosovo Report* 193; Wheeler *Saving Strangers* 42
[39] Wheeler *Saving Strangers* 305
[40] Higgins *Problems and Process* 110

"After a century in which 160 million human lives were wasted
by war and genocide and torture,
the world [could] best [remember] those its pledges have failed
by determining that in the future, at whatever cost,
it is going to make these pledges stick."[41] *– Geoffrey Robertson*

[41] Robertson *Crimes against humanity* 454

Appendix A: Relevant articles from the Charter of the United Nations

Preamble

We the Peoples of the United Nations Determined
to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
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, and
to promote social progress and better standards of life in larger freedom,
And for these Ends
to practice tolerance and live together in peace with one another as good neighbours, and
to unite our strength to maintain international peace and security, and
to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples,
Have Resolved to Combine our Efforts to Accomplish these Aims
Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:
1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. 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.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. 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.

CHAPTER II

MEMBERSHIP

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER IV

THE GENERAL ASSEMBLY

Functions and Powers

Article 11

1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.
2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:
a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;
b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

CHAPTER V

THE SECURITY COUNCIL

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Voting

Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice

to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces. their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII

REGIONAL ARRANGEMENTS

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This Article in no way impairs the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of

measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

CHAPTER XII

INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed

there under by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
a. to further international peace and security;
b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals and also equal treatment for the latter in the administration of justice without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed there under by means of trusteeship agreements:
a. territories now held under mandate;
b. territories which may be detached from enemy states as a result of the Second World War, and
c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under

mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.
2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.
2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.
3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political. economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this

end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XV

THE SECRETARIAT

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

CHAPTER XVIII

AMENDMENTS

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective

constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.
3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX

RATIFICATION AND SIGNATURE

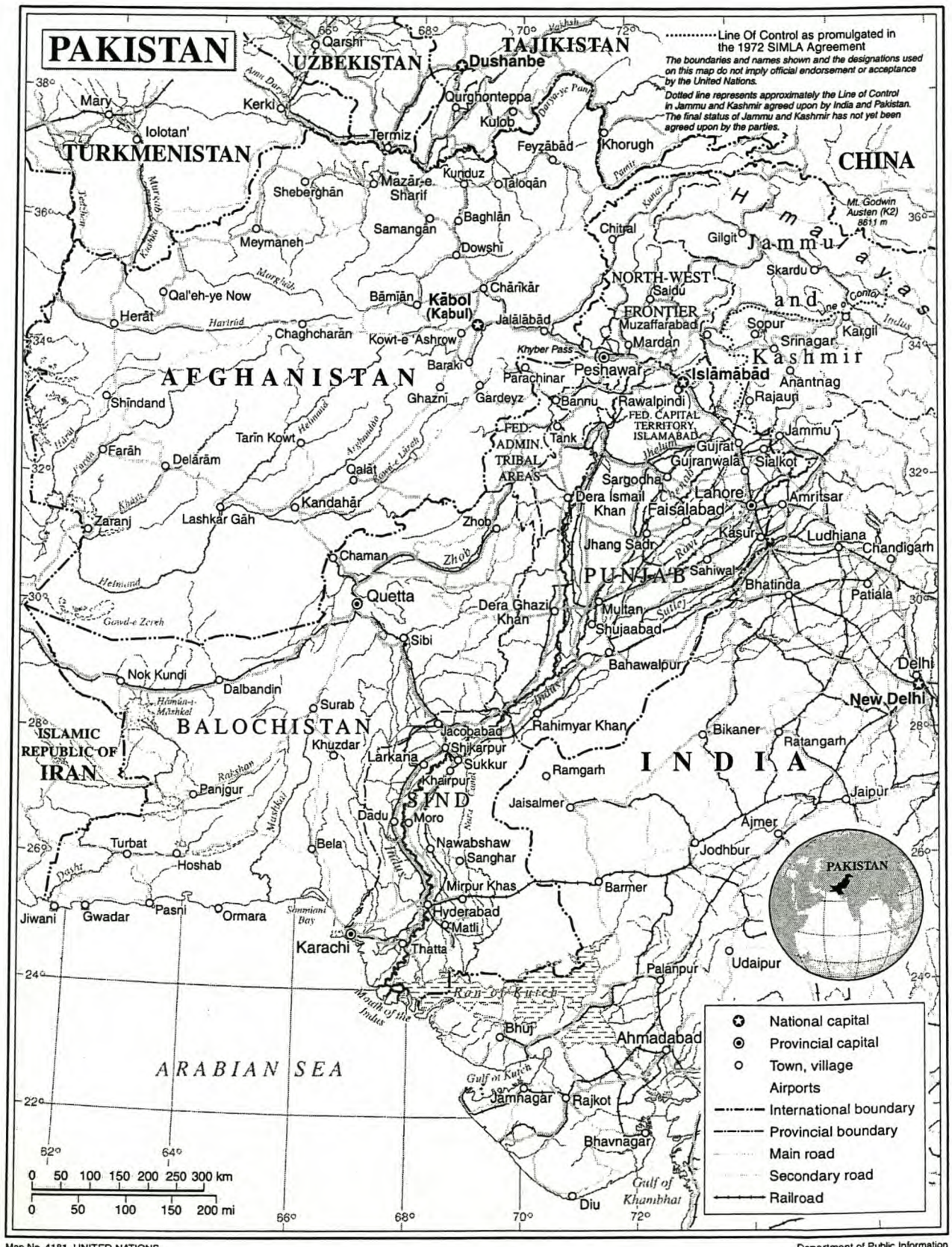
Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.
2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.
3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.
4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111

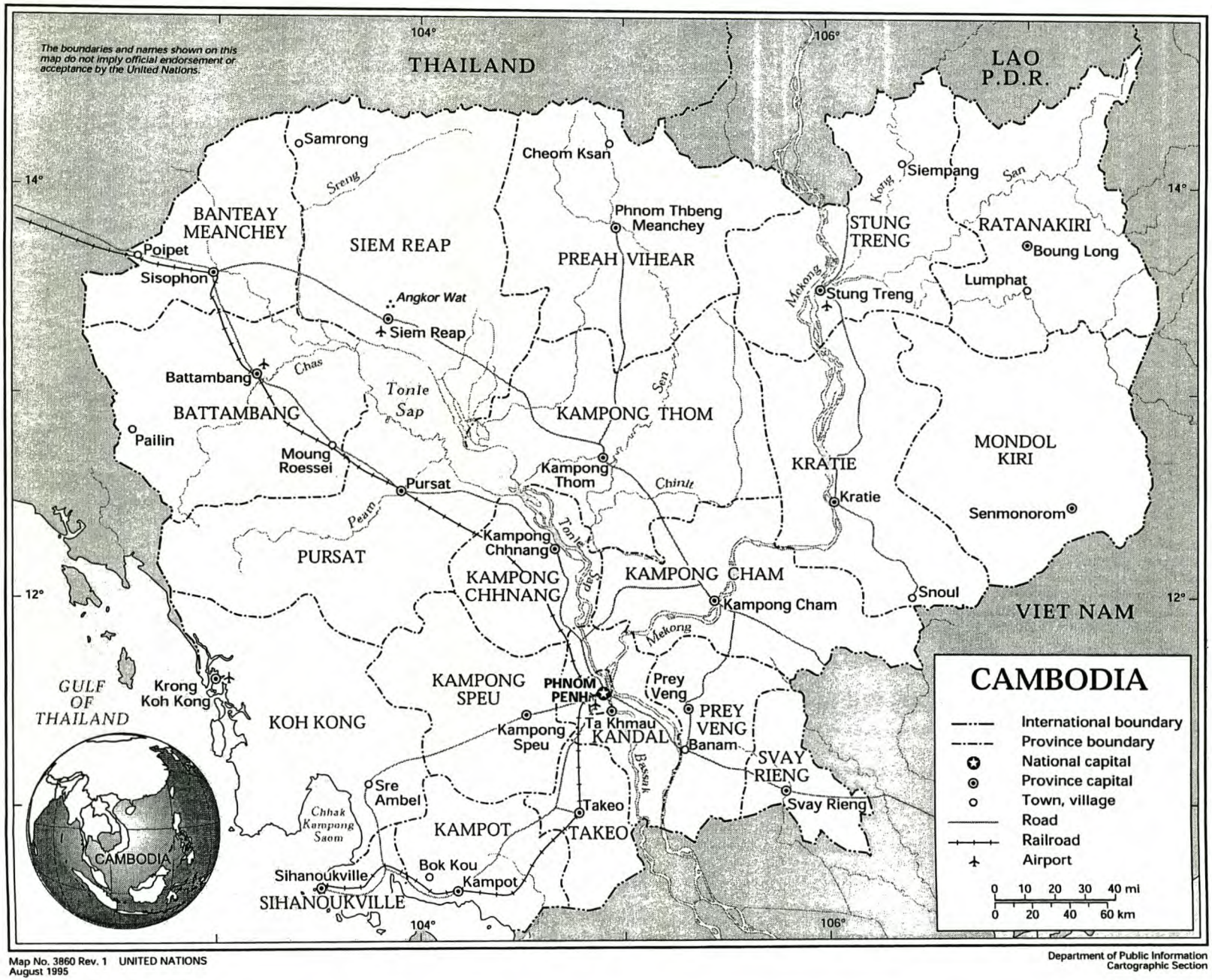
The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.
IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.
DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

Appendix B: Maps of Interventions, East Pakistan, 1971



Map No. 4181 UNITED NATIONS
April 2002

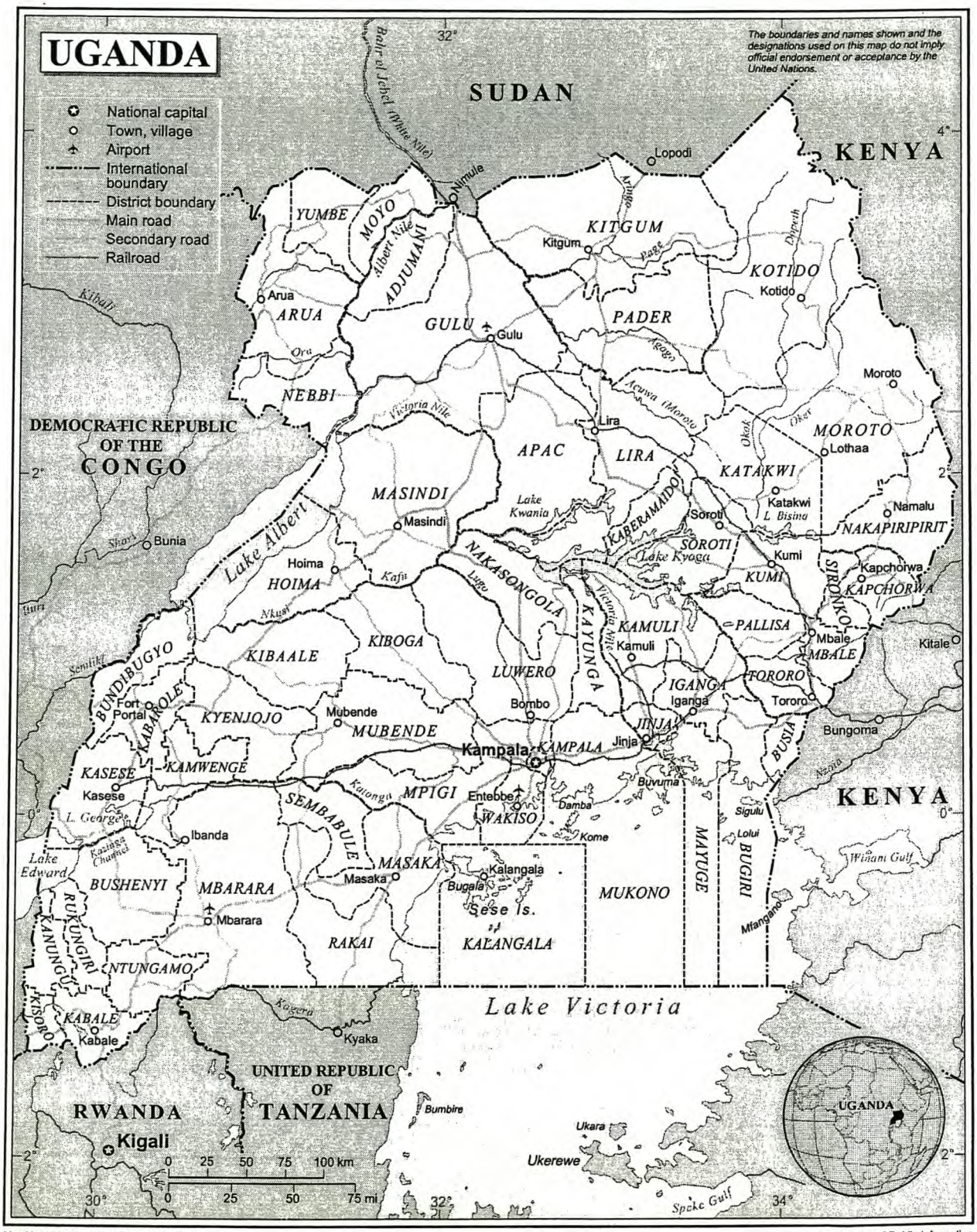
Department of Public Information
Cartographic Section



Map No. 3860 Rev. 1 UNITED NATIONS
August 1995

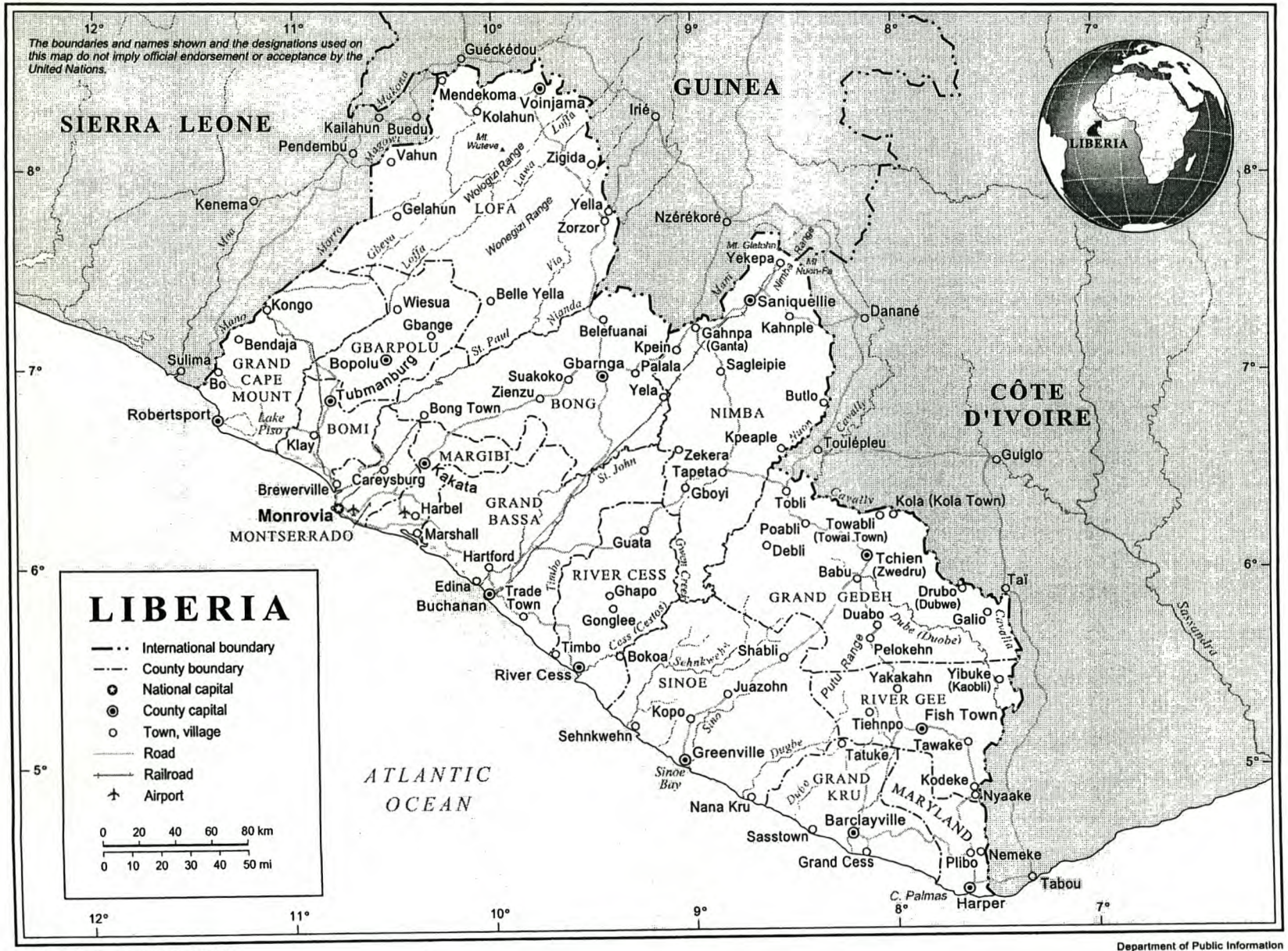
Department of Public Information
Cartographic Section

Appendix D: Uganda, 1979



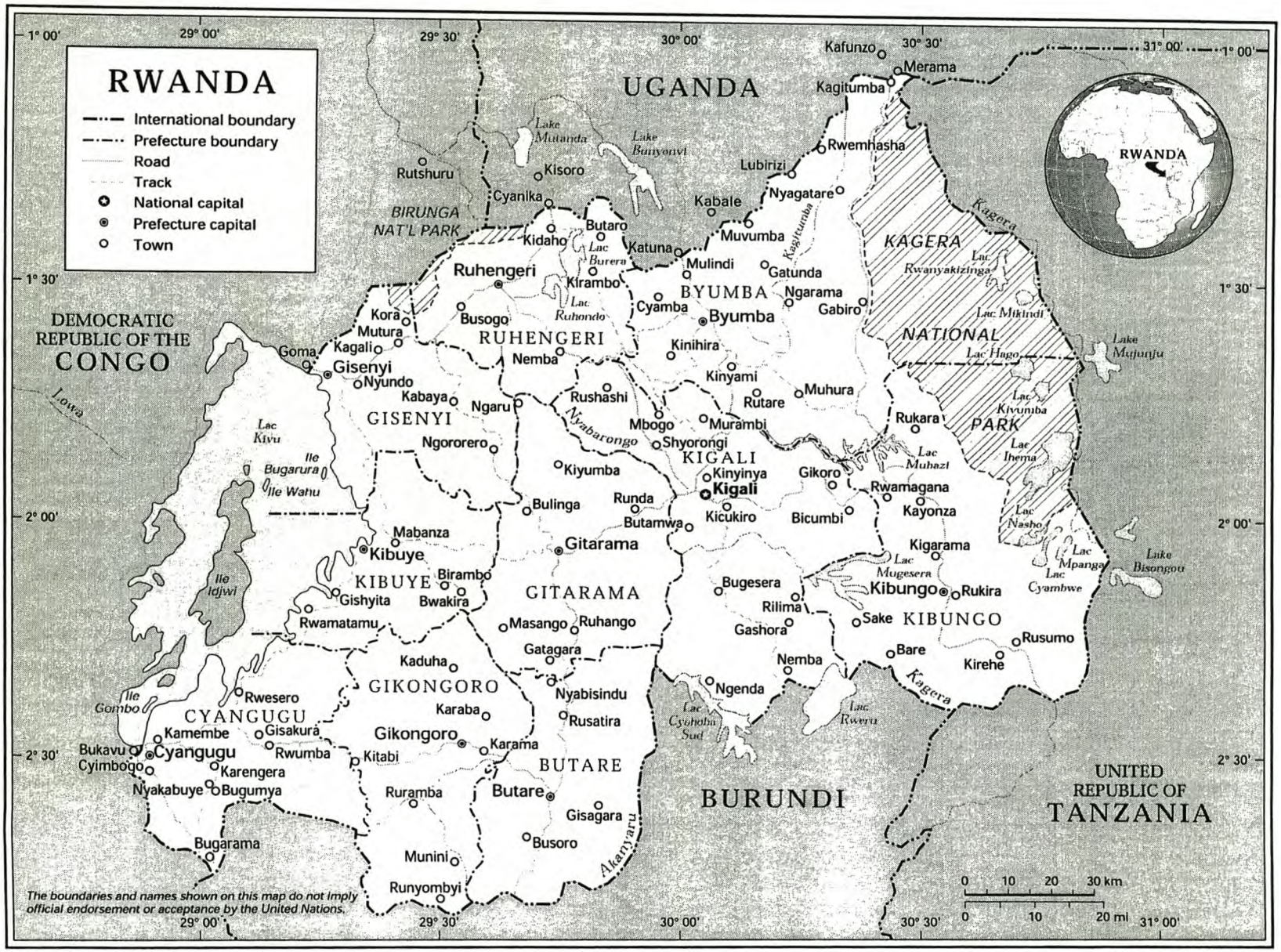
Map No. 3862 Rev. 4 UNITED NATIONS
May 2003

Department of Public Information
Cartographic Section



Map No. 3775 Rev. 5 UNITED NATIONS
April 2003

Department of Public Information
Cartographic Section



Map No. 3717 Rev. 7 UNITED NATIONS
December 1997 (Colour)

Department of Public Information
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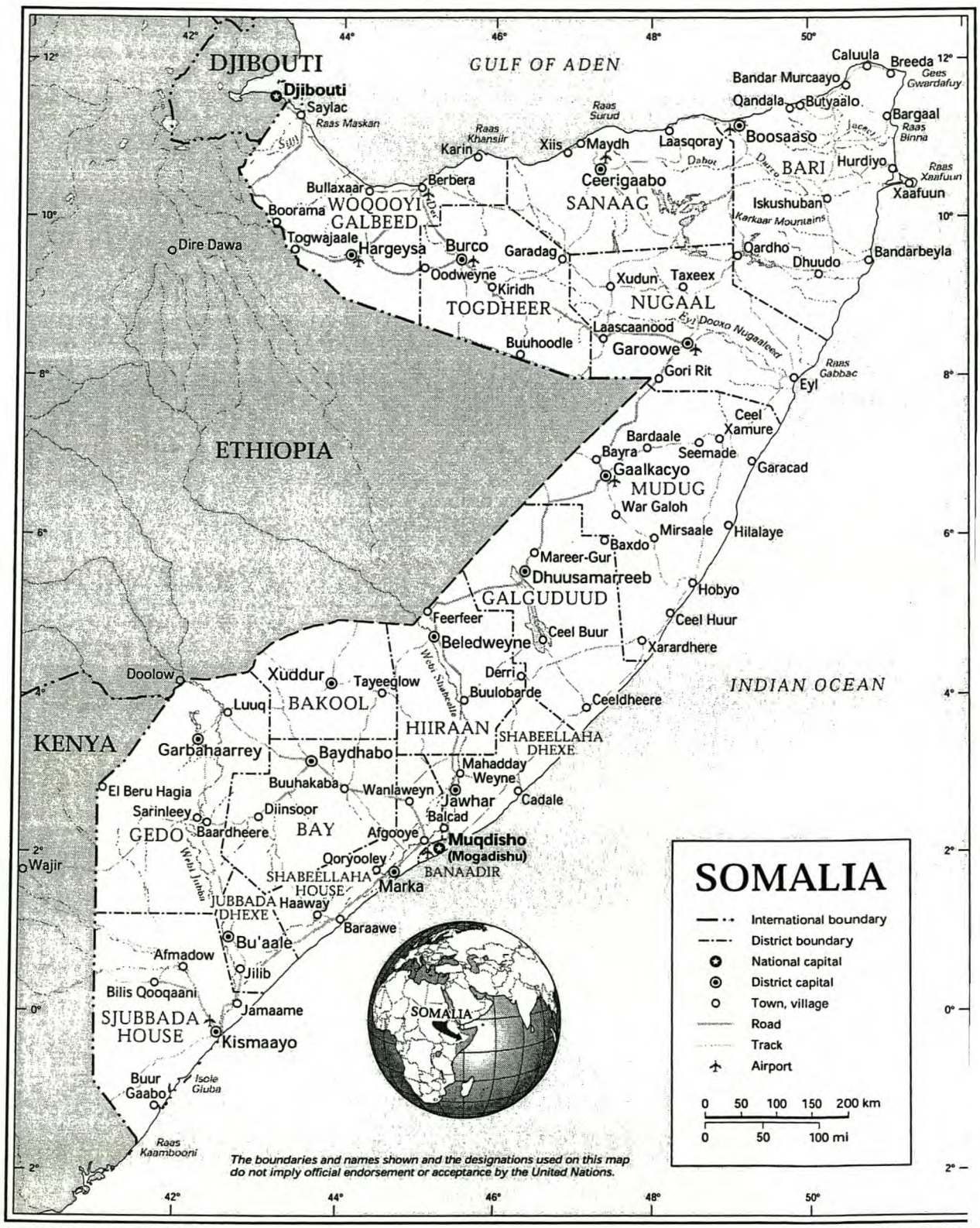
Appendix G: Somalia, 1992 – 1993



Map No. 3690 Rev. 4 UNITED NATIONS
August 1997

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Appendix H: Kosovo, 1999 -

Map No. 4069 Rev. 1 UNITED NATIONS
February 2003

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Map No. 3689 Rev. 10 UNITED NATIONS
February 2003

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Appendix I: Security Council Resolutions

SCR 82 Complaint of aggression upon the Republic of Korea, 25/06/1950

SCR 221 Question concerning the situation in Southern Rhodesia, 09/04/1966

SCR 232 Question concerning the situation in Southern Rhodesia, 16/12/1966

SCR 418 South Africa, 04/11/1977

SCR 502 Falkland Islands (Malvinas), 03/04/1982

SCR 598 Iraq-Islamic Republic of Iran, 20/11/1987

SCR 660 Iraq-Kuwait, 02/08/1990

SCR 688 Iraq, 05/04/1991

SCR 746 Somalia, 17/03/1992

SCR 770 Bosnia and Herzegovina, 13/08/1992

SCR 788 Liberia, 19/11/1992

SCR 794 Somalia, 03/12/1992

SCR 836 Bosnia and Herzegovina, 04/06/1993

SCR 872 Rwanda, 05/10/1993

SCR 912 on adjustment of the mandate of the UN Assistance Mission for Rwanda due to the current situation in Rwanda and settlement of the Rwandan conflict, 21/04/1994

SCR 918 on the expansion of the mandate of the UN Assistance Mission for Rwanda and imposition of an arms embargo on Rwanda, 17/05/1994

SCR 925 on extension of the mandate and deployment of the 2 additional battalions of the UN Assistance Mission for Rwanda and settlement of the conflict in Rwanda, 08/06/1994

SCR 929 on establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda, 22/06/1994

SCR 955 on establishment of an International Tribunal and adoption of the Statute of the Tribunal, 08/11/1994

SCR 1199 on the situation in Kosovo (FRY), 23/091998

SCR 1203 on the situation in Kosovo, 24/10/1998

SCR 1244 on the situation relating Kosovo, 10/06/1999

SCR 1441 The situation between Iraq and Kuwait, 08/11/2002

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