HUMANITARIAN INTERVENTION: LEGALITY, LEGITIMACY AND THE SEARCH FOR SOLUTIONS

BY

ELKANAH OLUWAPELUMI BABATUNDE

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DEDICATION

I dedicate this work to the many lives that have been lost in the hands of oppressive governments while the international community watched and did nothing.

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I am highly indebted to the various lecturers who taught me during the LLM programme. I appreciate your contribution to improving my legal research and legal writing skills.

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In Him I live, in Him I breathe and have my being. I am most indebted to God for my life and whatever success comes with it.

ABBREVIATIONS

AU: African Union

CHARTER: United Nations Charter

ECOMOG: Economic Community of West African States Monitoring Group

ECOWAS: Economic Community of West African States

GA: General Assembly

HLP: High Level Panel

ICISS: International Commission on Intervention and State Sovereignty

NATO: North Atlantic Treaty Organisation

OAU: Organisation of African Unity

R2P: Responsibility to protect

SC: Security Council

UN: United Nations

US: United Sates of America

United Kingdom: United Kingdom of Great Britain and Northern Ireland

TABLE OF CONTENTS

DECLARATION………………………………………………………………………….. i

DEDICATION…………………………………………………………………………….. iii

ACKNOWLEDGEMENTS………………………………………………………………….. iv

ABBREVIATIONS………………………………………………………………………….. v

INTRODUCTION………………………………………………………………………… 1

CHAPTER 1: HISTORY OF HUMANITARIAN INTERVENTION

Introduction……………………………………………………………………………….. 8

The Just War Era………………………………………………………………………….. 10

Use of Force in the Nineteenth Century…………………………………………………... 11

The Limitation of *Jus ad bellum*………………………………………………………….... 12

Conclusion………………………………………………………………………………… 18

CHAPTER 2: HUMANITARIAN INTERVENTION AND THE UN CHARTER

Introduction……………………………………………………………………………….. 20

Territorial Integrity……………………………………………….. 20

Political Independence……………………………………………...................................... 23

Purposes of the United Nations…………………………………………………………… 26

The Security Council and Humanitarian Intervention…………………………………….. 27

Conclusion………………………………………………………………………………… 28

CHAPTER 3: HUMANITARIAN INTERVENTION UNDER CIL

Introduction………………………………………………………………………………….. 29

Post-1945 CIL on Humanitarian Intervention………………………………………………….. 30

Egyptian Intervention in Palestine/Israel……………......................……………………………… 31

United States Intervention in the Dominican Republic…………………………………………… 31

India Intervention in Bangladesh……………………………………………………………….. 32

Tanzania Intervention in Uganda……………………………...…………………………….. 34

Vietnamese Intervention in Cambodia……………………………………...……………….. 34

French Intervention in CAR………………………………………………………………………. 35

Kurdish North Iraq Interventions……………………………………………………………. 36

NATO Intervention in Kosovo…………………………………………………………………. 37

Opinio Juris and Humanitarian Intervention…………………………………………………… 37

Conclusion………………………………………………………………………………………… 40

CHAPTER 4: HUMANITARIAN INTERVENTION: ILLEGAL BUT LEGITIMATE

Introduction………………………………………………………………………………….. 42

The Legitimacy of Humanitarian Intervention…………………………………………………. 42

The Test for Justification……………………………………………..……………………… 47

UN Charter: The Need for a Review…………………………………………………………… 51

The Emergence of a New Custom……………………………………………………………… 54

Conclusion………………………………………………………………………………………… 55

CHAPTER 5: SUMMARY AND CONCLUSION…………………………………………….. 56

BIBLIOGRAPHY……………………………………………………………………………… 60

INTRODUCTION

Use of Force

One of the most significant developments of the 20th century is the prohibition of the use of force as an instrument of national policy. For centuries, the right to resort to war - jus ad bellum - had been considered the sovereign right of states.[1] Every state had a largely unrestrained right to commence war. However, this changed in 1945 with the coming into force of the United Nations (UN) Charter. Article 2 (4) of the Charter banned the use of force as an instrument of international relations by states. It provides that states:

> …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.[2]

This provision of the UN Charter expressly bans all forms of the use of force by one state against each other. The Charter takes a stronger stance on the use of force than all the previous treaties and agreements such as the Bryan treaties and the Charter of the League of Nations.[3] It pre-empts the tendency of states to engage in armed conflict without acknowledging the existence of a war. It prohibits not only a formal state of war but any use of military force against another state.[4] The UN Charter thus revolutionizes pre-Charter law on the use of force by extending beyond war to include other measures short of war.

However, Article 51 of the UN Charter provides an exception to the prohibition on the use of force, it provides that:

> 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 the measures necessary to maintain international peace and security.

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[1] Nico Schrijver 'The Use of Force under the UN Charter: Restrictions and Loopholes' *The ACUNS 2003 John W. Holmes Memorial Lecture* available on http://acuns.org/wp-content/uploads/2012/09/WebPageSchrijver_UseofForce.pdf accessed 24 February 2017.

[2] Article 2 (4) *Charter of the United Nations (UN Charter)*, 24 October 1945, 1 UNTS XVI.

[3] Robert Kolb & Richard Hyde *An Introduction to the International Law of Armed Conflicts* (2008) Portland: Hart Publishing 11.

[4] Ibid; Olivier Corten *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010) Oxford: Hart Publishing 52.

The Charter recognises and upholds the right of states to individual and collective self-defence. Article 51 of the UN Charter provides that the exercise of the right of self-defence is activated 'if an armed attack occurs'. Thus, a state will be acting within its rights and within the ambits of the law if it uses force in order to defend itself against an 'armed attack'.[5]

Furthermore, the UN Charter provides for a collective security system wherein the Security Council is vested with the authority for non-defensive use of force. In other words, only the Security Council has the power to use force other than in self-defence. The power of every state to use force is restricted to force used in self-defence. Article 39 vests the Security Council with the powers to decide upon the existence of any threat to the peace, breach of the peace, or act of aggression. Where the Council decides that there exists a threat or a breach of peace or an act of aggression, the Council has the jurisdiction to decide what measures are to be taken to restore international peace and security.[6] These measures could include the taking of military action against the state or states involved.[7] Other than these two exceptions, the Charter does not allow for any other derogation from the provision of Article 2(4).

Humanitarian intervention has been posited as a third exception to the use of force under the UN Charter.[8] The proponents of humanitarian intervention seek to provide an assurance to nationals of tyrant governments that the international community will intervene to protect them from gross violations of human rights. Humanitarian intervention is based on a view of sovereignty which emphasizes as its defining characteristic the capacity to provide protection, rather than territorial control.[9] Where a state is thus unable or unwilling to offer protection to those under its control, other states are justified to intervene in such a state. Humanitarian intervention is the use of force by one or more states with or without the authorization of the United Nations Security Council,

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[5] Article 51 of the UN Charter; Kolb & Hyde op cit note 3 at 11. Recently, scholars have argued that the armed attack need not emanate from a state before the right of self-defence can be exercised. They argue that a state would be within its rights to use force against an armed attack by a non-state actor. For further discussion, Kimberley N. Trapp 'Can non-state actors mount an armed attack?' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 695.
[6] Article 39 of the UN Charter.
[7] Article 42 of the UN Charter.
[8] Hersch Lauterpacht *International Law and Human Rights Law* (1950) London: Stevens & Sons Ltd 174; Michael Reisman 'Humanitarian intervention to protect the Ibos' in *Humanitarian Intervention and the United Nations* (1973) Charlottesville: University Press of Virginia 161-195, 171.
[9] Eve Massingham 'Military intervention for humanitarian purposes: Does the responsibility to protect doctrine advance the legality of the use of force for humanitarian ends?' (2009) 91 *International Review of the Red Cross* 803-831 at 804.

in order to protect citizens of a foreign state from humanitarian catastrophes.[10] It is the use of force by a state in a manner that would otherwise amount to the abuse of the sovereignty of a foreign state in order to protect the nationals of the intervened state from death or grave injury.[11] It refers to the use of force to end tyranny or anarchy[12] and is usually in reaction to gross human rights violation.[13] The concept of humanitarian intervention traces its origin to the writings of classical jurists such as Grotius, who argued for the existence of just war. This principle refers to a right, or even an obligation, to rescue populations undergoing grave persecution or widespread and/or systematic violations of basic human rights.[14] The just war principle argues that the punishment of injustice and crimes in a foreign territory was a justification for war on a foreign territory.[15]

However, this study contends that humanitarian intervention is not a valid exception to the use of force under present international law. The UN Charter only provides for two exceptions tot eh use of force; self-defence and use of force pursuant to a Security Council resolution. Without a Security Council approval, the use of force for humanitarian intervention is a contravention of the Charter. Humanitarian intervention is an infraction upon the political independence and territorial integrity of a state. Even where the purpose of such intervention is not a change in government, it is a violation of the state's political independence nonetheless as it seeks to dictate the state's policies. Every state has a right to choose its own policy and pursue same in the manner it thinks best. This right is protected by Article 2 (7) of the UN Charter which prohibits the UN from interfering in the domestic affairs of member states, except as provided under Chapter VII of the Charter.

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[10] Ian Brownlie *Principles of Public International Law* 6 ed (2003) Oxford: Oxford University Press 710; Sean D. Murphy 'Criminalizing humanitarian intervention' 41 *Case W. Res. J. Int'l L.* 314-377 at 341; J. L. Holzgrefe 'The humanitarian intervention debate' in J. L. Holzgrefe & Robert Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) Cambridge: Cambridge University Press 18. The terms humanitarian intervention, unilateral intervention and military intervention would be used in this research and would mean the same thing.

[11] Richard B. Lillich (ed.) *Humanitarian Intervention and the United Nations* (1973) Charlottesville: University Press of Virginia 53.

[12] Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* 3 ed (2005) New York: Transnational Publishers 6.

[13] Murphy op cit note 10 at 341.

[14] Thomas Franck & Nigel Rodley 'After Bangladesh: The law of humanitarian intervention by military force' (1973) 67 *AJIL* 275.

[15] Grotius, De Jure Belli ac Pacis, Bk. II, ch. Xxv. 8, in Bronwlie op cit note 2 at 338.

Humanitarian intervention also infringes on a state's territorial integrity as it forms an incursion into a state's territory without its consent. This incursion violates the state's territorial integrity which includes its exclusive right to choose who comes upon its territory and for what duration and on what conditions such person or persons may remain on its territory.[16] Humanitarian intervention implies that forces would be on a state's territory without its approval. This is an infringement of the state's territorial integrity even if it is for a humanitarian reason.

While human rights constitutes one of the purposes of the UN, the authority for the extra-territorial use of force to protect human rights where it constitutes a threat to or breach of peace is vested in the Security Council.[17] It is not within the authority of individual states to make such decisions where it involves abuses outside its territory.[18] The Security Council has the power and responsibility to determine when there is a threat to international peace and security[19] and to determine how to react to such threat.[20] Chapter VII of the UN Charter deals with 'action with respect to threats to the peace, breaches of the peace, and acts of aggression.' Nothing in this chapter or indeed any other part of the Charter gives room for unilateral humanitarian intervention. A literal reading of the Charter leaves no doubt of the illegality of humanitarian intervention. Unilateral use of force against a state is only permissible where such use of force is in self-defence. Any other use of force under the international legal system must be subject to a UN Security Council resolution. In the absence of such an authorisation, any intervention constitutes an abuse of a state's sovereignty over its territory. Sovereignty refers to the independence of a state from other states.[21] It is the internal supremacy of a state over the territory that it controls.[22] Sovereignty embodies the principle that a state cannot be 'legally bound except by its own will or limited by any other power than itself.'[23] Humanitarian intervention challenges the very roots of sovereignty and remains illegal under international law.

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[16] Malcolm N Shaw *International Law* 6 ed (2008) Cambridge: Cambridge University Press 451; David T Bjorgvinsson *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (2015) Cheltenham: Edward Elgar Publishing 28.
[17] Article 24, 39-44 of the UN Charter.
[18] Article 24, 39-44 of the UN Charter.
[19] Article 39 of the UN Charter.
[20] Article 41-42 of the UN Charter.
[21] Harold J Laski *A Grammar of Politics* (1925) London: George Allen & Unwin 44.
[22] Ibid.
[23] James W Garner *Introduction to Political Science: A Treatise on the Origin, Nature, Functions and Organization of the State* (1910) New York: American Book Company 239.

However, the illegality of humanitarian intervention poses a problem given the reality of governmental abuse of power and the inability of the collective security system of the UN Charter to adequately intervene in such situations. Recent events have shown that gross human rights violations are yet to cease. Cases of state-organised violations of the human rights of people within the state's jurisdiction remain prevalent. The state security agencies and the judicial system, who are supposed to be the primary agents for the defence of the people's human rights, are used as tools in the hands of some governments for suppressing the human rights of those under their jurisdiction. The people are thus left in jeopardy and without remedy within the state, since the state itself is the violator of their rights. In such situations, the solution to the gross human rights abuse perpetuated against the citizenry can only come from the international community.

The inability of the UN Charter to do justice to these cases of gross violations of human rights has made it obvious that there is a need to look beyond the law in order to protect the rights of those under such governments. Humanitarian intervention must be viewed outside the present provisions of the law as the law has proved inadequate. Arguably, the legitimacy of humanitarian intervention can be founded upon moral principles. Humanitarian intervention could be justified on the common humanity of humankind, which places a duty on rulers to punish violations of human rights whether within or outside their territories. The sovereignty of such a violator state cannot be protected. An essence of sovereignty is the protection of the individuals of such a sovereign state and a state loses its sovereignty and right of non-intervention once it fails to protect the people for whom it holds sovereignty.[24]

The disparity between the legality and the legitimacy of humanitarian intervention calls for an in-depth analysis. Legitimacy encompasses much more than the written law; it includes the moral content of law. Where a law does not lead to the common good of those which it governs, it becomes illegitimate and must be reviewed.[25] In the light of this, a review of the UN Charter is necessary in order to bring it to terms with the legitimacy of humanitarian intervention. The concern of states over their sovereignty and the fear of abuse of a system which allows for a breach of state sovereignty make it improbable that the international community of states will

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[24] Lauterpacht op cit note 8 at 120.
[25] J.L. Brierly *The Law of Nations* 3 ed (1949) Oxford: Clarendon Press 24.

accede to a review of the Charter. This research argues for consistent state practice which will eventually lead to a customary international law principle permitting unilateral humanitarian intervention.

This thesis thus addresses the following questions:

- What is the legal status of military intervention under the UN Charter?
- Is unilateral military intervention for humanitarian reasons a breach of the sovereignty, political independence and territorial integrity of a state?
- Might there be instances in which military intervention is legitimate even if it is unlawful?
- Assuming the answer to the previous question is yes, what are the implications of this for international law?

The first chapter of this work discusses the concept of humanitarian intervention. This chapter further discusses the history of the use of force in international law and the emergence of the concept of humanitarian intervention in international law. In this chapter, I examine the just war concept and its influence on further development in the use of force among states. I also discuss the 'break-away' from the more traditional just war concept witnessed in the seventeenth century. It was during this period that jurists began to develop a less ecclesiastical view of the use of force and the possible justifications for the use of force by a state in a foreign territory. These various developments on the use of force culminated in the express ban on the use of force by states in the United Nations (UN) Charter.

Chapter two examines the prohibition of force provided for in Article 2 (4) of the UN Charter and its implications for humanitarian intervention. In this chapter, the principles of political independence, territorial integrity and the purposes of the UN are discussed in detail. This chapter examines the impact of these concepts on the legal status of humanitarian intervention. It provides an in-depth analysis of the legality of the humanitarian intervention under the UN Charter.

To get a complete understanding of the legal status of humanitarian intervention, Chapter three discusses customary international law on the concept of humanitarian intervention. In this

chapter, I undertake a detailed analysis of different instances of intervention and show that these situations have been unable to establish the existence of state practice supportive of humanitarian intervention. This chapter also examines opinio juris after the establishment of the UN Charter and whether there is a common belief that states do have an obligation or at least, a right to interfere in a state when the government of such a state unrepentantly engages in gross human rights abuses. It is shown in this section that the writings of scholars and jurists lead to a conclusion that such a right is not recognised under the current international law system.

Having established the illegality of humanitarian intervention in the previous chapters, Chapter four examines the broader concept of legitimacy. This chapter establishes that legitimacy extends beyond that which is brought about by the due process of law and considers the moral legitimacy of humanitarian intervention. This section analyses the moral implication of state sovereignty and its relationship with the duty of a state to protect the human rights of those under its jurisdiction. In this chapter I establish that humanitarian intervention is supported by the broader notions of legitimacy which takes into consideration not only the process of law making but the attainment of moral objectives such as the protection of human rights and the end of tyranny. This is especially so because of the inability of the Security Council to respond adequately to the different humanitarian catastrophes that has been witnessed since its establishment. I also provide certain guidelines which will help to ensure that humanitarian intervention is not abused and to ensure that its legitimacy is maintained.

I then proceed to analyse the consequences of the legitimacy of humanitarian intervention on international law despite its illegality. I emphasize the need for a review of the UN Charter to reflect the position of legitimacy of humanitarian intervention and thus ensure that the Charter itself does not lose its legitimacy as law. In conclusion, I argue that the continued practice of humanitarian intervention by states following the stated guidelines would eventually lead to the evolution of a new customary international law principle allowing for humanitarian intervention in the absence of a review of the UN Charter.

CHAPTER ONE

HISTORY OF THE CONCEPT OF HUMANITARIAN INTERVENTION

1.1 Introduction

Article 2 (4) of the UN Charter culminated an age long attempt at regulating the use of force by states in their international relations.[1] The regulation of the use of force, or war as was commonly called, dates as far back as the heroic epoch in Greece. Wars were not to be embarked upon without a definite and just cause[2] and leaders responsible for instigating war could be tried.[3] This chapter traces the history of the use and regulation of force from the just war era till the present dispensation under the UN Charter. It outlines the use of force from the days of loose control to the outright ban provided for in Article 2 (4) of the UN Charter. The focus of this history will be on the regulation of force and its implication on humanitarian intervention during each of these periods.

1.2 The Just War Era

A major thread which runs through the history and justification of war in all generations is the just war tradition. The origins of the just war doctrine can be found in the *jus fetiale* which was propounded by the Roman orator, Marcus Cicero (106-43 BC).[4] A war had to be commenced with the correct observance of formalities.[5] It must also be in accordance with religious sanctions and the express or implied command of the gods.[6] According to Cicero, a war was just only if it was commenced after an official demand for satisfaction and a formal declaration had been made.[7] Subsequently, the just war tradition was further elaborated in the writings of St. Augustine (354-430 AD) who posited that:

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[1] Randall Lesaffer 'Too much history: From war as sanction to the sanctioning of war' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 35.
[2] Evelyn Shuckburg *The History of Polybius* (1889) 171-74 in Ian Brownlie *International Law and the Use of Force by States* (1963) Oxford: Clarendon Press 4.
[3] Brownlie op cit note 2.
[4] Cicero, De officiis 1.11.33-1.13.41 in Lesaffer op cit note 1 at 37.
[5] Coleman Phillipson *The International Law and Custom of Ancient Greece and Rome* (1911) 180-2 in Bronwlie op cit note 2 at 4.
[6] Ibid.
[7] Cicero, De officiis I.xi. 34-36, Bronwlie op cit note 2 at 4.

> Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it.[8]

These ideas informed papal decisions and formed the foundation upon which St Thomas Aquinas (1225-74) would later crystalize the concept into much of what it is currently known as.[9] According to Aquinas, three criteria must be met for a war to be just: *auctoritas, causa justa* and *recta intentia*. *Auctoritas* refers to the fact that a war could only be waged upon the authority of a sovereign. *Causa justa* means that there must be a just cause for the war; those attacked should be attacked because they deserve it on account of some fault. Thirdly, *recta intentia* means it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.[10] Hugo Grotius who is famous for his treatise on the law of nations also viewed law as judicial and punitive procedure for the redress of wrongs suffered. His explanation for the justification of war was based on grounds of morality: once a war was moral, it was legal.[11]

This reasoning continued in various forms in the writings of different scholars.[12] There seemed to be a consensus that a difference existed between a just and an unjust war and whoever wages an unjust war was to be held responsible for any damage which results from such a war.[13] The only objective for war should be to remedy a wrong and the war is to be terminated as soon as the just cause of the war is realised. In further regulation of war, it is stated that if a war is waged ruthlessly and with a view to vengeance, it becomes unlawful.[14] War could be pursued to escape or avenge injury to oneself or one's ally, to defend the state, or one's King. However, it is not lawful to pursue the authors of a slight wrong with war as the degree of punishment should correspond with the measure of the offence.[15] It however remained the right and prerogative of the prince to wage war.

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[8] Quaestiones in Heptateuchum, vi. 10b in Bronwlie op cit note 2 at 5.
[9] Brownlie op cit note 2 at 5.
[10] Ibid.
[11] Ibid.
[12] Ibid at 5-9.
[13] Ibid at 7.
[14] Ibid at 8.
[15] Ibid at 9.

Three things are worthy of note with respect to this era.[16] First, the concept of just war was discriminatory. One side was seen as just and the other as unjust. The unjust party was not entitled to be in the war and could not benefit from the war. The claims of the war had to be attributed to one side who is to receive compensation for damages resulting to him from the war. All that the 'unjust' side had was the right of its soldiers to self-defence against any personal attack.[17] Secondly, the just war doctrine was largely theological. Its proponents were primarily theologians and canon lawyers. They viewed war in terms of its effect to one's eternal soul. The justice of war was commanded primarily by the principles of natural law.[18] Thirdly, war was not seen as an all-out use of force but as a means to enforce a claim. War did not put an end to all normal and peaceful relations between belligerents and their subjects.[19]

1.3 The Just War (17th-18th)

Even though the just war doctrine influenced subsequent practices of war, *jus ad bellum* witnessed a radical change by the half of the sixteenth century. The Reformation caused the collapse of the main foundations - canon law and ecclesiastical jurisdiction - upon which the just war theory was built.[20] Alberico Gentili (1552-1608) particularly focused on the effects of war in the earthly life rather than in the eternal as the earlier just war writers had done. According to him, a war was legal if it was waged by a sovereign and was formally declared. The justice of war could be on both sides and there could be no attribution until the end of the war. Gentili likened war to a civil trial; war was a form of dispute settlement.[21]

Grotius in his writings sought to harmonize the just war doctrine with the civilian tradition of legal war espoused by Gentili.[22] Grotius related the justice of war to the realm of the conscience while the legality of war was in the realm of positive law of nations and was externally enforceable. The concept of war as law enforcement, a means for punishing a wrong, began to lose popularity. War became outright clashes between sovereign states. Belligerents began to take measures at the outset of war which disrupted normal peacetime relations. War became a

[16] Lesaffer op cit note 1 at 37.
[17] Ibid at 38.
[18] Ibid at 38-39.
[19] Ibid.
[20] Ibid.
[21] Ibid at 40.
[22] Ibid at 41.

state of affairs between sovereigns. One of the legal effects of this was that the normal laws of peace applied during peace time while the laws of war applied during the time of war. It also meant that all enemy properties became liable to attack and seizure in the quest to win the war.[23]

State practice during this time conceived of the concept of legal war in relation to its effects on the waging of war itself (*jus in bello*), the making of peace and the way in which the wars were ended.[24] Most of the wars were ended with the entering of peace treaties and concessions which were not based on the justice of the war.[25] The concept of amnesty also became popular during this era thus wiping away all questions of the justice of the war and of the legality of wartime actions.[26]

However, sovereigns still relied on the concept of just war in their declarations of war. The arguments for the justification of the war embarked upon drew largely from the just war doctrine. The combination of the just war and legal war theory is seen in the fact that ‘when the sovereigns of Early Modern Europe went to war, they went to a just war; but when they waged or ended a war, they waged or ended a legal war’.[27] The concept of perfect and imperfect war was also developed during this time. It differentiated between full wars and hostile actions short of war.[28]

1.4 Use of Force in the Nineteenth Century

Legal positivism gained popularity in the nineteenth century and natural law became reduced to a code of morality.[29] The just war doctrine was totally eliminated and sovereign states were deemed to have the right to use war to pursue their claims or protect their security or interests.[30] This period witnessed less formal declarations of war and even though states still issued justifications for their wars, these were less extensive. As Carl von Clausewitz put it, war became a pursuit of policy by other means.[31] The justification for war was found in safeguarding

[23] Ibid at 42.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid at 41.
[28] Ibid at 45.
[29] Ibid.
[30] Ibid at 46.
[31] Carl von Clausewitz *On War* (1976) Princeton: Princeton University Press 69.

security, territorial integrity and vital interests or honour of states rather than individual rights'.[32] States began to argue that war was a defensive reaction to 'prior unwarranted action'[33] It was during the nineteenth century that defence began to become the centre of international law on the use of force.[34]

Another phenomenon that developed during this period were measures short of war. The different measures of war were all offshoots of the just war tradition and it was through these practices that concepts from the natural law era found its way into modern international law.[35] Some of these measures short of war included use of force in such matters as 'humanitarian and political intervention, self-defence, defence of nationals, and reprisal.[36]

It was also during the nineteenth century that the moderate peace movement gained ascendancy. This movement in cooperation with international lawyers argued for a programme which limits warfare using international law and tabled such propositions in the discourse of international civil society and public diplomacy.[37] This programme consisted of four major things:

a. disarmament through binding international agreements;
b. furthering the peaceful settlement of disputes through arbitration;
c. codification of the laws of war; and
d. collective security.

1.5 The Limitation of Jus ad bellum (1899-1945)

By the end of the twentieth century, states had begun to believe that war was to be a last and limited resort to be used only when all other means had failed.[38] However, states still retained the right to use force and there were no express binding regulations which limited the right to use force. The international community was only able to attain the codification of the laws of war at

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[32] Lesaffer op cit note 1 at 46.
[33] Ibid at 46.
[34] Bronwlie op cit note 2 at 19-50.
[35] Stanimir Alexandrov *Self-Defense against the Use of Force in International Law* (1996) The Hague: Kluwer 11-27.
[36] Lesaffer op cit note 1 at 47.
[37] Ibid at 48.
[38] Gooch and Temperley, *Docs on the Origins of the War*, xi. 51, 67 in Bronwlie op cit note 2 at 22.

the Peace Conferences held in 1899 and 1907.[39] During The Hague Convention I on the Pacific Settlement of International Disputes (1899), states promised to 'use their best efforts to ensure the pacific settlement of international disputes'.[40] The Convention also established a Permanent Court of Arbitration[41] and codified the obligation of states to formally declare war.[42] This period also saw the proliferation of international arbitration, albeit aimed to cover only disputes of a purely legal nature while exempting political disputes. Issues of vital interests and state security were within the realm of disputes of a political nature and thus not covered by these arbitrations.[43] It is in this regard that the Bryan Treaties of 1913 stand out. They provided for the submission of all disputes to an international commission for investigation and no resort was to be made to war until a period of 12 months after the conclusion of investigation.[44]

Subsequently, states began to be more restrictive in the use of force by adopting multilateral treaties and agreements.[45] The earliest of such attempts to restrict the use of force was The Hague Peace Conferences of 1899 and 1907. The Hague Convention 1 emphasized the desire of the international community to peaceful settlement of disputes between them rather than recourse to the use of force.[46] The international community agreed that the use of force would be secondary to peaceful adjustment of disputes and provided extensively for mediation in the case of disputes between states.[47] The Convention Relative to the Opening of Hostilities placed an obligation on states not to commence the use of force except and until notice has been given to the state against which force is to be used and such notice had to contain the reasons for the recourse to force.[48] Alternatively, the state had to give an ultimatum with a conditional declaration of war.[49] It should be noted that these Conventions provided significantly for

[39] Lesaffer op cit note 1 at 49.
[40] Art 1 *Convention (I) for the Pacific Settlement of International Disputes* 1899, 187 The Consolidated Treaty Series 410-28, opened for signature 29 July, 1899, entered into force 4 September 1900 hereinafter Hague Convention I.
[41] Art 20 *The Hague Convention I*.
[42] Lesaffer op cit note 1 at 49.
[43] Ibid.
[44] For example, *Treaty between the United States and Austria-Hungary* 1914, 220; Lesaffer op cit note 1 at 49.
[45] Nico Schrijver 'The ban on the use of force in the UN Charter' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 465-487 at 467.
[46] Preamble to the *Hague Convention I*.
[47] Ibid.
[48] Art 1 *International Convention Relative to the Opening of Hostilities* 1907 opened for signature 18 October, 1907 entered into force 26 January 1910 hereinafter Hague Convention II available at https://ihl-databases.icrc.org/ihl/INTRO/190?OpenDocument accessed 5 September 2016.
[49] Ibid.

procedural limitations on the use of force rather than an actual prohibition of the use of force.[50] In 1907, the Second Hague Peace Conference introduced for the first time an express ban on the use of force.[51] It was however limited to the use of force for the purpose of recovering a loan.[52]

It is worthy of note that none of these treaties could prevent the outbreak of World War One and its devastating casualties. The Peace Treaty of Versailles entered into in 1919 between the Allied Associated Powers and Germany bred a reform in the right of states to use force.[53] The treaty provided for the liability of Germany for the war and all loss and damages resulting therefrom.[54] It brought back the just war tradition of attributing the justice of war to one side while holding the other side unjust. It however went beyond the early just war practice where the justice of war was left to the court of God to judge. The Treaty made provisions for criminal prosecutions for the violation of both the *jus ad bellum* and the *jus in bello* by the 'unjust side' of the war.[55]

Subsequently, the Covenant of the League of Nations was entered into. This Covenant provided an avenue for states to restate their commitment to international peace and security.[56] The Covenant obliges states to submit their disputes to arbitration, judicial settlement or inquiry by the Council of the League of Nations.'[57] It further provides for a cooling off period of three months after 'the award by the arbitrators or the judicial decision, or the report by the Council' before a state can employ the use of force in any dispute.[58] The Covenant allowed for automatic economic sanctions against a state which resorted to war in contravention of the provisions of the Covenant.[59] It also provided for the establishment of a Permanent Court of Justice.[60] The Covenant of the League of Nations thus attempts to limit the use of force by providing for certain

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[50] Schrijver op cit note 45 at 467.
[51] Art. 1 of *Convention Respecting the Limitation of the Employment of Force for Recovery of Contract Debts* 1907, opened for signature 18 October, 1907, entered into force 26 January 1910 available at https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0607.pdf accessed 5 September 2016.
[52] Ibid.
[53] Lesaffer op cit note 1 at 50.
[54] Article 231 and 232 of the *Treaty of Peace with Germany (Treaty of Versailles)*, opened for signature 28 June 1919, entered into force 10 January 1920 available at https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf [accessed 10 March 2017].
[55] Article 228 and 229 Treaty of Versailles.
[56] Schrijver op cit note 45 at 467.
[57] Art 12 of *the Covenant of the League of Nations* 28 April 1919, available at http://www.refworld.org/docid/3dd8b9854.html [accessed 10 March 2017].
[58] Art 12 Covenant of the League of Nations.
[59] Art 16 Covenant of the League of Nations
[60] Art 14 Covenant of the League of Nations.

avenues to which states must have submitted their disputes before a final recourse can be had to the use of force. Perhaps the closest the Covenant got to the present Art 2 (4) of the UN Charter was its Article 10 which provided that members shall 'respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League'.[61] However, it must be stated that the Covenant did not abolish the right of states to use force if pacific settlement of disputes becomes impossible; it only 'attempted to limit *jus ad bellum*.'[62]

Further attempt at limiting *jus ad bellum* was the Kellogg-Briand Pact (Pact) of 27 August 1928. The Pact denounced war as an instrument for the settlement of international disputes.[63] Parties to the Pact renounced war as a national policy and agreed that force will not be used in any dispute arising between them; all disputes were to be settled by pacific means.[64] However, the Pact failed to provide for sanctions for a breach of its provisions[65] neither did it create any enforcement mechanism for the norms it had established.[66]

During this period, self-defence became a major justification put forward by states for resort to war. Self-defence was not regarded as a full war. Thus, states attempted to invoke self-defence as a means to escape the restrictions on war and its consequences.[67] The labelling of a resort to war as self-defence, rather than war, also ensured that third party states could render support without breaching neutrality.[68] However, self-defence was pushed beyond the natural limits of the term; states would use the smallest instance of attack against it as a justification for war.[69] State practice in this regard was so prevalent that scholars like Brownlie asserts that there was an established customary international rule against aggression by the end of the 1930s.[70]

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[61] Art 10 Covenant of the League of Nations
[62] Robert Kolb & Richard Hyde *An Introduction to the International Law of Armed Conflicts*. (2008) Portland: Hart Publishing 10.
[63] Art 1 *General Treaty for the Renunciation of War as an Instrument of National Policy* 27 August 1928, 94 LNTS 57 hereinafter General Treaty for the Renunciation of War.
[64] Art 1 & 2 of the General Treaty for the Renunciation of War.
[65] Schrijver op cit note 45 at 468.
[66] Kolb & Hyde op cite note 62.
[67] Lesaffer op cit note 1 at 53.
[68] Ibid.
[69] Ibid at 54.
[70] Brownlie op cit note 2 at 105-111.It must however be stated that this assertion is controversial and not generally agreed upon by international law scholars.

The inadequacy of this Pact and of the Covenant of the League of Nations became apparent with the outbreak of the Second World War in 1939. The casualties from the Second World War made it evident that there was a need for the international community to be more stringent in the prohibition of the use of force.[71] Some of the measures to be adopted as determined initially by the Allied Powers were the peaceful settlement of disputes, absolute ban on the use of force and an institutionalized collective security system.[72] During the San Francisco Conference, states discussed the need to prohibit the use of force. It was proposed that the prohibition of force be extended to include such types of force as economic force, moral or physical force and political force. None of these proposals were adopted and the term use of force was simply used in the prohibition text.[73] States such as Ecuador, Brazil, New Zealand and Bolivia also advocated for the inclusion of a prohibition of aggression into Article 2 (4). This proposition was opposed by China, the United Kingdom and the United States. The opponents of this proposal believed that to include aggression into Article 2 (4) would narrow its scope and it should rather be left within the scope of threat to the peace.[74] The inclusion of the phrase, 'or in any other manner inconsistent with the Purposes of the United Nations' was also a major discussion. It was argued that this phrase would be interpreted by states in such a manner as to justify their use of force in situations where it was ordinarily justified.[75] It gave room for subjective interpretations by states. This fear was however allayed by the British delegate who explained that the purpose of the phrase was to allow for the enforcement clauses provided for in Chapter VII of the Charter. Thus, the sole essence of this phrase was to give allowance for the use of force allowed in Chapter VII of the Charter. This phrase of Article 2 (4) will be examined in fuller details in the next chapter. Suffice it to say for now that states understood this phrase has giving room for the use of force in Chapter VII without causing a contradiction.[76]

On June 26, 1945, the Charter of the United Nations was adopted with an Article 2 (4) providing that:

[71] Schrijver op cit note 45 at 469.
[72] Ibid.
[73] Ibid at 470.
[74] Ibid.
[75] Ibid at 471.
[76] Ibid.

> 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.[77]

This provision of the Charter entrenches almost completely a ban on the use of force by states against each other.[78] The Charter takes a stronger stance on the use of force than all the previous treaties and agreements.[79] Art 2 (4) pre-empts the tendency of states to engage in armed conflict without acknowledging the existence of a war. It prohibits not just a formal state of war but any use of military force against another state.[80] The UN Charter thus revolutionizes pre-Charter law on the use of force by extending beyond war to include measures short of war.

It must be noted that the UN Charter expressly provides for three exceptions to the prohibition of the use of force. First, use of force against former enemy states of the Second World War Allies was allowed without a Security Council resolution.[81] This exception has become obsolete with the admission of the states in question to the United Nations.[82] Secondly, actions by the Security Council in line with its powers in Art 39, 41 and 42 of the UN Charter. The third exception is the right of states to self-defence. Even so, the Charter requires states to report such measure taken in self-defence to the UN Security Council. This shows a clear intention by the drafters of the Charter to limit the use of force by states and to centralize the use of force in the hands of the Security Council as far as possible

Another exception which has been quoted as an implicit exception to the use of force in the UN Charter is the use of force for humanitarian purposes.[83] Proponents of this view argue that the Charter's prohibition on the use of force is expressly directed towards certain purposes; territorial integrity, political independence or some other purposes of the UN.[84] The purpose of

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[77] Article 2 (4) of the UN Charter.
[78] Schrijver op cit note 45 at 465.
[79] Kolb & Hyde op cite note 62 at 11.
[80] Ibid; Olivier Corten *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010) Oxford: Hart Publishing 52.
[81] Art 53 (1), 107 of the UN Charter.
[82] Italy, Japan and Germany were admitted to the UN in 1955, 1956 and 1973 respectively.
[83] Julius Stone *Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958) London: Stevens & Sons Limited 95; Peter Malanczuk *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993) Amsterdam: Het Spinhuis; Nigel Rodley 'Humanitarian intervention' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 778.
[84] Rodley op cit note 83.

humanitarian intervention, they argue, is the protection and enforcement of human rights and cannot be conceived to be a contravention of Art 2 (4) of the UN Charter. Humanitarian intervention does not infringe on a state's political independence or territorial integrity neither does it contravene a UN purpose. Nigel Rodley argues that since humanitarian intervention neither pursues a regime change nor does it seek territorial changes, it will be legal under the UN Charter. This argument goes further that the provision of Art 2 (7) which prohibits states from interfering in the domestic affairs of a foreign state would not be offended either. This is because human rights are one of the purposes stated in Art 1 of the UN Charter and thus it is not a matter within the domestic jurisdiction of a state.[85]

This conclusion which supports the legality of humanitarian intervention is reached due to a misconceived understanding of the concepts of political independence, territorial integrity and the purposes of the UN Charter vis-à-vis the power of collective measures vested in the UN Security Council. The next chapter will therefore explore the meaning of these concepts and their implications in international law. This will help to answer the question whether the military force of a state acting in another state for humanitarian purposes could be said to have breached the UN Charter.

1.6 Conclusion

The history of the use of force reveals an intention on the part of states to limit the use of force in international relations. This restriction to the use of force became more prominent after the First World War. The enormous casualty of the First World War made it obvious that with the advancements in technology and means of warfare, there was a need for a more restrictive use of force by states. Thus, in the UN Charter, states expressed their desire to see an end to the indiscriminate use of force and placed an express and complete ban on the unilateral use of force. The only exception expressly provided for is the use of force in self-defence. States are allowed to protect themselves against an armed attack form another state. Every other use of force was vested in the Security Council. The expression used in Article 2 (4) of the Charter has been given their literal meaning and interpreted to permit unilateral use of force for humanitarian purposes.

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[85] Ibid at 779.

The next chapter will provide a detailed analysis of these terms in line with the rights of states to use of force for humanitarian ends.

CHAPTER TWO

HUMANITARIAN INTERVENTION AND THE UNITED NATIONS CHARTER

2.1 Introduction

Article 2 (4) of the UN Charter expressly prohibits the use of force by states in their relations with each other. It forbids a state from using force against another state. In stating this prohibition, certain legal terms are used which must be examined in order to have a complete understanding of the prohibition spelt out in this article. This chapter examines the concepts of territorial integrity, political independence and the purposes of the UN as used in Article 2 (4) of the Charter and its effect on the legality of humanitarian intervention. There will be an analysis of the *travaux preparatoires* to the UN Charter in order to gain an understanding of the intentions of the drafters of the Charter. This chapter will also undertake a short analysis of the inability of the collective system of the Security Council to respond to humanitarian catastrophes and the implication of this inability on the unilateral use of force.

2.2 Territorial Integrity

The borders of a state form the geographical boundaries of its jurisdiction.[1] This border includes its land, territorial sea, and the airspace above its land and sea territory. A state enjoys absolute jurisdiction over its territory.[2] Territory includes a state's islands, islets, rocks and reefs.[3] The state has an unrestrained prescriptive and enforcement jurisdiction over every part of it.[4] Territorial integrity has become recognized as an essential part of the international legal order.[5] The importance of territorial integrity has been stressed by several international treaties like the Arab League Charter, the Organization of African Unity Charter, the Vienna Convention on

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[1] Neil Boister *An Introduction to Transnational Criminal Law* (2012) Oxford: Oxford University Press 3.
[2] Vaughan Lowe & Christopher Staker 'Jurisdiction' in Malcolm Evans (ed) *International Law* 3 ed (2010) Oxford: Oxford University Press 320.
[3] Ian Brownlie *Principles of Public International Law* 7 ed (2008) Oxford: Oxford University Press 105.
[4] Lowe & Staker op cit note 2.
[5] *Accordance with International Law of the Unilateral Declaration of Independence In respect of Kosovo*. ICJ Reports 2010, p. 403, para 80; Article 2 (4) of the UN Charter; James Crawford & Simon Olleson 'The nature and forms of international responsibility' in Malcolm Evans (ed) *International Law* 3 ed (2010) Oxford: Oxford University Press 443.

Succession of States in respect of Treaties and the Helsinki Final Act. It forms the bedrock of the international political system and international relations.[6]

Territorial integrity refers to the right of a state to the inviolability of its territory.[7] It applies in the relationship of states with each other and prohibits a state from acquiring or entering the territory of the other by the force of arms.[8] Territorial integrity emphasizes the protection of existing territorial borders. It outlaws the unilateral variation of international borders through the use of force by a state.[9] It helps to maintain the need for stability and finality in boundary questions.[10] It guarantees the continued existence of existing geographical territories.[11] Territorial integrity is a consequence of the sovereignty of a state over its territory.[12]

Interventionists have argued that humanitarian intervention is not a contravention of territorial integrity as it leaves a state's boundaries unchanged.[13] The foreign power only comes for a short while and leaves the country without contravening territorial integrity or political independence. If an intervention leaves the borders of a state unchanged, such an intervention cannot be said to be a violation of the prohibition against the use of force against the territorial integrity of a state.[14] This claim must however be rejected. This interpretation limits territorial integrity to a shift or change in internally recognized borders and nothing more. It must however be understood that the focus of territorial integrity goes beyond the 'material elements of the state'[15]

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[6] Stuart Elden 'Contingent sovereignty, territorial integrity and the sanctity of borders' (2006) XXVI *SAIS Review* 11-24 at 11.
[7] Christian Marxsen 'Territorial integrity in international law- Its concept and implications for Crimea' (2015) 75 *Heidelberg Journal of International Law* 7-26 at 8.
[8] Vita Gudeleviciute 'Does the principle of self-determination prevail over the principle of territorial integrity?' (2005) 2(2) *International Journal of Baltic Law* 48-74 at 50.
[9] Marxsen op cite note 8 at 10.
[10] Crawford & Olleson op cit note 5.
[11] Marxsen op cite note 8.
[12] Lowe & Staker op cit note 2.
[13] Nigel Rodley 'Humanitarian intervention' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 778; Michael Reisman and Myres McDougal 'Humanitarian intervention to protect the Ibos' in Richard B. Lillich (ed) *Humanitarian Intervention and the United Nations* (1973) Charlottesville: University Press of Virginia, 167-195.
[14] Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* 3 ed (1973) New York: Transnational Publishers 193.
[15] Christos Rozakis 'Territorial integrity and political independence' R Bernhardt *Encyclopaedia of Public International Law*, Vol. 4 (1981) Amsterdam: Elsevier 813.

and its frontier delimitation to include all forms of direct or indirect involvement in its internal affairs.[16]

The principle of territorial integrity protects more than the 'unilateral change of territory by the use of force. It encompasses both territorial preservation and territorial sovereignty.[17] Territorial integrity protects a state against all manner of interventions into its territory from outside forces.[18] It includes both the prohibition of the use of force for the alteration of inter-state boundaries and the right of a state to conduct its affairs and activities within its territory without the interference of other states. It embodies the exclusive competence of a state as touching its own territory.[19]

The territory of a state is protected under international law from any intrusion or incursion whatsoever without the authorization of the state.[20] Any such incursion into a state's territory without its prior authorization amounts to a breach of the state's territorial integrity even if such incursion was not for the purpose of territorial annexation.[21] A state has the right to determine who enters upon its territory and on what terms such an entry is based. The entrance of troops into a state's territory would therefore amount to an illegality where it is done without the state's approval, even if it is done without the intention of altering the state's territory.[22] An invasion, however brief and for whatever purpose, violates the core of territorial integrity.[23]

Given the above stated, humanitarian intervention which holds that humanitarian intervention is legal is premised on a wrong understanding of the concept of territorial integrity. The attempt to exempt the prohibition of humanitarian intervention fails to take into cognizance the fact that territorial integrity is closely linked with the political independence of a state.[24] Any trans-frontier use of or entry of armed forces of one state into the territory of another state without the

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[16] Ibid at 814; Crawford & Olleson op cit note 5.
[17] Elden op cit note 6.
[18] Marxsen op cite note 8 at 10.
[19] *Island of Palmas Case (Netherlands v USA)*, Reports of International Arbitral Awards, 829-871 at 838.
[20] Marco Pertile 'The changing environment and emerging resource conflicts' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 1082.
[21] Ibid.
[22] Bruno Simma, Daniel-Erasmus Khan, Georg Nolte et al *The Charter of the United Nations: A Commentary* Vol. 1. 3 ed (2013) Oxford: Oxford University Press 216.
[23] Oscar Schachter 'The legality of pro-democratic invasion' (1984) 78 *American Journal of International Law* 645-649 at 648.
[24] Marxsen op cite note 8 at 10.

prior authorization of that state, other than for purposes of self-defence, would amount to a use of force against the territorial integrity of that state.

2.3 Political Independence

Political independence refers to the sovereignty and liberty of a state with regards to actions within its boundaries.[25] It is the freedom of a state from the authority of another state. It refers to the sole right of a state to take decisions on all matters economic, political, financial or other.[26] A politically independent state is legally equal with every other independent state and is not subject to any higher authority outside its territory.[27] The Draft Declaration on the Rights and Duties of States defines this independence as the freedom of a state from domination by other states and the right to choose its own form of government.[28] It is the right of a state to steer its own course without any coercive influence from any authority outside the state. A corollary of the independence of a state is the fact that no restrictions can be placed on a state other than such restrictions as may be accepted by the state concerned, either by treaty or customary international law.[29]

The notion of political independence in international law signifies the right of a state to exercise jurisdiction over its territory and over its permanent population to the exclusion of any and every other authority. This implies that all other states are prohibited from intervening in the internal affairs of an independent state.[30] The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States provides that:

> 'No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the

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[25] Clive Parry, John P. Grant, Anthony Parry & et al. *Parry and Grant Encyclopaedic Dictionary of International Law* (1986) New York: Oceana Publications 166-167.

[26] *Austro-German Customs Union Case* (1931) PCIJ Series A/B No 41 at 45.

[27] Robert Jackson & Carl Rosberg 'Why Africa's weak states persist: The empirical and the juridical in statehood' (1982) 35(1) *World Politics* 1-24 at 13.

[28] Article 1 of the Draft Declaration on the Rights and Duties of States p 287.

[29] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. Unites States of America) Merits Judgment*, I.C.J. Reports 1986, p. 14 paras. 202, 269; *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion,* I.C.J. Reports 1996, p. 226, paras 238-9, 247.

[30] Malcolm N Shaw *International Law* 6 ed (2008) Cambridge: Cambridge University 212.

> personality of the state or against its political, economic and cultural elements are in violation of international law.'[31]

The independence of states and non-intervention in the internal affairs of a state are necessary if international peace and stability are to be maintained.[32] Any attempt to vary this principle as it presently stands will lead to a destabilizing of international relations, peace and security.[33]

It is clear from the foregoing that the presence of foreign troops in a state requires the consent of that state, any such presence or incursion into a state's territory without its prior consent amounts to a violation of its political independence.[34] The presence of troops in a state to influence governmental policies and actions amounts to interference in the state's internal affairs, even if such influence is aimed towards a noble end such as human rights protection. The General Assembly of the UN has also declared that 'every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.[35] A state is free to choose whatsoever political structure it pleases and no state has a right to intervene irrespective of its perception of such structure. For example even if state A practices what state B perceives as tyranny, state B cannot, under international law, intervene to 'save' citizens of state A from such 'oppressive' government. The morality of intervention must be separated from its legality. We shall discuss the morality of intervention in a later chapter. Thus, while it may seem like a moral necessity that state A should intervene in state B, there is no legal provision under international law which supports such an intervention. On the contrary, intervention of any form is expressly prohibited as it means that a foreign state has begun to dictate and directly influence the political system and structures within a sovereign state. A state has no other authority over it than that of international law.[36]

Thus, humanitarian intervention cannot be conceived as legal exception to the use of force under the UN Charter. Article 2 (4) expressly prohibits infringements upon a state's political independence. Advocates of humanitarian intervention posit that humanitarian intervention does

[31] Art 1 para 3 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States UNGA Res A/RES/25/2625.
[32] Shaw op cit note 30 at 213.
[33] Ibid at 212; *The Corfu Channels Case* ICJ Reports 1949, 4 at 35
[34] Ibid at 214.
[35] Art 5 Declaration on the Admissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty 1965, GA Resolution 2131 (XX), December 21, 1965
[36] Austro-German Union Case

not constitute a breach of political independence as it does not seek to implement a regime change.[37] This position is misconceived. Humanitarian intervention eventually leads to a change in the power structures in the state. Also, humanitarian intervention seeks to change the governmental policy of a state from what it considers inhuman into a more humanitarian one. Even though this seems to be a positive interference, it is interference nonetheless and infringes a state's right to be politically independent.

The phrase 'territorial integrity and political independence' was introduced at a later stage in the development of the UN Charter.[38] The intention of the drafters of the UN Charter in including the phrase 'territorial integrity and political independence' was not to include an exemption to the prohibition of force but to re-enforce this prohibition.[39] It was meant to supplement the prohibition on the use of force and not to qualify it. This provision was added as a guarantee that the territorial integrity and political independence will be protected.[40] This is made clear by the *travaux preparatoires* to Article 2 (4) where the phrase was introduced by the newly independent states to secure their newly acquired sovereignty.[41] The purpose was not to make an allowance for humanitarian intervention but to re-emphasize the need to safeguard the territorial integrity and political independence of the newly independent states from more powerful states.[42] The inclusion was to give 'more specific guarantees' to small states rather than to restrict the prohibition of the use of force.[43]

It must also be made clear that what matters is not the purpose of the violation but the actual act of violation itself.[44] In order words, a state cannot claim that the purpose of the use of force is not to infringe on its territorial integrity and political independence if the use of force does in fact constitute such an infringement. Article 2(4) does not concern itself with the intentions of the

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[37] Rodley op cit note 13 at 779.
[38] Simma et al op cite note 22.
[39] Jane Stromseth 'Rethinking humanitarian intervention: The case for incremental change' in J. L. Holzgrefe & Robert Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) Cambridge: Cambridge University Press 268-272 at 268; Ian Bronwlie *International Law and the Use of Force by States* (1963) Oxford: Clarendon Press 268.
[40] Simma et al op cite note 22.
[41] Ian Bronwlie *International Law and the Use of Force by States* (1963) Oxford: Clarendon Press 265-267.
[42] Marxsen op cite note 8 at 9.
[43] Ian Bronwlie *International Law and the Use of Force by States* (1963) Oxford: Clarendon Press 267.
[44] Louis Henkin 'Humanitarian intervention' (1994) 26 *Studies in Transnational Legal Policy* 383-403 at 399; Daniel Wolf 'Humanitarian intervention' 9 *Michigan YBI Legal Studies* 333-366 at 339.

parties but with the actual act.[45] Thus, intervention, even if for humanitarian purposes, violates the principles of territorial integrity and political independence. The concept of territorial integrity coupled with political independence encompasses the inviolability of a state. The idea that wars waged for a good cause such as democracy and human rights would not violate the territorial integrity or political independence of the state involved demands as Schachter puts it, "an Orwellian construction of those terms.'[46]

2.4 Purposes of the UN

Another common argument by postulates of the legality of humanitarian intervention is the fact that the maintenance and enforcement of human rights constitutes one of the purposes of the UN and the use of force to that effect should be construed as a valid exemption to the prohibition on the use of force.[47] Article 1 of the UN Charter expressly provides for the protection and advancement of human rights as one of the most important purposes of the UN.[48] It is therefore unthinkable that the UN Charter will prohibit the use of force to overthrow authoritarian regimes and secure the protection of human rights.[49] Therefore, the argument suggests, humanitarian intervention does not constitute a contravention of any of the purposes of the UN Charter; rather it helps to serve one of the Charter's main purposes.[50]

This reasoning cannot justify the use of force. There are other purposes of the UN Charter such as economic cooperation and friendly relations. To take the argument that humanitarian intervention is lawful, being a purpose of the UN Charter, would mean that the use of force to enforce economic cooperation would also be legal as economic cooperation constitutes a purpose of the UN Charter.[51] Thus, while human rights remain one of the purposes of the UN, nevertheless, it does not justify unilateral use of force by a state against another.

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[45] Jean-Pierre L. Fonteyne, 'The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter' (1974) *4 California Western International Law Journal* 203-270 at 255.
[46] Schachter op cit note 23.
[47] Teson op cit note 14.
[48] Ibid.
[49] Ibid.
[50] Rodley note 13 at 779.
[51] Teson op cit note 14 at 194.

The justification for humanitarian intervention has also been based on the existence of a link between the maintenance of peace and security and respect for human rights.[52] Tyranny and oppression within a state could have implications for international peace and security.[53] Thus tyranny in a state becomes a matter of international concern once it becomes established that it poses a threat to the peace.[54] This reasoning is valid to the extent that it gives sufficient legal basis for the UN Security Council to intervene where there are serious human rights violation in a state.[55] However, it does not in any way justify the unilateral use of force in such situations. Article 39 of the UN Charter gives the Security Council the power to 'determine the existence of any threat to the peace or breach of the peace'.[56] The advocates of this position seek to vest a power which has been vested in the Security Council into the hands of individual states. It must be noted that Chapter VII of the UN Charter titled "Action with respect to threats to the peace, breaches of the peace, and acts of aggression" contains the course of action to be taken by states with respect to the use of force to maintain international peace and security. This chapter makes provision for only two possibilities for the use of force; self-defence by states and a Security Council resolution. Other than these two, the Charter does not provide for any other situations under which states may recourse to force in defence of human rights violation in a foreign territory.

2.5 Security Council and Humanitarian Intervention

The proper functioning of the Security Council would have left no room for the unilateral use of force since concerned states could easily have placed their grievances before the Security Council.[57] However, given the lack of consensus between the members of the Security Council, this system failed and gave room for states to embark on humanitarian intervention without

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[52] Ibid; Richard B. Lillich 'Forcible self-help by states to protect human rights' (1967) 53 *Iowa Law Review* 325-351.
[53] Myres McDougal & Michael Reisman 'Rhodesia and the United Nations: The lawfulness of international concern' (1968) 62 *American Journal of International Law* 1-19 at 15.
[54] Ibid.
[55] Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* 3 ed (2005) New York: Transnational Publishers 195.
[56] Article 39 of the UN Charter.
[57] W. M. Reisman 'Criteria for the lawful use of force in international law' (1985) 10 *Yale Journal of International Law* 279-285 at 279.

Security Council resolution.[58] It has therefore been argued that the inability of the Security Council to respond to humanitarian catastrophes around the world has given rise to a right of unilateral action by states.[59] While the logic of this argument seems sound and supports the legal maxim *ubi jus ubi remedium*, it must be stated that such reasoning has no support in the UN Charter or any subsequent interpretations of its provisions by the International Court of Justice. The UN Charter does not state that the unilateral use of force becomes permissible when the Security Council reaches a deadlock over any matter.

2.6 Conclusion

In conclusion, it must be stated that there is nothing in the UN Charter which gives room for an interpretation that permits humanitarian intervention. It has been seen that the inclusion of the phrase 'territorial integrity', 'political independence' and 'a manner inconsistent with the purposes' of the UN was not added to give a restrictive effect to the UN Charter. It was added to re-enforce the prohibition and re-emphasize the protection of smaller states and equality of states under international law. This phrase was never intended to permit the use of force for humanitarian or other purposes other than self-defence and pursuant to a Security Council resolution. On the other hand, there is no provision in the UN Charter which permits the unilateral use of force where the Security Council is unable to act effectively in response to a humanitarian crisis. The UN Charter is rather silent on what happens when the Security Council is unable to effectively exercise the collective security mechanism which is vested in it.

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[58] J. L. Holzgrefe 'The humanitarian intervention debate' in J. L. Holzgrefe & Robert Keohane, (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) Cambridge: Cambridge University Press 40.

[59] Ibid at 39.

CHAPTER THREE

HUMANITARIAN INTERVENTION AND CUSTOMARY INTERNATIONAL LAW

3.1 Introduction

This chapter explores the principle of humanitarian intervention under customary international law (CIL). This is with a view to examining whether post-UN Charter state practice and *opinio juris* has created an exception to the Charter which permits the use of force for humanitarian purposes. The chapter seeks to investigate whether reliance can be placed on CIL in understanding the regulation of force in international law and establishing the legality of humanitarian intervention.

The International Court of Justice has noted that the UN Charter does not by any means cover the whole area of the regulation of the use of force in international relations.[1] Customary international law remains one of the two major sources of international law.[2] It refers to the customary practice of states borne from a sense of legal obligation.[3] In order words, the actions of states which they believe they are legally obliged to do. To determine the existence of a rule of CIL, two things must be established: first, a general and consistent practice of sates. And second, that such practice is brought about by a sense of international legal obligation (*opinion juris*).[4] With respect to the first ambit of CIL, it is required that for a practice to be general, a large share of the affected states must have engaged in it.[5] There must atleast be continuous observance even if not 'absolute rigorous conformity.'[6] The essence of the second requirement is to ensure that practice which is undertaken as mere courtesy or emergency measures without a sense of legal obligation do not acquire the status of law.[7]

In establishing the CIL position on humanitarian intervention, this chapter analyses some of the popularly cited instances of humanitarian intervention. It concludes that none of these instances

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[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits Judgment* I.C.J. Reports 1986 p. 14 para 176.
[2] Ian Brownlie *Principles of Public International Law* 7 ed (2008) Oxford: Oxford University Press 6.
[3] Ryan M Scoville 'Finding customary international law' (2016) 101 *Iowa Law Review* 1893-1948 at 1895.
[4] Ibid.
[5] Andrew T Guzman 'Saving customary international law' (2006) 27 *Michigan Journal of International Law* 115-176 at 150.
[6] *Nicaragua v. United States of America (supra)* para 185.
[7] Scoville op cit note 3 at 1896.

leads to the assertion that there is a general practice of intervention among states borne from a sense of legal obligation. The various cases of intervention examined include the invasion by Egypt and other states in Palestine/Israel, the US intervention in the Dominican Republic, Indian intervention in Bangladesh, Tanzanian intervention in Uganda, NATO intervention in Kosovo, Kurdish North Iraq French intervention in the Central African Empire and the Vietnamese intervention in Kampuchea (Cambodia). An analysis of these interventions and *opinio juris* lead to the unequivocal conclusion that a customary international law rule permitting unilateral humanitarian intervention is yet to be established.

3.2 Post-1945 CIL on Humanitarian Intervention

Prior to the UN Charter of 1945, unilateral use of force to protect nationals of a foreign state was well established under customary international law.[8] The UN Charter however prohibited all forms of the threat or use of force and exempted self-defence or force authorized by the Security Council. Some authors have argued that unilateral humanitarian intervention continues to exist under customary international law.[9] They argue that state practice and *opinion juris* prior to the UN Charter had established the legality of unilateral intervention and this legality was neither "terminated nor weakened" by the UN Charter.[10]

There can be no adequate evaluation of an issue of international law without examining what the customary international law position on the matter is. It is therefore necessary to examine whether customary international law since 1945 has formed a body of law which permits humanitarian intervention as legal and a non-infringement of the UN Charter. Has subsequent state practice modified Article 2 (4) of the UN Charter to allow for unilateral intervention?[11]

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[8] Richard B. Lillich 'Intervention to protect human rights' (1969) 15 *McGill Law Journal* 205-219 at 209-210; A. Thomas & A. J. Thomas 'The Dominican Republic crisis 1965-Legal aspects' (1966) 9 *Hammarskjold Forum* 1-96;

[9] Myres S. McDougal & W. Michael Reisman 'Response by Professors McDougal and Reisman' (1969) 3(2) *The International Lawyer* 438–445 at 442; Simon Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* (2001) New York: Oxford University Press 53-87; Jean-Pierre L. Fonteyne 'The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter' (1974) 4 *California Western International Law Journal*, 203-270.

[10] Guzman op cit note 5 at 116.

[11] 1966 *Draft Articles on the Law of Treaties* provides that 'a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions' and Article 31(3) of the *Vienna Convention on the Law of Treaties* provides that treaties should be interpreted in the light of subsequent practice which shows the agreements of the parties as regards that treaty.

It must be noted that an analysis of state practice on humanitarian intervention will usually depend upon the choice of incidents, the credibility attached to official reasons given by the intervening government, the weight attached to the response from the international community, the duration of such intervention, etc.[12] There are no perfect examples of humanitarian intervention. Attempt is made here to examine some of the often-cited examples of state practice that would guide in determining whether a sense of legal obligation exists among states towards humanitarian intervention.

3.2.1 *Egypt and other states' Intervention in Israel 1948*

In 1948, Egypt, Syria, Lebanon, Transjordan and Iraq commenced military action against Israel. The reason for this action as put forward by Egypt was to 'put an end to massacres and establish respect for the laws of universal morality and the principles recognized by the United Nations.'[13] The government of Egypt made it clear that the intervention was '…not directed against the Jews of Palestine but against terrorist bands and has no other object than the re-establishment of order, peace and security in that country.'[14] At the Security Council, Egypt adopted this same argument. The Security Council however rejected it and called on all parties to the conflict to cease hostilities immediately.[15] On its own part, the UN General Assembly condemned the invasion and called for the demilitarization of Jerusalem and protection and free access to Palestine.[16] These reactions show clearly a rejection of a right to use force for humanitarian purposes by the community of states.

3.2.2 *United States intervention in the Dominican Republic, 1965*

On 28 April 1965, United States forces landed in the Dominican Republic. This operation was two-phased; the first aimed at the protection of US nationals in the Republic, and the second involved an actual exercise of control over the territory by the United States. The United States

[12] Chesterman op cit note 9 at 63.
[13] Ibid at 64.
[14] Ibid.
[15] Security Council Resolution 43, 1948 para 43 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/43(1948) [accessed 5 December, 2016].
[16] *United Nations General Assembly Resolution 194 (III). Palestine-Progress Report of the United Nations Mediator* 11 December 1948 available at https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A [accessed 10 March 2017].

explained its actions by stating that the invasion was aimed at preserving law and order and helping the people of that country to choose the path of political democracy, social justice and economic progress.[17] This situation however fails as a proof of state practice permitting unilateral intervention as the United States later varied the objective of the operation and failed to withdraw its troops when it should have done so. The President of the United States stated that 'the American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere.'[18] It therefore seems clear that the objective of this operation was more political than it was humanitarian. The inability of the US to insist on a humanitarian justification is proof that it did not belief that any such right exists under international law.

The Security Council rejected a call by the Union of Soviet Socialist Republics calling for the Security Council to condemn the action of the US and ask that the troops be withdrawn.[19] Even though the US action seem to have gained some support before the Security Council, it must be stated that the arguments before the Security Council centred around the protection of US nationals abroad rather than on humanitarian intervention. The Council eventually adopted a resolution calling for a ceasefire.[20]

3.2.3 *Indian intervention in Bangladesh, 1971*

This case has been described as one of the perfect examples of humanitarian intervention.[21] The Pakistani central government responded to an attempt by East Pakistan to secede from the rest of the Pakistani nation by attacking Dacca.[22] This attack involved the indiscriminate killing of civilians, including women and children, attempt to exterminate the Hindu population, the arrest, torture and killing of activists, the raping of women, destruction of villages and towns and the

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[17] President Johnson, Statement of 1 May, 1965 in Chesterman op cit note 9 at 70.
[18] Ibid
[19] Chesterman op cit note 9 at 70.
[20] Security Council Resolution 203, 1965 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/203(1965) [accessed 5 December, 2016].
[21] Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* 3 ed (2005) New York: Transnational Publishers 207; Fonteyne op cite note 9 at 203-204.
[22] Nigel Rodley 'Humanitarian intervention' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 781.

looting of property.[23] One million people were killed within nine months of these attacks and many more had fled to neighbouring India.[24] On 3 December 1971, India invaded and defeated the Pakistani army. India also presided over the establishment of Bangladesh.[25]

In his defence before the Security Council, the Indian representative stated that India acted with the purest motives and the action was intended 'to rescue the people of East Bengal from what they are suffering'[26] India went further to argue that Bangladesh had become a subject of colonial rule and India's action was to support the people of Bangladesh in its pursuit of its right to self-determination.[27] The humanitarian argument put forward was also mixed with other arguments such as self-defence.[28] India failed to make a clear and proper argument basing its actions on humanitarian concerns.[29] Scholars have argued that given the history of the relationship between the two states, India probably acted to secure a strategic advantage against Pakistan.[30] The Security Council eventually referred the matter to the General Assembly.[31]

The General Assembly, in an overwhelming majority, called for the cessation of hostilities and for the withdrawal of Indian troops.[32] India's humanitarian argument was not accepted as a justification in discussions within the United Nations.[33] It was stated that while the Pakistani government's action constituted a humanitarian catastrophe, nevertheless, it did not justify the actions of India which violated Pakistan's territorial integrity and political independence.[34]

The actions of India found no support with the opinion of scholars either. At best, certain authors recognized that the intervention may have some moral validity and stressed the difference

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[23] International Commission of Jurists, *The Events in East Pakistan 1971* (1972) Geneva: International Commission of Jurists 26-27.
[24] Ibid at 24-26.
[25] Rodley op cit note 22.
[26] Chesterman op cit note 9 at 73.
[27] Thomas M. Franck & Nigel S. Rodley 'After Bangladesh: The law of humanitarian intervention by military force' (1973) 67 *American Journal of International Law* 275-305 at 276-277; Rodley op cit note 22.
[28] Chesterman op cit note 9 at 73.
[29] Ibid at 74.
[30] Rodley op cit note 22.
[31] Security Council Resolution 303, 1971.
[32] General Assembly Resolution 2793, 1971 104 voted for cessation of hostilities, 11 against and 10 abstentions.
[33] Chesterman op cit note 9 at 73.
[34] Security Council Resolution S/PV.1611 (1971) para 19 United Nations Security Council Official Records 1611th Meeting: 12 December 1971.

between legal and moral validity.[35] Whether an action can be moral and yet illegal or whether a moral act should necessarily be considered as legal will be examined in the next chapter. Suffice it to say here that there is a paucity of opinio juris in the instant case to support the claim that unilateral intervention has become recognized under customary international law.

3.2.4 *Tanzanian intervention in Uganda, 1976*

Tanzania invaded Ugandan territory subsequent to Uganda's occupation of part of the Kagera region of Tanzania.[36] This invasion led to the ouster of Idi Amin, the erstwhile president of Uganda and a new government was established.[37] Even though there had been grave abuses of human rights by the Idi Amin-led government, Tanzania relied largely on the right to self-defence for its actions against Uganda.[38] While the matter was never discussed at the Security Council and the General Assembly, the actions of Tanzania met with wide approval from the international community.[39]

However, this approval must not be mistaken as evidence of recognition of the legality of unilateral military action in support of human rights. As scholars have noted, the support of the international community was based on recognition of Tanzania's right of self-defence rather than on the concept of unilateral intervention.[40] Two wars seem to have been fought during this period; one by Tanzania in self-defence and another by Ugandan exiles and dissidents and the international community's support was for Tanzania's exercise of its right to self-defence.[41]

3.2.5 *Vietnamese intervention in Kampuchea (Cambodia), 1978-9*

The Khmer rouge government of the Democratic Kampuchea had been accused of grave human rights violation that reached genocidal proportions.[42] The Vietnamese troops which included members of the United Front for National Salvation of Kampuchea (an insurgent group formed by exiled Kampucheans) successfully invaded Kampuchea and captured Phnom Penh on 7

[35] Richard B. Lillich (ed.) *Humanitarian Intervention and the United Nations* (1973) Charlottesville: University Press of Virginia 114.
[36] Rodley op cit note 22 at 782.
[37] Chesterman op cit note 9 at 77.
[38] Rodley op cit note 22 at 782.
[39] Chesterman op cit note 9 at 78.
[40] Ibid; Rodley op cit note 22 at 782.
[41] Rodley op cit note 22 at 782.
[42] Rodley op cit note 22 at 782.

January 1979.[43] Prior to this, there had been various border incursions.[44] There was a successful overthrow of the Pol Pot who fled into the mountains.[45] The foreign minister of Kampuchea accused Vietnam of invading its territory and requested a Security Council meeting for the matter to be addressed.[46]

At the Security Council meeting, Vietnam was careful to make a distinction between the border wars between Vietnam and Kampuchea and the revolutionary war fought by the Kampucheans.[47] Vietnam argued that based on its right of self-defense, it had a right to use force in defense of its territory and political independence.[48] Vietnam refrained from claiming that it had the right to intervene on humanitarian grounds.[49] In their response, an overwhelming majority of states rejected any notion of foreign intervention or forcible overthrow of government, even if such a government is guilty of gross human rights violation.[50] The discussion ended with a General Assembly resolution calling for the immediate withdrawal of Vietnamese forces from Kampuchea and re-instating the principle of non-interference in the internal affairs of states.[51] Thus, this case is proof that the international community of states rejects the notion of unilateral humanitarian intervention.

3.2.6 *French intervention in the Central African Empire, 1979*

Emperor Bokassa had ruled the Central African Empire from 1966 and there had been allegations of widespread humanitarian atrocities against his regime. In 1979, Amnesty International published a report which revealed that about 100 school children had been detained and killed by the regime and that Bokassa may have participated directly in these killings. In September 1979, France gave military support to a coup which led to the overthrow of the Bokassa regime and the re-instatement of David Dacko as the head of state.[52]

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[43] Chesterman op cit note 9 at 79.
[44] Rodley op cit note 22 at 782.
[45] Chesterman op cit note 9 at 79.
[46] Ibid.
[47] Ibid at 80.
[48] Ibid.
[49] Ibid.
[50] S/PV.2109 (1979) para 10, 18, 20, 36, 50, 59, 91 United Nations Security Council Official Records 2109th Meeting: 1979; S/PV.2110 (1979) para 26, 39, 48-49, 58, 65.
[51] Rodley op cit note 22 at 782.
[52] Rodley op cit note 22 at 783.

The intervention by France has been described as the 'best example of humanitarian intervention.'[53] Teson has also described the French involvement in the overthrow of Emperor Bokasssa as humanitarian intervention '*par excellence*.'[54] On its own part, France failed to justify its involvement in Central African Empire in any clear terms.[55] Evidence has however shown that France must have acted for a number of reasons which included Bokassa's poor human rights records and economic concerns on the part of France.[56] France was reported to have withdrawn its financial support to the country shortly before the time of the coup and France also had concerns with the continued stay in power of a government not sympathetic to French economic interests.[57]

This incidence never came before the United Nations or the African Union and while the Soviet Union, Senegal and Zaire condemned the action, states were largely mute on the matter.[58] It must be stated that this incidence fails as an example of state practice in support of humanitarian intervention. The intervention of France is hard to evaluate and scholars have said that while France may have had humanitarian concerns, the intervention seemed primarily to have been economically motivated.[59]

3.2.7 *Intervention in Kurdish North Iraq*

The government of Saddam Hussein was responsible for massive political imprisonment, torture, murder, enforced disappearance and use of chemical weapons against the Kurdish population.[60] These atrocities became regular tools of governance against the opposition in the Kurdish area of northern Iraq.[61] This political unrest led to a humanitarian catastrophe that saw the influx of over 400,000 refugees from North Iraq into Turkey.[62] This situation led to the establishment of a no-fly zone in northern Iraq led by the United Kingdom, France and United States troops. The no-fly

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[53] Sean D Murphy *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996) Philadelphia: University of Pennsylvania Press 108.
[54] Chesterman op cit note 9 at 81.
[55] W Rosenberger & H.C. Tobin *Keesing's Contemporary Archives* Vol. 25 (1979) London: Keesing's Publication Limited 29933-34.
[56] A. Mark Weisburd *Use of Force: The Practice of State since World War II* (1997) Pennsylvania: Pennsylvania State University Press 226.
[57] Chesterman op cit note 9 at 82; Ibid.
[58] Ibid.
[59] Ibid at 227.
[60] Rodley op cit note 22 at 785; Chesterman op cit note 9 at 131.
[61] Rodley op cit note 22 at 785; Chesterman op cit note 9 at 131.
[62] Rodley op cit note 22 at 785.

zone was to allow for the delivery of aid and movement of refugees. In effect, the no-fly zone created an autonomous Kurdish zone in northern Iraq.[63]

In defending their actions, the West claimed that their action was 'consistent with' or 'in support of' Security Council Resolution 688.[64] The reliance on a Security Council resolution for their action goes to show that these states understood that they had no right to intervene without a Security Council resolution. However, the resolution in question while condemning the repression of the Kurdish population did not authorize the enforcement action.[65] All that the resolution did was to admonish member states of the UN to contribute to humanitarian relief efforts.[66] Thus, this case also fails to give support to the argument that a customary international law principle recognising unilateral humanitarian intervention has emerged.

3.2.8 *NATO intervention in Kosovo, 1998*

Slobodan Milosevic had been responsible for violent repression of resistance to its annexation of Kosovo. His government was responsible for large scale killings and bombardments which was condemned by the Security Council who also placed an arms embargo on the regime.[67] On 24 March 1999, the North Atlantic Treaty Organization (NATO) began a bombing campaign in Kosovo. NATO did not rely on a Security Council resolution to justify this bombings, as there was none supporting the action.[68] The only justification that NATO could give for the bombing campaign was one of 'overwhelming necessity'.[69] The representative of the United Kingdom (UK) stated that the intervention was in order to 'prevent an overwhelming humanitarian catastrophe'.[70] The President of the United States on his part stated that his country and the allied forces were interested in preventing a bigger war if action was not taken and that humanitarian concerns were utmost in their minds.[71] The president of the European Union stated that NATO's

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[63] Ibid.
[64] Ibid.
[65] Ibid at 786.
[66] Nigel S. Rodley, 'Collective intervention to protect human rights and civilian populations' in Nigel Rodley (ed) *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992) Michigan: Brassey's Ltd 14, 28-34
[67] Security Council Resolution 1160 of 31 March 1998.
[68] Rodley op cit note 22 at 786.
[69] Ibid at 787.
[70] Ibid.
[71] President Clinton's address on airstrikes against Yugoslavia, in Chesterman op cit note 9 at 211.

action was pursuant to a moral obligation to prevent a humanitarian catastrophe in Europe.[72] It was only the UK and Netherlands who argued that the action was a legal response to the humanitarian catastrophe in Kosovo.[73]

Prior to the attack, the United Kingdom was of the view that NATO would need an authorization of the UN before it could intervene in the crisis in Kosovo.[74] Russia had also issued a statement saying that 'the use of force against a sovereign state without due sanction of the UN Security Council would be an outright violation of the UN Charter'.[75] The implication of these statements is that NATO member states understood that humanitarian intervention could only be embarked upon pursuant to a UN authorization. Unilateral military intervention without the requisite UN resolution remains prohibited under international law. Subsequent to the interventions, the United Kingdom took the position that Kosovo was a special case and it should not be interpreted to mean that NATO had created 'a new legal instrument' permitting humanitarian intervention without a Security Council authorization.[76] The then UK foreign minister stated expressly that the NATO incidence is not a precedent for unilateral interventions.[77] It is therefore unthinkable that some would pose the Kosovo incidence as authority for the claim that state practice now supports unilateral interventions. The Security Council never condemned the NATO actions nor was the matter discussed before the General Assembly. The silence of the Security Council may not however be interpreted to mean that it was approving the intervention.[78] This is especially because a good number of strong NATO member states also constitute the permanent members of the Security Council. It is therefore unlikely that they would criticise their own actions.

3.3 Opinio Juris and Humanitarian Intervention

It is necessary to examine whether *opinio juris* supports the notion that unilateral interventions are legal. Is there a widespread acceptance that unilateral humanitarian intervention is lawful?

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[72] Chesterman op cit note 9 at 211.
[73] Ibid.
[74] J. Steele *Learning to Live with Milosevic* (1998) Transitions 5.
[75] 'Britain and U.S. may have to go it alone', *Electronic Telegraph,* 8 Oct. 1998 in Nicholas J. Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2002) Oxford: Oxford University Press 261.
[76] Ibid at 262.
[77] Ibid.
[78] Rodley op cit note 22 at 787.

The United Nations General Assembly (GA) has persistently rejected the legality of unilateral intervention.[79] The General Assembly's Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, for example, provides that 'no state has the right to intervene, directly or indirectly, *for any reason whatever*, (emphasis added) in the internal or external affairs of any other state'.[80] The GA was more direct in its Declaration on Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations when it stated emphatically that 'humanitarian assistance should be provided with the consent of the affected country…'[81] The GA took this same position when it condemned the United States intervention in Kosovo.[82] The GA reaffirmed that 'no state may use or encourage the use of economic, political or any other type of measures to coerce another state.'[83] Thus, unilateral intervention is still recognized as illegal within the framework of the GA and its practice post-1945 cannot lead to a conclusion that it has come to perceive unilateral intervention as legal.

Furthermore, it must be noted that intervening states have very often relied on other grounds as the basis of deploying their armed forces to the affected states. The fact that states have generally been reluctant to evoke a right of unilateral humanitarian intervention indicates that there is no evidence of the opinio juris necessary to support the claim that such a right exists. States like Iran and Tanzania, for example relied primarily on self-defence as the justification for their actions.[84] Vietnam on its own part claimed that the intervention in Cambodia was a response to 'large-scale aggressive war.'[85] The ECOWAS interventions were said to have been embarked upon pursuant to an invitation by the legitimate government of the affected states.[86] NATO defended its invasion of Kosovo on the ground that there was a prior Security Council resolution authorizing the intervention.[87] The focus is not on the credibility of these justifications but on the fact that these countries sought for some other grounds for legitimizing these interventions other than

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[79] J. L. Holzgrefe 'The humanitarian intervention debate' in J. L. Holzgrefe & Robert Keohane, (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) Cambridge: Cambridge University Press 47.
[80] *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States* (1965), GA Res. 2131, UN Doc. A/6220
[81] *Declaration on Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (1991), GA Res. 46/182, UN Doc. A/RES/46/182
[82] GA Res. 54/172, UNGAOR, UN Doc. A/RES/54/172
[83] Ibid.
[84] Franck & Rodley op cit note 27; Holzgrefe op cit note 79 at 48.
[85] Foreign Ministry Statement (6 January 1979) quoted in Holzgrefe op cit note 79 at 48.
[86] Karsten Nowrot & Emily W. Schabaker, 'The use of force to restore democracy: International legal implications of the ECOWAS intervention in Sierra Leone' (1998) 14 *American University International Law Review* 321-412.
[87] Holzgrefe op cit note 79 at 49.

humanitarian intervention.[88] The concerned states did not think that they had a right of humanitarian intervention which could have justified these interventions.

A good number of intervening states in the 1990s sought the approval of the Security Council before embarking on those interventions.[89] Such interventions such as the UNITAF operation in Somalia (1992), French intervention in Rwanda (1994), the United States intervention in Haiti in 1994, Australian deployment of INTERFET in East Timor (1999) and the proposed intervention of a coalition of states, including Canada in Zaire, all sought for Security Council authorisation before their interventions.[90] The act of seeking permissions by states shows that they did not perceive themselves as having the right to intervene in a foreign state without a Security Council resolution. The understanding among states is that international law does not permit unilateral use of force except for the purposes of self-defence. The retroactive authorization of certain unilateral interventions, such as the French and the Nigerian-led ECOMOG intervention in Central African Republic and Sierra Leone respectively, also points to the fact that the international community recognizes that unilateral intervention is illegal without a Security Council resolution. Thus, we conclude that neither state practice nor *opinio juris* post-UN Charter have established a customary international law principle which legalizes unilateral humanitarian intervention.

3.4 Conclusion

The reluctance of states to rely on humanitarian intervention as justification for their intervention in a foreign state reveals that they do not believe that such a justification is permissible under international law. States would rather rely on self-defence and other more likely principles. The reaction of the international community against intervening states and the position of the UN Security Council, the General Assembly, and other regional organizations reveals that they have consistently rejected this principle whenever a state raises such as justification for its intervention in another state. Therefore, humanitarian intervention remains illegal both under the UN Charter and under present CIL. No legal justification exists for humanitarian intervention.

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[88] Ibid.

[89] Brian D. Lepard *Rethinking Humanitarian Intervention* (2002) Pennsylvania: Pennsylvania State University Press 336.

[90] Ibid.

Humanitarian intervention must rely on broader principles of legitimacy to establish its permissibility.

CHAPTER FOUR

HUMANITARIAN INTERVENTION: ILLEGAL BUT LEGITIMATE

4.1 Introduction

> (...) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?'[1]

The Independent International Commission on Kosovo reached the conclusion that the NATO intervention in Kosovo was 'illegal but legitimate.'[2] This leads one to the question of whether an action can be legitimate despite being illegal and what must happen to the law where it has lost its legitimacy. Should the law continue to be upheld despite its lack of legitimacy or should the law be disobeyed and discountenanced when its legitimacy has become lost? Alternatively, can we say that a norm loses its legal character if it has no more legitimacy?

This chapter addresses whether humanitarian intervention can be justified on moral grounds, and explores what the moral legitimacy of unilateral humanitarian intervention means for the law in this area. In arguing for the legitimacy of humanitarian intervention, I will rely on the sovereignty/intervention argument which is sometimes used to argue that humanitarian intervention is legal. However, I will go further to examine other factors outside of the law which could make humanitarian intervention legitimate.

4.2 The Legitimacy of Humanitarian Intervention

It has been shown from the preceding chapters that humanitarian intervention without a Security Council resolution remains unlawful both under the United Nations Charter and under customary international law. Can humanitarian intervention be held legitimate on some other grounds despite its express prohibition by law?

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[1] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) Ottawa: International Development Research Centre VII.

[2] Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) Oxford: Oxford University Press 4, 167.

As the Kosovo Report makes clear, law is not the only basis upon which conduct is legitimated in the global sphere. Legitimacy conveys a wide range of meanings depending upon the context in which the word is used. Legitimacy could refer to religious, moral, philosophical or political standards of a high quality upon which the validity or acceptability of a law, a form of government or the exercise of power is judged.[3] Legal positivism restricts the validity of law to the due process of law making by constituted authorities and gives moral principles a very limited role in the definition of legitimacy.[4] The restriction of legitimacy to that which is permissible under the law alone would lead to situations that are legally permissible but humanly unjustifiable. The danger of such restriction or limitation of legitimacy is exemplified in apartheid South Africa and Nazi Germany. The racist and anti-Semitist laws were passed under the due process of law recognized under both regimes but were nevertheless illegitimate as they violate the principles of natural justice and morality. Thomas Franck explains the absurdity of this conception of legitimacy with an illustration. He tells the story of two boys whose fathers had a fight, as a result of which one of the fathers instructed his son 'never to have anything to do' with the other boy. On the next day, this boy saw his friend who could not swim drowning and decided to help him. This was obviously contrary to his father's injunction but his action is definitely justifiable and punishing him for rescuing the boy would be 'morally wrong'.[5] Support for the view that certain conduct, even though illegal, would be permissible under certain circumstances is also found in the cases of *Regina v. Dudley and Stephens* and *United States v. Holmes*, where the courts mitigated the punishment for murder when express principles of legality collided with the 'common sense of justice and morality'.[6] Indeed, some authors seem to regard the *legitimacy* of conduct on a par with its *legality*. Skinner suggests that a course of action is prohibited if it cannot be *legitimated*,[7] and Wheeler points out that this legitimacy

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[3] Peter Malanczuk *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993) Amsterdam: Het Spinhuis 5.
[4] H L A Hart 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 593 at 596, 601.
[5] Thomas M. Franck *Recourse to Force: State Action against Threats and Armed Attacks* (2002) Cambridge: Cambridge University Press 178.
[6] Ibid.
[7] Q. Skinner 'Analysis of political thought and action' in J. Tully (ed) *Meaning and Context: Quentin Skinner and His Critics* (1988) Cambridge: Polity Press 117.

depends on finding a ground upon which to base such action.[8] These grounds can be legal, prudentially rational, morally acceptable or a combination of these various bases.[9]

This implies that if there is a principle upon which humanitarian intervention could rely, then an otherwise illegal conduct would be tolerated as there is a legitimizing principle upon which it is based. As it has been shown from the preceding chapters, no such legal principle exists. There is therefore a need to make recourse to some other principle outside the precincts of law to legitimize humanitarian intervention. In arguing for the legitimacy of humanitarian intervention, I rely on some arguments, such as a particular interpretation of sovereignty, which have been used to argue for the legality of humanitarian intervention. However, my position is that humanitarian intervention is unlawful. I am therefore considering these arguments in the context, not of the formal process of law making, but the wider scope of morality and principles of natural justice.

Humanitarian intervention can be justified on grounds of justice and morality as mentioned earlier. The philosophical underpinnings of the legal principles and rules dealing with human rights and the use of military force are founded on 'the most basic moral principles and intuitions.'[10] These principles are an intrinsic attribute of mankind and possess an inherent significance which human beings, irrespective of where they are, cannot alter.[11] Human rights violations in any part of the world shock the conscience of all mankind and it is the duty of states everywhere to ensure the protection of these rights for everyone under their jurisdiction.[12] When a state becomes unwilling or unable to protect the rights of those under its jurisdiction, a corresponding responsibility falls on the international community to rescue the members of such a state.[13]

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[8] Nicholas J. Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2000) Oxford: Oxford University Press 8.
[9] A. John Simmons *Justification and Legitimacy: Essays on Rights and Obligations* (2001) Cambridge: Cambridge University Press 123.
[10] Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* 3 ed (1973) New York: Transnational Publishers 14.
[11] J. L. Holzgrefe 'The humanitarian intervention debate' in J. L. Holzgrefe & Robert Keohane, (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) Cambridge: Cambridge University Press 19.
[12] Secretary-General, 'Secretary-General defends, clarifies 'Responsibility to Protect' at Berlin event on 'Responsible Sovereignty: International Cooperation for a Changed World,' SG/SM/11701, (July 15, 2008), available at http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm accessed 10 December 2016.
[13] International Commission on Intervention and State Sovereignty op cit note 1.

This reasoning is founded upon the notion of *societas humana*- the universal community of humankind- put forward by a seventeenth century jurist, Hugo Grotius.[14] Grotius stated that when a prince inflicts tyranny on his subjects, other states are justified to intervene against such a state.[15] The right of kings to demand punishment for injuries committed goes beyond injuries committed against them or their subjects and includes injuries that 'excessively violate the law of nature or of nations in regard of any person whatsoever.'[16] This universal community of mankind implies a moral duty and right to help others outside a state's immediate jurisdiction.[17] The community of states cannot sit back and do nothing while thousands and perhaps millions of people are being tortured and murdered by authoritarian regimes. As the immediate past Secretary-General of the UN puts it, 'it would be neither sound morality, nor wise policy, to limit the world's options to watching the slaughter of innocents…'[18] He continues that actions must be taken and such actions need not wait for a Security Council resolution or 'pictures of unfolding atrocities that shock the conscience of the world.'[19] This general duty to help others is the most basic ground within this common morality for interference in the internal affairs of one nation by outsiders including international bodies.[20] This normative ground, he continues, is there and will justify the unlawful use of force in extreme situations.[21]

The need for a common front in the protection of human rights was stressed by the International Court of Justice when the court stated that 'when a common effort is made to promote a great humanitarian object… it is rather the acceptance of common obligations in order to attain a high objective for all humanity that is of paramount importance."[22] When faced with heinous crimes such as torture, genocide, rape, crimes against humanity and war crimes, the safeguard of our common humanity becomes of paramount importance over and above legal concepts and ideologies. This is especially because, in those moments, legal concepts often serve as

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[14] Hugo Grotius, *De Jure Belli ac Pacis*, Book II (1925) Oxford: Oxford University Press, ch. 25 quoted in Holzgrefe op cit note 11 at 26.
[15] Ibid.
[16] Ibid.
[17]Joseph Boyle 'Natural law and international ethics' in Terry Nardin & David R. Mapel (eds) *Traditions of International Ethics* (1992) Cambridge: Cambridge University Press 123.
[18] Secretary General op cit note 12.
[19] Ibid.
[20] Boyle op cit note 17.
[21] Ibid.
[22] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* 1951 I.C.J. 23 (May 28, 1951).

instruments in defence of the oppressor and not the people of the states involved. The welfare and the security of rights for the individuals must trump the defence of the legal concepts of sovereignty and non-intervention. The justification for humanitarian intervention lies in the fact that important values of human rights are promoted by the intervention and such protection of life is preferable to the upholding of legal concepts that only create a leeway for the perpetration of gross human rights abuse. The OAU Report on the Rwandan genocide revealed that an appropriate intervention by a few states could have prevented, halted or reduced the Rwandan genocide.[23] In such situations, the higher law of morality compels one to act to save the lives of millions that would be lost.[24]

Furthermore, the rights and powers of a state are derived from the rights of its citizens.[25] Legitimate political authority is one which is exercised for the good of the members of the state.[26] As Hobbes argues, the sovereign enjoys legitimacy not mainly because authority has been conferred on him by covenants but 'because and only as long as he effectively provided protection to the subjects.[27] Sovereignty is 'morally speaking, an empty vessel' that needs to be justified.[28] The fundamental justification for the continued existence of a state and the protection of its sovereignty is the fact that it ensures the protection and enforcement of the natural rights of those within its jurisdiction. Sovereignty must be established on some higher order and values which a state which enjoys that sovereignty must seek to attain.[29] Sovereignty only has value to the extent which it helps to secure and promote human rights.[30] A government's exercise of sovereign powers is a delegated function and this exercise of powers enjoys legitimacy when it takes into concerns the interest of the persons involved and protects their human rights.[31] A state must display a commitment to the protection of the human rights of its citizens. Thus, a government only enjoys legitimacy when it acts as an agent of and for the good of its citizens.

[23] OAU Report, "The Preventable Genocide," Executive Summary, p 9 para E.S. 44.
[24] Franck op cit note 5 at 182.
[25] Malanczuk op cit note 3; Teson op cit note 10 at 16.
[26] Allen Buchanan 'The internal legitimacy of humanitarian intervention (1999) 7 *Journal of Political Philosophy* 71-87 at 74-75.
[27] Thomas Hobbes *Leviathan* in Anne Peters 'Humanity as the A and Ω of sovereignty' (2009) 20(3) *European Journal of International Law* 513-544 at 519.
[28] David Rodin *War and Self-Defense* (2003) Oxford: Clarendon Press 119.
[29] Anne Peters 'Humanity as the A and Ω of sovereignty' (2009) 20(3) *European Journal of International Law* 513-544 at 518.
[30] Ibid at 514.
[31] Ibid at 519.

The continuance of that legitimacy depends on the continued observance of the rights of everyone by those in power.[32] A government loses its domestic and international legitimacy once it becomes guilty of gross violation of the human rights of its members.[33] Having transgressed the very purpose of its existence, such a government lacks any moral right to claim non-intervention as the purpose for which it enjoys sovereignty has been defeated. The normative value of sovereignty is inferred from the need to respect, protect and promote human rights.[34] States are only instruments and their primary function is to serve the interests of their members as 'legally expressed in human rights.'[35] Humanity is the totality and essence of sovereignty and it limits, qualifies and determines the extent of sovereignty. When a state begins to practice tyranny and deviates from such values, the sovereignty which it hitherto enjoys erodes and gives room for intervention.

4.3 Tests for Justification

To avoid or at least reduce the abuse of the argument that humanitarian intervention is permissible in certain circumstances, it is necessary that certain guidelines be put in place to regulate such interventions. It must be stated that each case must be considered based on its facts. A plea for mitigation 'is not merely a summons to temper the law with considerations of moral legitimacy but is also a reminder to consider the specific facts of a case before applying general normative principles.'[36] Thus, it must be emphasized that beyond providing general rules or guidelines, there is a need that each case be analysed based on its own facts rather than on a general basis of what is permissible and what is not. The early natural law theory in just war provide certain principles upon which the *justness* of force is to be judged and I shall rely on some of those principles in setting out the safeguards that will help prevent an abuse of humanitarian intervention.

1. Gravity of the situation

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[32] Teson op cit note 10 at 16.
[33] Ibid.
[34] Peters op cite note 29 at 513.
[35] Ibid at 514.
[36] Franck op cit note 5 at 185.

The situation must reach a certain level of gravity before intervention can be justifiable. It must involve the existence of human rights violation on a significantly large scale[37] and on a sustained basis.[38] There must be much to gain or prevent in terms of human casualties and security.[39] It is hardly possible to quantify the amount of lives lost and the amount to be rescued in an intervention: the task therefore is to weigh the foreseeable result of an intervention against the foreseeable result of non-intervention.[40] Humanitarian intervention must rescue more lives than it endangers. Humanitarian intervention would be permissible in cases where there is deprivation of basic human rights, the deprivations are large scale; they are deliberately inflicted and are imminent or on-going.[41] The existence of such crimes as genocide, ethnic cleansing, crimes against humanity or war crimes would provide a ground for the justifiability of unilateral intervention.

2. Neutrality

Neutrality is a central issue in the debate regarding intervention.[42] Neutrality exists when the intervening states acts impartially and according to certain standards.[43] Neutrality can be measured by the conferment of an equal benefit, detriment and punishment to the parties involved in the conflict.[44] It refers to fairness to both parties in its actions. The actions of the intervening state must be geared towards the restoration of human rights in the state rather than in support of the political goals and aspirations of one group against another except where these goals and aspirations have a direct and immediate bearing on the state of human rights in the state.

3. Intention

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[37] Eric A. Heinze *Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Intervention* (2009) Albany: State University of New York Press 33.
[38] Independent International Commission on Kosovo op cit note 2 at 193.
[39] Heinze op cit note 37 at 43.
[40] Ibid at 45.
[41] Ibid at 43.
[42] Teson op cit note 10 at 113.
[43] Brian D. Lepard *Rethinking Humanitarian Intervention* (2002) Pennsylvania: Pennsylvania State University Press 203.
[44] Ibid.

An intervening state must be acting with humanitarian reasons.[45] The overriding objective of the intervention must be the direct protection of the victimized population.[46] This requirement is founded upon the just war tradition which provides that war should be based on a 'righteous intent'.[47] A war must be intended to 'promote a good cause' or to stop an evil.[48] Humanitarian concern need not be the sole reason for which the state acts; however, it must occupy a central and major reason for the state's intervention.[49] This is especially because states rarely act from solely humanitarian motives.[50] However, the lack of a primarily humanitarian intention would render such intervention impermissible.

Intention here refers to the conduct of the state and its willed consequence(s).[51] In other words, it refers to what the state had in mind, the result which the state aimed at achieving by its intervention. It refers to the consequences which were within the state's contemplation at the time of action. An intervention would not be rendered immoral and unacceptable simply because certain unforeseen and unwilled consequences resulted from it. Intention has been distinguished from motive.[52] While intention is what a person intends to achieve, motive refers to the reason or the 'further goal' which one wishes to accomplish with the intended act.[53] For example, if I see a drowning child and I rescue him; my intention could be to save him from death. Motive on the other hand would be my reason for wanting to save him, which could be because I see it as a religious obligation to help whoever I can or because I just want those around to think I am a super-swimmer. What we are concerned about here is not the motive but the intention. If a state intends to save the victims of an oppressive regime and is successful in its attempt to do so, then we have a justifiable intervention. It is irrelevant that in doing so, the state is able to advance some of its interest as, in fact, states will always seek to advance their interest internationally.[54] It is necessary to add that states must be willing to assist the state in nation building after hostilities must have ceased as this becomes a pointer to their primary intention for intervening.

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[45] Teson op cit note 10 at 113.
[46] Independent International Commission on Kosovo op cit note 2 at 194.
[47] Teson op cit note 10 at 115.
[48] Ibid.
[49] Ibid.
[50] Oxford Handbook on the Use of Force in International Law, p 789
[51] Ibid.
[52] Ibid at 117-118; John S. Mill *Utilitarianism* (1998) Oxford: Oxford University Press 65.
[53] Ibid.
[54] Ibid at 118.

4. Security Council paralysis

The position of the Security Council as the legal authority for the collective use of force must always be recognised. The unilateral use of force on humanitarian grounds must be subsequent to an inability of the Security Council to reach an agreement in the face of a continued humanitarian catastrophe. Unilateral intervention should only be considered where a Security Council veto as constituted a deadlock and rendered the Council incapable of coming to a decision on the matter. Where there is an explicit threat by a permanent member to veto a resolution authorizing intervention, such threat would suffice to meet this requirement.[55]

5. Necessity

The principle of necessity occupies a prominent role in the rules concerning self-defence. For this criterion to be met, it must be shown that the action was 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'[56] Force must be employed as a last resort. The intervening states or some other state or international organisations must make recourse to diplomacy and other political and economic sanctions before the use of force can be considered. Force should only be used when other forms of coercion has failed and must be capable of achieving the objective.[57] If other lesser forms of coercion have been tried by other states and have failed, an intervening state need not try those alternatives before intervening.[58]

6. Proportionality

The level of force used by the intervening state or group of states must be the barest minimum necessary for securing a cessation of the violations.[59] The scale, duration and intensity of force

[55] Nigel Rodley 'Humanitarian intervention' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (2015) Oxford: Oxford University Press 790.
[56] Letter from Mr. Webster to Lord Ashburton, August 6, 1842, cited in Lori F. Damrosch, Louis Henkin, Sean D Murphy et al, *International Law Cases and Materials* 5 ed (2001) St Paul: West Publishing 923.
[57] Rodley op cit note 55.
[58] Ibid at 791.
[59] Ibid.

used should not be beyond what is necessary to stop the humanitarian catastrophe.[60] The actions of the intervening state must 'cure, rather than aggravate' the human rights situation.[61]

7. Accountability

Any action taken in intervention must be reported to the Security Council and the UN General Assembly. This is line with the provision of Article 51 of the UN Charter, which requires that all action taken in self-defence must be reported to the Security Council. The Security Council serves as the primary accountability system for the international community and offers a significant level of political legitimacy for the action of states with regards to the use of force.[62] It is also necessary to emphasize the role of regional accountability systems such as the Economic Community of West African States, the African Union, the European Union and the Organisation of American States. These regional organisations have a degree of legitimacy over member-states and would be in a position to grant some degree of political legitimacy to a unilateral humanitarian intervention.[63]

4.4 UN Charter: The Need for a Review

The law as it stands does not permit unilateral humanitarian intervention.[64] Any such use of force requires the authorization of the UN Charter.[65] However, it has been shown that despite this illegality of humanitarian intervention, certain situations make it legitimate to use force to protect human rights in a foreign state. This shows a clear gap between the law and the legitimacy of humanitarian intervention. It is therefore necessary to bridge this gap between law and legitimacy to articulate a legal framework within which human rights can be pursued. As Professor Brierly stated,

> '…situations perpetually arise which fall outside all rules already formulated. Law cannot and does not refuse to solve a problem because it is new and unprovided for; it meets

[60] Centre for Law and Globalization, *Six Principles Governing the Responsibility to Protect in Humanitarian Interventions*, available at www.clg.portal.com accessed 7 February 2017
[61] Rodley op cit note 55 at 791.
[62] Ibid at 792.
[63] Ibid.
[64] Article 2(4) of the UN Charter.
[65] Article 39, 42 of the UN Charter.

> such situations by resorting to a principle, outside formulated law…appealing to reason as the justification for its decisions.'[66]

A way must therefore be found to bridge any gap which arises between the law and the widely shared moral values to ensure that the law remains legitimate.[67]

As long as the UN Charter remains unchanged, states and international actors will be uncertain as to how to respond to humanitarian catastrophes. The present constraints imposed by international law on the non-defensive use of force have proved inadequate for the protection of victims of human rights violations and the maintenance of international peace and security. The provisions of the UN Charter on the use of force are no longer able to meet up with humanitarian emergencies around the world. The collective security system which the Charter made provision for has been unable to respond timeously to current situations due to the use of veto by permanent members of the Council. The Charter as it currently stands is not satisfactory for 'a world order that is currently being called upon to respond to humanitarian challenges.[68]

The legitimacy of a law becomes questionable if its implementation produces terrible and inhumane consequences.[69] The law fails when it leads to absurd results and offends the common sense of what is right, and just.[70] To ensure that the current UN Charter does not lose its legitimacy as law, it is necessary to amend it in order to be able to meet up with the current humanitarian realities. Passivity cannot be encouraged in the face of these atrocities and as Franck has asked, what benefit can a legal order derive from becoming an accomplice to a moral depravity?'[71] It must be understood that 'moral reasoning is a necessary ingredient of legal reasoning.'[72] There is a direct and inseparable connection between legal and moral propositions.[73]

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[66] J.L. Brierly *The Law of Nations* 3 ed (1949) Oxford: Clarendon Press 24.
[67] Franck op cit note 5.
[68] Independent International Commission on Kosovo op cit note 2 at 185.
[69] Franck op cit note 5 at 175.
[70] Ibid at 178.
[71] Ibid at 183.
[72] Teson op cit note 10 at 11.
[73] Ronald Dworkin *Taking Rights Seriously* (1978) Cambridge: Harvard University Press 7.

There is a need for a review of the UN Charter in order to bridge the gap between Charter law and moral legitimacy and 'between strict legal positivism and a common sense of moral justice.[74] The Independent Commission on Kosovo also made this call in its report asking that diligent work be done to bridge this gap between legality and legitimacy and bring the UN Charter into agreement with international moral consensus.[75]

A review of the law will ensure that the Charter mechanism can adequately provide for and protect the interest of people who fall victim to gross human rights at the hands of their government and ensure timely action on their behalf. This review will also help bring certainty to the question of humanitarian intervention and help create clear legal background upon which such interventions could be embarked upon by states. This certainty is currently absent, a situation which has fuelled the abuse of the concept of humanitarian intervention.

However, an amendment of the UN Charter giving room to unilateral interventions is unlikely. This is because states are generally protective of their sovereignty and would generally not agree to a legal framework that makes sovereignty penetrable by another state. An earlier call by the former British Foreign Minister Robin Cook for the UN to formulate new norms for humanitarian intervention was rejected by the General Assembly of the UN.[76] States are more concerned with loss of sovereignty than allowing external guarantee of human rights for their citizens. The possibility of an express amendment which loosens the sovereignty of state may therefore be impractical.

Furthermore, given the colonial history of the African continent, it is unlikely that African states would agree to this system. Humanitarian intervention has been termed as a 'big-power agenda to recolonize Africa' due to its primary focus on African crisis.[77] Some perceive it as an opportunity for stronger states to impose their will on the less developed states, especially in

[74] Franck op cit note 5 at 175.
[75] Independent International Commission on Kosovo op cit note 2 at 187.
[76] Franck op cit note 5 at 183.
[77] Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (2009) London: Verso 300.

Africa.[78] For these reasons, a proposal for a Charter amendment for this purpose will meet more disapproval than approval.

4.5 The Emergence of a new Customary International Law Principle

International law derives from treaties and customary international law. Where a practice is not provided for under treaty law, such practice will be legal if it conforms to state practice and *opinio juris*. Given the improbability of a UN Charter amendment, CIL remains the only route through which the law on the use of force can maintain its legitimacy by meeting up to the humanitarian catastrophes that emerge. States could maintain a practice of humanitarian intervention which though unlawful, would be considered legitimate given the reasons already discussed. If they keep within the constraints suggested above, such interventions would be met with little or no criticisms from other states and could eventually lead to the creation of a new customary international law that recognizes humanitarian intervention.[79]

Humanitarian intervention could be abused and this possibility has led to a reluctance among many states and jurists from accepting this concept.. Allowing for a humanitarian exception to the use of force against states may give room for aggressive states to invade weaker states under humanitarian pretexts. The consequent loss, suffering and death would outweigh any humanitarian objective what could have been sought to be achieved by allowing such exceptions.[80] Non-interventionists have therefore insisted on absolute non-intervention to prevent the possibility of abuses.[81] However, the possibility of abuse should not lead to a total rejection of a moral justification for humanitarian intervention. As Professor Higgins illustrates, the principle of self-defence has been abused by states but the fact of abuse does not lead to the eradication of the use of force for self-defence.[82] The role of norms, she continues, is not to

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[78] Paul Alexander Haegeman 'Humanitarian intervention and the 'Responsibility to Protect' (R2P) as an instrument, extension and continuation of neo-colonialism and post-modern imperialism: The Libyan Case' (2011) Center for Syncretic Studies available at https://syncreticstudies.com/2015/05/02/responsibility-to-protect-as-imperialism-the-libyan-case-of-2011/ accessed 15 February, 2017.

[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits Judgment* I.C.J. Reports 1986 p 14 para 207.

[80] Teson op cit note 10 at 108.

[81] Ibid at 109.

[82] Rosalyn Higgins *International Law and the Avoidance, Containment and Resolution of Disputes: General Courses on Pubic International Law* 230 Recueil des cours (1991) Leiden: Martinus Nijhoff 315.

'remove the possibility of abusive claims ever being made'.[83] A claim for intervention in exceptional case should not be out rightly rejected because these claims may be unjustly made in other instances.[84] Therefore, a fact and context specific analysis is necessary for each case rather than a broad based legal exemption of the use of force or an outright rejection of the idea that unilateral intervention is permissible in certain instances.

Given the nature of wars and the loss of life that results therefrom, it has been argued that war cannot serve any humanitarian ends. Teson counters criticism of intervention with the proposition that it is also necessary to justify non-intervention where intervention would end a massacre at a reasonable cost.[85] This is because non-intervention allows the continued perpetuation of loss of life and violence which intervention could have prevented. It is therefore necessary to show that despite the loss of life that may result from an intervention; the intervention may nevertheless be necessary and morally justifiable.

A systemic practice of intervention by states which puts all the above stated factors in place will eventually lead to a CIL that allows unilateral intervention on behalf of people of a foreign state whose state has become unwilling or unable to protect them from gross violations of human rights. This system would also ensure that the practice is not abused by ensuring that the yardstick for legality is maintained by all intervening states.

[83] Ibid.
[84] Ibid at 316.
[85] Teson op cit note 10 at 137.

CHAPTER FIVE

5.1 Conclusion and recommendations

The UN Charter regime on the use of force provides a very wide prohibition of the use of force by states. The international community, having witnessed various regional and international armed conflicts in the twentieth century, and determined to prevent such an occurrence, prohibited the use of force via Article 2 (4) of the UN Charter. The only exemption to this prohibition is that provided for in Article 51 of the UN Charter, which allows for the use of force in defence of an armed attack against a state. Although there has been an infraction of the provision on the use of force in state practice, these practices have not evolved into a new customary international law permitting humanitarian intervention. States have often relied on other grounds other than humanitarian intervention for such violations. The reliance on other grounds, especially self-defence, shows that the belief that states are legally obliged to intervene in another state under gross human rights abuses is yet to develop in international law. The present international law does not permit, either through treaty or customary international law, unilateral humanitarian intervention. All such interventions involving the use of military force must go through the scrutiny and approval of the UN Security Council pursuant to its powers under Article 39-44 of the UN Charter.

However, the reality of human suffering makes one question the existing legal framework on the unilateral use of force for humanitarian purposes. The extant law fails to do justice to humanitarian crisis which has become a regular occurrence in many states in the last fifty years. Government, which should be the primary guarantor of the peoples' rights, has often become the violator of the rights which it has a duty to protect. The inability of international law to do justice is further worsened by the deadlock usually experienced by the Security Council.

The UN Charter places the authority to decide the use of force other than self-defence in the Security Council. The intention of the drafters of the Charter was that the Security Council will be a unified forum from which the international community could use force against any threat to the peace, breach of the peace, or act of aggression.[1] Unfortunately, the exercise of veto powers by permanent members of the Security Council has made the Council ineffective and unable to

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[1] Article 39 of the UN Charter.

effectively intervene in the different humanitarian crisis across the world. Even when it does, it often intervenes too late.[2]

The inability of the UN charter to address these situations effectively has called the legitimacy of the Charter's provisions on humanitarian intervention into question. The last sixty years has shown that such a solution must lie outside the Security Council, or else the veto power being exercised by the permanent members of the Council will be an obstacle to any effective action. The validity of a law is impugned where such a law fails to do justice to the situation which that law is supposed to govern. Where a law loses its legitimacy, it becomes necessary to review such a law to adequately address the prevailing situations. In the context of this study, the UN Charter having become unable to solve the humanitarian catastrophes of this generation, it must be reviewed to ensure that there is a solution for millions of people across the world who are being subjected to human rights abuses in the hands of their own governments.

An amendment of the UN Charter to allow for unilateral intervention by states has become necessary. The UN Charter must be reviewed to allow for the legality of interventions without a Security Council resolution. This will ensure that there is a precise legal framework upon which states could intervene and end gross human rights violations outside their territories. It must be maintained that since unilateral intervention can easily be abused, the Charter must provide for specific guidelines to ensure that the intervention is not abused. However, the likelihood of abuse should not discourage states from amending the Charter and providing for a unilateral right to intervene in a state involved in gross human rights abuses.

The probability of an amendment of the UN Charter is very low. This is because states are generally protective of their sovereignty and would view any attempt to permit unilateral force as an onslaught against their sovereignty. This is more so because the leaders of government are the one who will sit at the UN meetings where the amendment will be discussed. It is unlikely that they will agree to a system that weakens their authority over their subjects. Secondly, the suspicion of states regarding the intention of intervening states makes a review of the Charter less likely. This suspicion is stronger on the part of militarily weaker states, who often view

[2] Rwanda crisis

humanitarian intervention as an attempt at re-colonisation. This fear is further worsened by the fact that majority of the interventions in the past have been in the African continent.

However, this does not necessarily form a permanent barrier in the search for solutions to gross human rights violation. An intervention by a state would meet with less opposition and criticism from other states if it meets certain minimum standards.

5.2 Recommendations

I have argued that unilateral intervention would be tolerated where:

1. The situation on ground is grave i.e. there has been gross human rights violations. The human rights abuses must have reached certain levels of gravity.
2. The intervening state is neutral. Its primary goal is not to aid any of the parties to win or lose the battle but to ensure that lives are protected and human rights abuses are kept to the minimum. The intervening party must be fair to all parties involved in the dispute.
3. The intention of the intervening state is be to protect human rights. An intervention must not be for economic or political reasons. It must be conceded that states hardly act for solely humanitarian reasons. However, the protection of human rights must be the major and central reason for which the state intervenes.
4. The military intervention of the state must also be shown to be necessary. Military intervention would not be justified if a diplomatic or non-military means would have stopped the humanitarian catastrophe.
5. It must also be shown that the Security Council is deadlocked in addressing the situation. The Security Council retains the primary responsibility to use force other than in self-defence and until the Security Council has been unable to adequately intervene, unilateral intervention is not permissible.
6. The force used by the intervening forces must be proportional. The intervening states must only use such force as is necessary to quell the human rights abuses and no more.
7. To maintain a level of accountability and monitoring, any intervention undertaken by a state should be reported to the Security Council, the General Assembly and the regional organisation of the continent where such a country is located.

Consistent practice of intervention which takes these safeguards into account could be met with widespread acceptance by states. This would eventually develop into a new customary international law principle that allows for unilateral use of force to protect human rights abuses.

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