THE VALIDITY OF
HUMANITARIAN
INTERVENTION
UNDER INTERNATIONAL LAW

BY

MÉCHELLE BENEKE

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MAGISTER LEGUM IN THE FACULTY OF LAW AT THE UNIVERSITY OF PORT ELIZABETH

24 February 2003

SUPERVISOR: PROF S V HOCTOR
ACKNOWLEDGEMENTS

There are hundreds of sources cited in the footnotes of this study, all of which are, of course, important. However, I would like to offer my sincere appreciation to a few individuals who are more than mere footnotes.

Thank you

• Capt Quinton Swanepoel, SO 1 Legal Advice and Litigation, of the South African National Defence Force Legal Satellite Office in Port Elizabeth for essential advice provided on extremely short notice.
• David Smith and Carol Beneke for your tireless assistance with research, without which I would still be in a dark corner of a library somewhere.
• Shannon Hoctor, for your invaluable guidance and patience as supervisor. Somehow, we muddled through.
• Family and friends, for your support and patience over the last two years, and for ensuring that fluctuations in my self-confidence and self-discipline did not have any detrimental consequences.

Finally and most importantly,

Thank you, God
For Your words, when mine dried up
For the sunrise, when the nights grew long
For Hope, when the desperate necessity for this study settled over me.
## CONTENTS

### SYNOPSIS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>1 THE DEFINITION OF HUMANITARIAN INTERVENTION</td>
<td>3</td>
</tr>
<tr>
<td>1. Dictatorial Interference</td>
<td>4</td>
</tr>
<tr>
<td>2. Internal Affairs</td>
<td>5</td>
</tr>
<tr>
<td>3. Armed Force</td>
<td>6</td>
</tr>
<tr>
<td>4. Third Party</td>
<td>6</td>
</tr>
<tr>
<td>5. Inhabitants</td>
<td>7</td>
</tr>
<tr>
<td>6. Human Rights Abuses</td>
<td>8</td>
</tr>
<tr>
<td>2 SOVEREIGNTY AND ITS INFRINGEMENT</td>
<td>10</td>
</tr>
<tr>
<td>1. The Content Of Sovereignty</td>
<td>10</td>
</tr>
<tr>
<td>2. Restrictions Upon Sovereignty</td>
<td>11</td>
</tr>
<tr>
<td>3. Violations Of Sovereignty</td>
<td>12</td>
</tr>
<tr>
<td>3.1 Intervention</td>
<td>13</td>
</tr>
<tr>
<td>3.1.1 Character Of Intervention</td>
<td>13</td>
</tr>
<tr>
<td>3.1.1.1 Economic And Political Intervention</td>
<td>14</td>
</tr>
<tr>
<td>3.1.1.2 Military Intervention</td>
<td>14</td>
</tr>
<tr>
<td>3.1.2 Motives For Intervention</td>
<td>15</td>
</tr>
<tr>
<td>3.2 Use Of Force</td>
<td>16</td>
</tr>
<tr>
<td>3.2.1 Exceptions To The Prohibition Of The Use Of Force</td>
<td>20</td>
</tr>
<tr>
<td>3 HUMAN RIGHTS AND THEIR PROTECTION</td>
<td>22</td>
</tr>
<tr>
<td>1. Conceptual Development</td>
<td>22</td>
</tr>
<tr>
<td>2. Recognition Of Human Rights After 1945</td>
<td>23</td>
</tr>
<tr>
<td>2.1 Human Rights Protection And The United Nations</td>
<td>24</td>
</tr>
<tr>
<td>2.1.1 Universal Declaration Of Human Rights</td>
<td>24</td>
</tr>
<tr>
<td>2.1.2 International Covenant On Civil And Political Rights</td>
<td>25</td>
</tr>
<tr>
<td>2.1.3 International Covenant On Economic, Social And Cultural Rights</td>
<td>26</td>
</tr>
<tr>
<td>2.2 Regional Recognition Of Human Rights</td>
<td>27</td>
</tr>
<tr>
<td>2.2.1 Europe</td>
<td>27</td>
</tr>
<tr>
<td>2.2.2 The Americas</td>
<td>27</td>
</tr>
<tr>
<td>2.2.3 Africa</td>
<td>28</td>
</tr>
<tr>
<td>3. The Importance Of Various Human Rights</td>
<td>29</td>
</tr>
<tr>
<td>3.1 The Right To Life</td>
<td>29</td>
</tr>
<tr>
<td>3.1.1 Convention On The Prevention And Punishment Of The Crime Of Genocide</td>
<td>29</td>
</tr>
<tr>
<td>3.2 The Right To Human Dignity And Bodily Integrity</td>
<td>30</td>
</tr>
<tr>
<td>3.2.1 Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment</td>
<td>30</td>
</tr>
<tr>
<td>3.2.2 Slavery, Servitude And Forced Labour</td>
<td>31</td>
</tr>
<tr>
<td>3.3 The Right To Equality</td>
<td>32</td>
</tr>
<tr>
<td>3.3.1 The International Convention On The Elimination Of All Forms Of Racial Discrimination</td>
<td>32</td>
</tr>
</tbody>
</table>
3.3.2 The International Convention On The Suppression And Punishment Of The Crime Of Apartheid 32
3.3.3 The Convention On The Elimination Of All Forms Of Discrimination Against Women 33
3.4 Crimes Against Humanity 33
3.5 Humanitarian Law 34
4. Enforcement Of Human Rights 35

4. HUMANITARIAN INTERVENTION BY STATES 40

1. If We Believe A Thing To Be Bad 40
2. If We Have A Right To Prevent It 41
2.1 Action Authorised By The United Nations 41
2.1.1 Action By The Security Council 41
2.1.2 Regional Organisations And States Under Security Council Mandate 43
2.1.3 Regional Organisations And States Under Article 51 44
2.1.4 General Assembly Recommendations 45
2.2 Customary International Law 46
2.2.1 Opinio Juris 46
2.2.2 State Practice 47
3. It Is Our Duty To Try To Prevent It 48
3.1 Moral Duty 48
3.2 State Interests 49
3.3 Responsibility To Protect 51
3.4 Necessity 52
4. Requirements For The Legitimate Use Of Force In The Protection Of Human Rights 53
4.1 Human Rights Abuses 54
4.1.1 Nature Of Human Rights 54
4.1.2 Extent Of Abuses 55
4.1.2.1 Evidence Of The Atrocities 58
4.1.2.2 How Many Deaths Will It Take To Know That Too Many People Have Died? 59
4.2 The Target State Is Unwilling Or Unable To Impede The Atrocities 60
4.2.1 Inability To Impede Atrocities 61
4.2.2 Lack Of Political Will To Impede Atrocities 61
4.3 The United Nations Refrains From Action 62
4.4 Exhaustion Of Pacific Remedies Commensurate With The Urgency Of The Situation 63
4.5 Multilateral Force 65
4.6 Support Or Non-Opposition Of The Majority Of The Members Of The United Nations 66
4.7 Right Intention 68
4.8 Reasonable Prospect Of Success 69
4.9 The Force Employed Must Be Proportional To The Exigencies Of The Situation 72
4.9.1 Proportionality Of Action 72
4.9.2 Proportionality In The Choice Of Targets 74
4.10 The Action Must Accord With International Humanitarian Law 75
5. To Damn The Consequences 78
6. The International Commission On Intervention And State Sovereignty 78
6.1 Synopsis Of The Report Of The International Commission On Intervention 79

6.2 The Recommendations Of The International Commission On Intervention 81

5 RESPONSIBILITY FOR THE PROTECTIVE ACTION 83

1. State Responsibility 83
   1.1 Aggression 85
       Framing a charge of aggression 85
   1.2 War Crimes 90
       Framing a charge of war crimes 90

2. Individual Responsibility 92
   2.1 Aggression 93
   2.1.1 Ad hoc Tribunals 93
   2.1.2 International Criminal Court 94
   2.2 War Crimes 94
   2.2.1 Ad Hoc Tribunals 94
   2.2.3 Domestic Courts 98
       2.2.3.1 Criminal Courts 98
           a) South Africa 99
               i) Defences under South African Law 100
                  Private defence 101
                  Necessity 107
       2.2.3.2 Courts Martial 107
           A United States example: United States v Rockwood 108
   2.2.4 International Criminal Court 109
       2.2.4.1 Indictments in the International Criminal Court 111
       2.2.4.2 Elements of the crimes 112
           a) Murder as a crime against humanity 113
               i) Intent 113
               ii) Unlawful act or omission 114
           b) Extensive destruction of property as a grave breach of the Geneva Conventions 115
           c) Attacks on dwellings or other installations used only by the civilian population, including places of worship as a violation of the laws or customs of war 115
               i) Civilian targets 116
   2.2.4.3 DEFENCES 117
       a) Article 31(1)(c) 119
       b) Article 31(1)(d) 120

CONCLUSION 122

BIBLIOGRAPHY 125
SYNOPSIS

The study which follows considers the current approach to State sovereignty, use of force, and human rights, in order to determine the balance which exists between these concepts. A shift in this balance determines the direction of development of the concept of ‘humanitarian intervention.’ The investigation establishes that State sovereignty and certain human rights are at a point where they are viewed as equal and competing interests in the international arena. This leads to the question of whether or not the concept of humanitarian intervention has found any acceptance in international law. It is determined that the right to intervention rests exclusively with the United Nations Security Council. There are, however, obstacles to United Nations action, which necessitate either taking action to remove the obstacles, or finding an alternative to United Nations authorized action. The alternatives provided are unilateral interventions by regional organizations, groups of States or individual States, with interventions by regional organizations being favoured. The study further discusses the requirements which would make unilateral action more acceptable. These same requirements provide a standard against which the United Nations can measure its duty to intervene. Such an investigation was done by the International Commission on Intervention and State Sovereignty, and a synopsis of its Report and Recommendations are included. Finally, the question of responsibility is addressed. State and individual responsibility for two separate types of action are considered. The responsibility of States and individuals for initiating an intervention is considered under the topic of the crime of aggression. The responsibility of States and individual for exceeding the mandate of a legitimate intervention is considered under the heading of war crimes.
When wilt thou save the people?
   Ebenezer Elliot

When wilt thou save the people?
   O God of mercy, when?
The people, Lord, the people,
   Not thrones and crowns, but men!
Flowers of thy heart, O God, are they;
Let them not pass, like weeds, away –
Their heritage a sunless day.
   God save the people!

Shall crime bring crime for ever,
   Strength aiding still the strong?
Is it thy will, O Father,
   That man shall toil for wrong?
‘No,’ say thy mountains; ‘No,’ thy skies;
Man’s clouded sun shall brightly rise,
And songs be heard instead of sighs.
   God save the people!

When wilt thou save the people?
   O God of mercy, when?
The people, Lord, the people,
   Not thrones and crowns, but men!
God save the people; thine they are,
Thy children, as thy Angels fair;
From vice, oppression, and despair,
   God save the people!
INTRODUCTION

“To overthrow oppression is the highest aspiration of every free man.”
Nelson Mandela

To overthrow oppression is the highest aspiration of every free man. It follows that a free man faced with the dilemma of allowing oppression to continue or breaking the law to prevent or halt it will, indeed must, take the latter option. This, at least, is what morality dictates. It may be noted that, in the past, international law has not always coincided with this aspect of morality. Recent developments in international human rights law give one hope that this may be changing. The right of States to their sovereignty is coming into conflict with international human rights more often than in the past. This is not because international law is now recognizing more human rights. Rather, it is because more people are willing to take up the fight against human rights abuses.

Herein lies both the reason for the study as well as the importance of the work. For several years international forces have taken it upon themselves to intervene in countries which they alleged needed their help. Less often have these forces addressed specific human rights abuses within the State which they ‘assist.’ There are, however, cases where individuals have taken it upon themselves to act against human rights abuses even where this action falls outside of their mandate either as peacekeepers or other categories of forces. The reason for this study is to determine whether these individuals and the authors of the interventions have any protection under municipal law or international law for their actions.

The importance of this study lies in the balancing of the two most fundamental principles of international law: State sovereignty and human rights. Despite the growth of the concept of the ‘global village,’ humanity is not yet at the stage where States will willingly give up their autonomy. Add to this the idea, held by many, that human rights do not fall within the autonomous control of a State and it becomes evident that the ingredients for conflict are in place. Add to this volatile mixture time, and history shows that conflict will explode. If it is at all possible to minimize the damage caused by this inevitability, it is essential that this be done. One of the means of doing this is to impose a set of requirements which must be

1 From Mandela’s ‘Black Man in a White Court’ statement at his trial held in the Old Synagogue, Pretoria, from 15 October 1962 to 7 November 1962 cited in In the words of Nelson Mandela Crwys-Williams J (ed) 1997.
fulfilled before any State-sponsored or individual humanitarian intervention can be considered lawful. These requirements may already exist in the elements of various defences under municipal and international law. If this study proves successful, it may be possible to ensure, at least in theory (and later in practice) that there are mechanisms in place to prevent unnecessary conflict between State sovereignty and human rights.

This work will consider individuals who prevent or halt human rights abuses, while taking part in operations by foreign States in a country experiencing internal strife. This issue cannot be separated from the question of whether or not intervention by States in order to protect human rights is allowed, for, in doing so, one creates a situation where the individuals intervening would not be allowed into the State, let alone being allowed to intervene in specific circumstances.

There are two aims to this study. The first aim is to determine the general level of acceptance of humanitarian intervention. The second aim is to provide a system of guidelines to assist adjudicators in determining whether or not an intervention can be classified as legitimate. It is for this reason that this study is divided into two parts. The first part will examine the definition of humanitarian intervention as well as the attitude of the international community to the use of force in general and protection of human rights. The second part will investigate forceful humanitarian intervention by States in particular and those defences which intervenors may have before the International Criminal Court or other tribunals if they are charged with international crimes. The law stated in these parts is correct as of February 2003.

The exponential growth in the recognition of human rights and the development of an international order concentrating on globalism makes one wonder whether human rights protection may one day reach a level higher than that provided for in the Charter of the United Nations. The Charter calls for all States to take action, jointly with as well as separate from the United Nations, for the achievement of universal respect for and observance of human rights. In this study there is hope that eradication of oppression will, one day, transcend the aspiration of free men. It must become the reasonable and resolute duty of all humanity.
THE DEFINITION OF HUMANITARIAN INTERVENTION

The definition of humanitarian intervention that will be used is drawn from many sources. The composite definition is as follows:

**Humanitarian Intervention:** Dictatorial interference in the internal affairs of a State through the use of armed force by a third party for a limited time and for the specific purpose of protecting the inhabitants of the State from arbitrary and persistent human rights abuses which exceed the limits of the authority within which sovereign States are presumed to act.

What follows is a discussion of this definition. It must be borne in mind, however, that much of what is contained in the latter part of this study is, in fact, a discussion of the above definition and its application to factual situations. This chapter is, therefore, mainly to be understood as an outline of what will be discussed in depth later.

Six concepts have been highlighted for discussion. The first of these is ‘dictatorial interference.’ This will be followed by ‘internal affairs,’ ‘armed force,’ ‘third party’ and ‘inhabitants.’ The final concept to be discussed is ‘human rights abuses.’

---

1. **DICTATORIAL INTERFERENCE**

The concept of ‘dictatorial interference’ has variously been referred to as ‘coercive intrusion’, ‘forcible interference’ and action calculated to impose a stronger nation’s will upon a weaker nation. The essence of the term is that a third party acts in a manner that is without regard for the wishes or without the consent of the local government resulting in the ‘target State’ being deprived of control over the matter. By providing that the interference is dictatorial or forcible, the concept excludes the scenario where a party assists a State at the latter’s request and with its consent.

Two further issues arise with regard to this concept. The first is the issue of United Nations Security Council authorisation. While it is possible for coercive action against a State to occur with UN Security Council authorisation, this study will concentrate on the scenario where such authorisation is lacking. The second issue arising is the length of duration of the interference. This study will consider only the scenario in which the interference is of limited duration. This aspect of duration will be considered further in the later chapters, especially when dealing with the requirement of proportionality of the intervention.

---

3 Evans & Newham (n2) 231; Jennings & Watts (n2) 430.

4 Jennings & Watts (n2) 430.

5 Jennings & Watts (n2) 430; Schwarz (n2) 32.

6 See discussion *infra* at Chapter 1 para 4.

7 Pogany (n2) 186.

8 Danish Institute of International Affairs (n2).

9 The state intervened against.

10 Jennings & Watts (n2) 432.

11 Jennings & Watts (n2) 435.

12 As included in the definition by the Danish Institute of International Affairs (n2).

13 As included in the definitions by Schwarz (n2) & the Ottawa Round Table Consultation Rapporteur’s Report (n2).
2. INTERNAL AFFAIRS

The concept ‘internal affairs’ has also been referred to as ‘domestic jurisdiction.’ The territorial integrity, political independence and domestic jurisdiction of a State are sacrosanct according to international law. This being the case, the question which arises is that of what, precisely, falls within the domestic jurisdiction of a State.

It has been accepted that a State has jurisdiction over everything and everyone within its territory. In effect, this means, to paraphrase Jennings and Watts, that a State may employ any political, economic or social policy of its choice without interference by any other party. This may seem to be an unchecked power. In fact, it is not. The power is circumscribed by the various obligations a State may incur through customary international law and through treaties binding upon it. Some of these limitations may deal with the treatment of the State’s population.

It is for this reason that the question of whether the treatment of its population is solely within a State’s domestic jurisdiction is one of the issues which must be considered to determine whether human rights provide a justification for intervention. It is, perhaps, with foresight of the possibility that States abusive of their sovereign powers in respect of human rights then step out of the bounds of domestic jurisdiction that Stowell includes such a suggestion in his definition of humanitarian intervention. It is this idea that will be investigated further to assist in determining the legality of humanitarian intervention.

---

14 United Kingdom Foreign Policy Document 148 (n2) 614.
15 Charter of the United Nations arts 2(4) & 2(7).
16 (n2) 383-384.
17 Supra n2. The definition is as follows: “…reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is arbitrary and persistently abusive as to exceed the limits of the authority within which the sovereign is presumed to act.
3. ARMED FORCE

Just as domestic jurisdiction is sacrosanct in international law, so too is the principle of non-use of force inviolable, both in customary international law and in conventional law. This principle prohibits both the use and the threat of the use of force. In addition, both direct and indirect use of force are prohibited. There is also a sentiment that economic coercion is prohibited.

For the purpose of this study, it has been necessary to limit the types of force that are to be examined. The choice of direct military action is appropriate as it is the most difficult form of force to justify. The following chapters will thus seek to identify when and to what extent the direct use of armed force is admissible in the defence of human rights.

4. THIRD PARTY

Intervention is a third party’s interference in the domestic jurisdiction of a State. There are various entities which have the capacity to intervene in a State. It is evident from international law documents that international organisations and States are able to intervene, though prohibited from doing so. International organisations, while being prohibited under most circumstances, may, if certain conditions are met, authorise their members to perform a collective intervention. In addition to this, a State or group of States

---

18 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits, Judgement, ICJ Reports 1986 14 100 par 188.
19 UN Charter art 2(4).
20 UN Charter art 2(4).
21 Military and Paramilitary Activities Case (n18) 108 par 118-119.
23 UN Charter art 2(7).
25 UN Charter Chapters VII & VIII.
might act unilaterally, without the authorisation of an international organisation. In most, if not all interventions, these organisations or States are usually of superior power\textsuperscript{26} to the target State.

While it is true that virtually all forceful interventions involve either international organisations or States, this study will consider mainly unilateral intervention by States. There will also be a brief discussion on the situation where an individual in a force already lawfully in a State, acts outside the scope of his mandate to effect an intervention in some or other aspect of the domestic jurisdiction of the host State. This will facilitate an investigation into both the scenario of the commander of the forces (possibly unlawful intervention by a State) and that of the ordinary soldier (lawful action by the State, though possibly unlawful intervention by the individual) being brought up on charges of aggressive intervention.

5. **INHABITANTS**

Intervention differs from defence of nationals in two important respects. The first difference is that the latter is usually held to be legal\textsuperscript{27} while the former is not. The second difference, and the one most relevant to this discussion, is that the latter involves the rescue of a State’s own nationals while the former involves the rescue of the target State’s nationals.

A third party’s rescue of a State’s nationals does not seem reconcilable to the principle of territorial authority, in terms of which a State has supreme authority over all persons within its territory. This will, accordingly, be one of the issues dealt with in greater depth later. Another issue which arises from this concept is the question of which inhabitants, if any, will receive deliverance from human rights abuses. An important point, to be emphasized later, is that the protection to be given to endangered persons\textsuperscript{28} should not be selective. All who are in need of defence of their human rights and other aid should have such assistance made available to them indiscriminately.

\textsuperscript{26} Schwarz (n2) 32.

\textsuperscript{27} A prime example is the landing of Israel commandos at Entebbe airport, Uganda, in 1976 to free mostly Israeli passengers of a hijacked aircraft.

\textsuperscript{28} Pogany (n2) 186.
6. **HUMAN RIGHTS ABUSES**

This is one of the more controversial issues arising from the definition provided. The crucial question is which human rights, if any, are protected, and to what degree. There are few rights which are universally recognized, and fewer still whose infringement seems to warrant mass mobilization of foreign forces.

For this reason one must distinguish between two groups of rights. The first of these has resulted in controversial interventions such as that of the United States of America’s action in Nicaragua, giving rise to the *Military and Paramilitary Activities Case*.\(^{29}\) This group may be termed pro-democratic interventions. These interventions arise out of the right of all peoples to self-determination\(^{30}\) and the interpretation of that right. This will be discussed later to determine whether or not protection of democracy is a justifiable action.

The second group of rights is that relating to life and bodily integrity. These have, equally, spurred controversial interventions such as the North Atlantic Treaty Organisation (NATO) intervention in Kosovo at the end of the last century. Violations of these rights include genocide, war crimes and crimes against humanity. Thus the prevention or cessation of death and other physical violence has been accepted\(^{31}\) as action for which intervention *may* be necessary.

As to the extent of the human rights abuses necessary to prompt humanitarian intervention, the most common phraseology employed is that the violations of human rights must be gross\(^{32}\) and massive.\(^{33}\) It has also been held that the suffering and death must be

---


30 Common art 1 of the International Covenants on Civil and Political Rights (U.N.T.S. No. 14668 Vol 999 (1976) 171) hereinafter referred to as the ICCPR, and on Economic, Social and Cultural Rights (U.N.T.S. No. 14531 Vol 993 (1976) 3) hereinafter referred to as the ICESCR.

31 Evans & Newham (n2) 231.

32 Pogany (n2) 186; Danish Institute of International Affairs (n2).

33 Danish Institute of International Affairs (n2).
widespread, arbitrary and persistent. A description which seems appropriate is that provided in Jennings and Watts which states that there must exist in a State ‘cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind.’

It is with this definition in mind that the investigation into humanitarian intervention can begin. As stated in this chapter, there are various concepts which will be dealt with later. The two first and most essential aspects to be dealt with are the prohibition of the use or threat of the use of force and the prohibition of intervention. And so, with these the investigation begins.

34 Evans & Newham (n2) 231.
35 Stowell (n2) 53.
36 (n2) 442.
2

SOVEREIGNTY AND ITS INFRINGEMENT

Sovereignty is a fundamental principle of international law. It is also the principal reason for
the failure of the United Nations Organization (UN) and other international bodies to achieve
their goal of a peaceful world in which human rights receive universal recognition and
protection. In this chapter the nature of State sovereignty will be outlined. The discussion
will include a delineation of the factors which impact on State sovereignty, leading either to
its limitation or its infringement.

1. THE CONTENT OF SOVEREIGNTY

“Sovereignty in the relations between States signifies independence. Independence in regard
to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the
functions of a State…”  

State sovereignty is a fundamental principle of international law and the State system.\(^{38}\) The
principle is so important that it has been named as one of the founding characteristics for a
State,\(^{39}\) and has been awarded extensive protection in the UN Charter.\(^{40}\) It is from the
principle of State sovereignty that the basic rules for the interaction of States are derived.
These rules provide that a State has the following rights:

- *Internal Independence* - Internal independence guarantees that a government is supreme
  within its own borders. This means that a State may act as it
will when dealing with all persons and things within its
territory. For this reason internal independence is also known
as territorial authority or territorial sovereignty.

\(^{37}\) Island of Palmas Case 1928 RIAA 2 829 & 838 as cited in Jennings & Watts (n2) 382 par 117 n1.

\(^{38}\) Hocking B & Smith M *World Politics: An Introduction to International Relations* (1990) 42; *Corfu Channel
Case* 1949 ICJ Rep 35.

\(^{39}\) Hocking & Smith (n 38) 46.

\(^{40}\) Art 2(1), (4) & (7).
• **External Independence** - This right guarantees that a sovereign government is accountable to no superior authority with regard to actions outside its borders.

• **Personal Authority** - This right encompasses elements of both internal and external independence. According to this principle a State has the power to exercise authority over its citizens whether they are abroad or at home. This principle is also known as political sovereignty.\(^{41}\)

As a consequence of sovereignty and its constituent rights, a State can manage its internal affairs according to its own discretion. This means that every State possesses a fundamental right to choose and implement its own political, economic and social systems.\(^{42}\) This right includes the authority to treat its nationals any way it pleases.\(^{43}\)

## 2. RESTRICTIONS UPON SOVEREIGNTY

A sovereign State may be compared to a person with full autonomy over his actions. And, just as a State with fully autonomous citizens would be in anarchy, so too would a system where nations adhere to no rules governing their conduct fall into a state of chaos. It is for this reason that States have come to accept certain restrictions upon their sovereignty. These restrictions on liberty of action may take the form of rules of customary international law or the form of treaty obligations incurred by the State. It has also become accepted by the international community that such restrictions relate not only to external actions of States, but also to questions of domestic policy.\(^{44}\)

One of the universally accepted restrictions in fact flows from sovereignty. This is the rule that the exercise of one State’s external independence must not cause any interference in any other State’s internal affairs.\(^{45}\) While this rule flows naturally from the established principle

\(^{41}\) Hocking & Smith 54; Jennings & Watts (n2) 382 par 117.

\(^{42}\) *Military and Paramilitary Activities Case* (n18) 131; 1970 Declaration on the Principles of International Law principle 3.

\(^{43}\) Jennings & Watts (n2) 384 par 118.

\(^{44}\) *Military and Paramilitary Activities Case* (n18) 131.

\(^{45}\) *Corfu Channel Case* (n38) 22; Jennings & Watts (n2) 392 par.121.
of sovereignty, there are other restrictions which are harder to prove and which result more often from treaties than from customary international law. Such treaties may even have the effect of allowing limited interference in the otherwise autonomous State’s internal affairs. Treaties such as the twin 1966 International Covenants\(^{46}\) and the 1984 Convention against Torture\(^{47}\) create restrictions which bind the States Party to respect the fundamental freedoms and human rights of their own citizens. The restrictions indicated here play an important role in the discussion on humanitarian intervention which follows.

While it is evident that sovereignty may be limited in specific circumstances, it must be remembered that sovereignty is the founding principle of the current State system. It is for this reason that restrictions on sovereignty must not be presumed.\(^{48}\) If a State acts in a manner which restricts another State’s sovereignty and there exists no evidence that this action is authorized by customary international law or by treaty, then the action constitutes a violation (unlawful restriction) of the latter State’s sovereignty.

### 3. VIOLATIONS OF SOVEREIGNTY

“…[I]n absence of treaty provisions to the contrary, a State is not allowed to intervene in the management of the internal or international affairs of other States, or to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse.”\(^{49}\)

The reason for requiring a permissive treaty provision is that intervention in a sovereign State’s affairs is forbidden in international law. Likewise, the use of force against a sovereign State is prohibited. The principle of non-intervention\(^{50}\) and the principle of non-use of force\(^{51}\) have both been held to be principles of customary international law which are

---

\(^{46}\) ICCPR & ICESCR.

\(^{47}\) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 24 *ILM* 535 in Mtshaulana *et al* *Documents on International Law* 1996 229.

\(^{48}\) Jennings & Watts (n2) 390-391 par 120.

\(^{49}\) Jennings & Watts (n2) 386 par 119.

\(^{50}\) *Military and Paramilitary Activities Case* (n18) 106.

\(^{51}\) *Military and Paramilitary Activities Case* (n18) 100.
Intervention may occur by various means. Where intervention is through the threat or use of force the action infringes both the principles of non-intervention and the principle of non-use of force. It is for this reason that the discussion in this paragraph will deal both with intervention and use of force, and will also consider the interaction of the two.

3.1 INTERVENTION

Intervention may be defined as forcible interference in the affairs of another State, which is calculated to impose the will of the intervening State upon the State intervened against. Such conduct is prohibited by international law. This prohibition is the corollary of every State’s right to sovereignty, territorial integrity and political independence. It is important to note at this stage that, while they are often considered alongside each other, intervention and use of force are distinct concepts. Hereafter the character of and motives for intervention will be discussed.

3.1.1 CHARACTER OF INTERVENTION

Interference in a State’s affairs does not automatically amount to intervention. In order for the interference to constitute intervention it must be of a forcible or coercive nature. This means that the interference must have the effect of depriving the State intervened against of control over the matter in question. The character of the intervention is most often economic, political, or military action and may take the form of either direct or indirect interference.

52 Military and Paramilitary Activities Case (n18) 100.


54 Military and Paramilitary Activities Case (n18) 106-107.

55 Jennings & Watts (n2) 432 par 129.
3.1.1.1 ECONOMIC AND POLITICAL INTERVENTION

The term ‘intervention’ is usually associated with the use or threat of the use of military force. However, even where such force is lacking, intervention may still occur through economic, political and other means. Such intervention is also considered illegal by international law.\(^{56}\)

Where a State halts economic aid to another State or institutes a trade embargo against that State, it cannot be said to be violating the principle of non-intervention\(^ {57}\) as long as the interfering State does not attempt to coerce the target State into specific conduct. This type of economic interference may constitute economic intervention if the interfering State crosses the line and begins dictating conduct to the target State. An example of this type of intervention is where economic assistance is given to a State on condition that the assisted State undertakes certain action in respect of the future management of its economy. This condition limits the assisted State’s freedom of action in respect of its economy.

Similarly, political interference will not constitute intervention unless it amounts to a coercive action. This means that severing diplomatic relations with a State purely to show disapproval for that State’s actions does not constitute intervention. However, should the resumption of diplomatic ties be conditional upon specific action by the political organs of the pariah State, then the interference will amount to intervention. This is due to the condition limiting the State’s freedom in controlling its own political activities.

3.1.1.2 MILITARY INTERVENTION

Military intervention may take either a direct or an indirect form. Direct military intervention occurs when a State uses part of its regular forces or a significant number of irregular troops in a military action within another State. Indirect military intervention occurs when a State’s interference is limited to supply of weapons or logistical support.


\(^{57}\) Military and Paramilitary Activities Case (n18) 126.
Where interference takes this form it violates not only the principle of non-intervention but also the principle of non-use of force.\textsuperscript{58} Depending on the nature and extent of the military action the intervention may even constitute aggression.\textsuperscript{59} For this reason the discussion will later turn to use of force. Now, however, the motives for intervention will be discussed.

3.1.2 MOTIVES FOR INTERVENTION

The Draft Code of Offences against the Peace and Security of Mankind of 1954,\textsuperscript{60} article 29, makes the interesting point that intervention to “obtain advantages of any kind” ought to be forbidden. Interventions usually will not occur unless they are advantageous to the interests of the intervening State.

The most frequently arising motives for intervention are political in nature. The best examples of politically motivated intervention may be drawn from the Cold War when many interventions occurred as a result of the Monroe and Brezhnev Doctrines. In terms of the Monroe Doctrine, the United States of America would intervene in other American States to ensure that democracy was protected and the spread of Communism halted.\textsuperscript{61} Similarly, in terms of the Brezhnev Doctrine, the former Union of Soviet Socialist Republics would intervene in other Eastern European States to ensure that socialism prevailed over democracy in those States.\textsuperscript{62}

An example of intervention on grounds of a State’s economic interests has occurred quite recently. While some may disagree, it is submitted that the recent Persian Gulf War intervention would have been less likely to occur had the world’s oil reserves not been in danger. This supports the view that, while an intervention may be legitimate, the only real way to obtain State support for such action is to have that State’s interests threatened.

\textsuperscript{58} Military and Paramilitary Activities Case (n18) 108.

\textsuperscript{59} Jennings & Watts (n2) 432.

\textsuperscript{60} Yearbook of the International Law Commission (YBILC) (1954) pt 2 151-152.

\textsuperscript{61} Jennings & Watts (n2) 449-450 par 133.

\textsuperscript{62} Jennings & Watts (n2) 451 par 133.
Other circumstances which may motivate an intervention by a State include the following:

- Where a State’s citizens are abroad and are being wrongfully treated without any legal recourse.\(^{63}\)
- Where permissible action taken in exercise of the right of self-defence involves a degree of intervention.\(^{64}\)
- Where action is required to assist the peoples of a territory to exercise their right to self-determination.\(^{65}\)

While it is true that there exist numerous and diverse motives for intervention, few of these motives are held to legitimise the action. Those which have been deemed acceptable motives can be counted on one hand and are the three listed in the paragraph above.

One motive which has yet to be mentioned is the protection of human rights. This has not often been the reason for interventions, although it has often been relied on *ex post facto* to justify the actions of intervening States. For many years human rights abuses by States against their own people were not deemed important enough to allow intervention against those States. As Chapter 3 will show, this may be changing. Human rights may have reached a point where their protection has become of equal or greater importance than the sanctity of State sovereignty.

This has been a brief discussion of intervention. For the purpose of this study, the discussion will concentrate on intervention of a military character (use of force) and intervention motivated by human rights responsibilities (Chapter 3). First, attention is given to the concept of ‘use of force.’

### 3.2 USE OF FORCE

The use of force is prohibited by international law. The principle of non-use of force is a fundamental principle of customary international law.\(^ {66}\) So intrinsic is this rule to

---

\(^{63}\) The well known incident of the Israeli commandos landing at Entebbe Airport, Uganda, in 1976 to free mostly Israeli passengers of a hijacked aircraft.

\(^{64}\) *Military and Paramilitary Activities Case* (n18) 14, although *in casu* the facts did not reconcile themselves to this reason.

\(^{65}\) Jennings & Watts (n2) 445 par 131 n 30 & 31.

\(^{66}\) *Military and Paramilitary Activities Case* (n18) 100.
international law that it has been used as a prime example of *jus cogens*. As a customary international law principle, non-use of force is separate from later treaty obligations.

These later treaties and conventions have, however, contributed to a greater understanding of the exact extent of the prohibition against the use of force. One provision, in particular, has led to a development of the principle of non-use of force. This is UN Charter article 2(4).

The UN Charter article 2(4) prohibition states that

“[a]ll 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.”

In order to understand the scope of the prohibition of the use of force the discussion will focus on article 2(4). The reason for this is that virtually every State in existence today is a member of the UN.

The first question that comes to mind is what type of force is prohibited. There are two views in this regard. The wide approach deems the word ‘force’ to include force of any kind whether physical, political, economic or psychological. The narrow approach follows the traditional view that the force prohibited is limited to armed force. In this study the lowest common denominator has been used. In this case it is the use of armed force. If this form of force is permissible in defence of human rights then the lesser forms are likely also to be acceptable.

Both direct and indirect armed force are prohibited. Direct armed force entails sending military forces or smaller, unofficial, armed bands into another State. An example of indirect force is available from the *Military and Paramilitary Activities Case*. Here the International

---

68 *Military and Paramilitary Activities Case* (n18) 106.
70 Schachter (n69) 111; Cassese (n69) 137.
71 *Military and Paramilitary Activities Case* (n18) 118-119, 128.
Court of Justice held\textsuperscript{72} that arming and training of a group fighting against the Nicaraguan government amounted to the threat or use of force by the United States of America. This study will focus upon \textit{direct} armed force.

The next issue arising from article 2(4) is the extent of the force required for the action to be unlawful. Article 2(4) explicitly states that not only the actual use of force is prescribed, but also the \textit{threat} of the use of force. The effect of including this phrase is that build up of military forces or specific deployments may be deemed unlawful if the aim of these actions is to coerce a State into making concessions. However, each specific case of a purported threat of force must be considered individually and on the facts \textit{in casu}. Two of the most important factors to be considered in such a determination are, firstly, the “preponderance of [the] military strength” of the State and its “political relations with potential target States.”\textsuperscript{73} This study will concentrate on the \textit{use} of direct armed force.

The prohibition in article 2(4) makes it clear that the use of force is unlawful only if it is during the course of “international relations” and only if it is “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the [UN].” Cassese\textsuperscript{74} understands this qualification to mean that force may be used neither against States, nor against “peoples having a representative organisation and falling in one of the categories entitled to self-determination.” Schachter goes further and discusses the relationship between the phrases “territorial integrity,” “political independence” and “inconsistent with the purposes of the [UN].”

Schachter points out that these terms are not mere qualifications of the prohibition but rather ensure a complete ban on the use of force [with the exception of those legitimate grounds listed in the Charter].\textsuperscript{75} The author states that “any coercive incursion of armed troops into a foreign State without its consent impairs [that] State’s territorial integrity.”\textsuperscript{76} This means

\footnotesize{\textsuperscript{72} 118-119.

\textsuperscript{73} Schachter (n69) 111.

\textsuperscript{74} Cassese (n69) 140.

\textsuperscript{75} Arts 51 and 53 & Chapter VII.

\textsuperscript{76} Schachter (n69) 112.}
that, unless the troops were invited, their presence in a foreign State is unlawful irrespective of their reason for being there. Similarly, it is suggested that “any use of force to coerce a State to adopt a particular policy or action must be considered as an impairment of that State’s political independence.”\footnote{Schachter (n69) 112.} Finally, it is observed that one of the primary purposes of the UN is to “remove threats to peace and to suppress breaches of peace.”\footnote{Schachter (n69) 112.} Thus it must be recognized that any use of force in international relations would be inconsistent with the Charter and with international law.

In fact, depending on the nature and extent of the force employed, the action may constitute the international crime of aggression. A State that breaches its treaty obligations or a general obligation owed to all States will incur international responsibility. Where the wrongful act amounts to a breach of an international obligation that is essential for the protection of fundamental interests of the international community, it may be categorized as an international crime. State sovereignty is considered the primary interest of the international community. Thus, where force is used against the sovereignty of a State, it is considered an international crime.

Aggression, although included in the Rome Statute of the International Criminal Court,\footnote{UN Doc A/CONF.183/9 1998 \textit{ILM} 999.} as yet does not have a universally accepted definition. The closest the UN has come to any decision is its 1974 Definition of Aggression.\footnote{GA Res 3314 (XXIX) 1974 art 1.} This resolution defines aggression as the use of armed force by a State or group of States either against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the UN. The resolution goes on to state that

“no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”\footnote{Art 5(1).}
For these reasons the use of force will be exceptionally difficult to justify. Yet, there do exist legitimate, or at least acceptable, uses of force.

3.2.1 EXCEPTIONS TO THE PROHIBITION OF THE USE OF FORCE

While the use of force is generally prohibited, certain exceptions to this principle do exist. Three of these are codified in the UN Charter as exceptions to article 2(4). The first Charter exception is Chapter VII enforcement action taken under the authorization of the Security Council. The second is article 53 which provides for regional organizations’ enforcement action authorized by the Security Council. However, such action may only be taken if the situation in question constitutes a “threat to peace, breach of peace, or act of aggression.”

The third Charter exception is also an exception under customary international law. This exception is found in article 51. Article 51 allows the use of force by States in circumstances of self-defence. The provision recognizes that self-defence is an ‘inherent’ right of States. It is for this reason that States often try to use this as a justification for the use of force.

However, collective or individual self-defence is not always the reason for the use of force. Other justifications have been tried, independently of self-defence. These include:

- Consent of the *de jure* government of a State to that use of force.
- Force that is used to enforce territorial claims.
- Force that is used to assist a people struggling for democratic rights against a repressive regime.
- Force that is used to protect or secure legal rights when no other means are available (such as defence of nationals).

---

82 Arts 39 & 42.

83 Schachter (n69) 114: The Union of Soviet Socialist Republics employed this justification when it claimed that its troops were invited by the Hungarian government into Hungary in 1956. It was also the basis of the United States of America’s claim that armed intervention in Grenada in 1983 was at the invitation of the Governor-General of Grenada.

84 Schachter (n69) 116: This justification was used by India in 1961 when it sent its troops into Goa, which was then under Portuguese authority. In 1982 it was also used by Argentina to enforce its claim over the Malvinas-Falkland islands.

85 Schachter (n69) 121: The United States used this reason to justify its actions in Iran in 1953, Guatemala in 1954 and Chile in 1970.

86 Schachter (n69) 127: Britain and France employed this justification when they invaded Egypt in 1956 in reaction to the Egyptian expropriation of the Suez Canal Authority.
• Force that is used for humanitarian ends to prevent or suppress atrocities and massive violations of human rights.\textsuperscript{87}

The success of these reasons as justifications for the use of force depends upon the circumstances of each individual case. The primacy of the principles of non-intervention and non-use of force only makes the task of justification more difficult.

Another factor that hinders the proof that use of force is justified is when one is dealing with idealistic principles such as universal human rights. In fact, many States using force choose rather to rely on any other factor than on protection of human rights. Despite this, human rights have increased in importance over the last 50 years. As a result, States seem more willing to rely on human rights as a ground for the use of force. In the following chapter the development of human rights and their protection will be investigated.

\textsuperscript{87} Schachter (n69) 124-125: This justification was employed by India in 1971 when it sent troops into East Pakistan (Bangladesh) to protect the Bengali people. It was also used by the French in 1979, when France deployed troops against the Bokassa regime because of the atrocities it committed.
HUMAN RIGHTS AND THEIR PROTECTION

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”
July 4, 1776, USA Declaration of Independence

In the previous chapter it was established that State sovereignty is the founding principle of international relations, and possibly the greatest obstacle to having an enforceable system of international law. The concept of State sovereignty is as old as the concept of Statehood. It has been suggested that in the last fifty years another concept has arisen to sovereignty’s primacy. This is the concept of human rights. This chapter provides a brief analysis of the development of the concept of human rights, as well as the current approach to their recognition and enforcement.

1. CONCEPTUAL DEVELOPMENT

It is a general and frequent misconception that the recognition of human rights is a 20\textsuperscript{th} century development (or perhaps an 18\textsuperscript{th} or 19\textsuperscript{th} century one). The enforcement of human rights is likewise deemed usually to have appeared in our ‘enlightened’ era. It is true that the 20\textsuperscript{th} century has seen a move to universal recognition of human rights. However, the concept of human rights and their protection dates at least as far back as 2000 B.C.

In Babylon in 2000 B.C., the Code of Hammurabi recognised certain rights of persons. The Charter of Cyrus the Great of Persia, c. 328 B.C., also recognised certain civil and political rights and even some social and economic rights.\textsuperscript{88} These are not the only occurrences of the idea of protection of individual rights. Many philosophers and poets from different backgrounds expounded similar ideas in their works. Thus the idea of individual worth can be found to exist on every continent and in many different civilizations.\textsuperscript{89}


\textsuperscript{89} Robertson & Merrills (n88) 8.
How, then, did human rights come to be viewed as part of Western thinking? The view that human rights as a concept is wholly based on the liberal democratic tradition of Western Europe is incorrect. If one were to hold, however, that many of the formulations of human rights resemble those of the Western tradition one would not be incorrect. The development of the Western idea of human rights has drawn much from the history of Europe and the New World and, in so doing, has provided formulations of a better quality than the other traditions.  These formulations bear the influence of the ancient Greek philosophers, Roman Law, the Judeo-Christian tradition, the Magna Carta, the Humanists, and the Age of Reason.

Great leaps forward in the recognition of human rights were made during this latter period. These include the United States’ Declaration of Independence, with its idea that all men are equal and have certain inalienable rights, and the French Declaration of the Rights of Man and the Citizen of 1789 which, too, recognises certain natural and inalienable rights.

The culmination of these gradual and progressively larger steps may be held to be the Universal Declaration of Human Rights of 1948. This flung wide the door to a new age in which recognition of human rights did not hinge on the will of fickle leaders, but became the basis upon which many States are judged, to the extent that human rights began to challenge the primacy of sovereignty itself.

2. RECOGNITION OF HUMAN RIGHTS AFTER 1945

The greatest developments in the recognition of human rights have taken place since World War II. Voltaire pointed out that as long as people believe in absurdities they will continue to commit atrocities. He was, regrettably, proved correct, by the German National Socialists (Nazis) in the 1930’s and 1940’s, who believed in race supremacy and consequently caused the death of not only 6 million Jews, but many others in the course of the resulting war. This situation led mankind finally to decide not only that war should be outlawed, but (through a more gradual development) that States should henceforth realize that human beings,
irrespective of differences in race, sex or sexual orientation, were equally entitled to have certain basic rights respected. The following paragraphs consider the extent to which human rights are protected in various international documents.

2.1 HUMAN RIGHTS PROTECTION AND THE UNITED NATIONS

2.1.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS

While the United Nations was created to ensure that humanity would never again be faced with a war such as the Second World War, another of its purposes was to ensure that human rights were recognised and protected. The first document of the new organisation dealing with the latter issue was the Universal Declaration of Human Rights. The Universal Declaration enumerated various rights deemed by the international community to be fundamental. This document is a declaration and is ordinarily deemed to be non-binding. However, since 1948 it has inspired several conventions and constitutions. Many of the rights listed have been universally accepted and thus parts (if not the whole Declaration) may be deemed to have become part of customary international law.

The Universal Declaration includes in its list of rights both first and second generation rights. First generation rights are rights of a civil or political nature. Examples of these rights are the right to life, the right to bodily integrity and the right to vote. Second generation rights are social, economic and cultural rights. Examples of these include the right to work, the right to an adequate standard of living and the right to an education.

94 UNGA Res 217 A (III) of 10 December 1948.

95 The best examples of these are the right to life, liberty and security of person, the right to be free from torture and the right to equality before the law. These rights are enumerated in many later human rights documents from around the world, with the result that the vast majority of States accept them as binding.

96 Art 3.
97 Art 5.
98 Art 21.
99 Art 23.
100 Art 25.
101 Art 26.
As long as the Universal Declaration remained an unenforceable wish list, the different political groupings of the time were willing to sign the document. However, as moves were made to codify the rights into an enforceable Convention, two different factions emerged. The mainly Western, democratic nations did not wish to recognise the socio-economic rights of which the Communist bloc was so fond. Similarly, the mainly Eastern, Communist States would not ratify a document which contained the civil and political rights long fought for by the democratic States. This rift resulted in the eventual drafting of two separate documents. One document enumerates civil and political rights, while the other lists the social, economic and cultural rights. A brief discussion of each follows.

2.1.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

As stated above, ideological differences between East and West necessitated separate conventions for civil and political, and social, economic and cultural rights. The twin International Covenants are the result of this decision. The first is to be discussed is the ICCPR. As the name of this Covenant indicates, it catalogues the civil and political rights which initially appeared in the Universal Declaration. The Covenant, however, includes more rights, over and above those found in the Declaration. In addition, the rights are drafted with a greater juridical specificity, a requirement for easier enforceability.

Part I of both the ICCPR and its twin Covenant guarantee the right of self-determination of all peoples. Part II of the ICCPR places certain duties on States Parties to ensure equality in the exercise of the rights contained therein, effective remedies if any of the rights therein are violated, and enforcement of such remedies. Part II also ensures that, if States Parties wish to derogate from their obligations under the Covenant, they do so only when stringent

102 Dugard (n67) 242.

103 Articles 3 & 9 of the Universal Declaration guarantee that everyone has the right to liberty and security of the person and that no-one shall be subjected to arbitrary arrest, detention or exile. Article 9 of the International Covenant likewise guarantees these rights. However, the provision in the International Covenant goes on to enumerate the requirements for ensuring this protection, which includes provisions that anyone who is arrested shall be promptly informed of the charges against him, shall be brought promptly before a judge and shall be entitled to trial within a reasonable time.

104 Art 1 of both Covenants (n30).

105 Art 2.
requirements have been met.\textsuperscript{106} Part III goes on to list the specific civil and political rights which it protects.\textsuperscript{107} Part IV provides for the establishment of a Human Rights Committee.\textsuperscript{108} This Committee’s function and operation will be discussed briefly under paragraph 4.

2.1.3 \textbf{INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS}

The ICESCR is the second of the twin Covenants on human rights and, as the name suggests, deals with the economic, social and cultural rights that were omitted from the ICCPR. As with the ICCPR, it catalogues not only the rights found in the Universal Declaration, but includes other economic, social and cultural rights. As stated in paragraph 2.1.2 above, Part I of the ICESCR recognises the right to self-determination.

Part II of the Covenant requires the States Parties to take all reasonable steps to achieve the realisation of the rights contained in the Covenant, and requires States Parties to guarantee the rights therein to all persons without discrimination of any kind.\textsuperscript{109} Part II then goes on to allow developing countries to decide to what extent they would guarantee the economic rights in Part III to non-nationals, having due regard to human rights and their national economy.\textsuperscript{110} As in the ICCPR, the ICESCR allows the rights in the Covenant to be limited. This is allowed only where the limitation is determined by law, is compatible with the nature of the right and where the sole purpose of the limitation is the promotion of the general welfare in a democratic society.\textsuperscript{111}

Part III of the Economic and Social Covenant enumerates the rights protected. This is often done in great depth, with the Covenant even providing the steps that should be taken to realise the rights. Part IV lays out enforcement procedures for ensuring the observance of the rights contained in the Covenant. These will, likewise, be discussed below.

\textsuperscript{106} Art 4.

\textsuperscript{107} Arts 6-27.

\textsuperscript{108} Arts 28-45.

\textsuperscript{109} Art 2(1)-(2), Art 3.

\textsuperscript{110} Art 2(3).

\textsuperscript{111} Art 4.
2.2 REGIONAL RECOGNITION OF HUMAN RIGHTS

Under the influence of the international movement towards the recognition of human rights, various regional organisations developed instruments for the protection of human rights. The resulting documents each contain fundamental rights as recognised at world level. Each document does, however, also include principles accepted in those particular regions which may not necessarily have been accepted, or at least not included in the documents, by other regions.

2.2.1 EUROPE

Regional protection of human rights in Europe is based upon two treaties. These treaties divide the rights into two groups, after the manner of the twin Covenants. The first of these treaties is the European Convention for the Protection of Human Rights and Fundamental Freedoms, \(^{112}\) which guarantees basic civil and political rights. The European Convention on Human Rights (ECHR) as it is known, provides for enforcement at both State and regional level. The second European treaty is the European Social Charter, \(^{113}\) which recognises economic and social rights. The Social Charter lists several policy objectives which are transformed by the Charter into enforceable rights. As with the ECHR, the enforcement mechanisms will be discussed below.

2.2.2 THE AMERICAS

There exist two systems for the protection of human rights in the Americas. One is based upon the Charter of the Organisation of American States (OAS), \(^{114}\) while the other is based upon the American Convention on Human Rights. \(^{115}\) The Charter applies to all members of the OAS, while the Convention is binding only upon States Parties.

\(^{112}\) Rome, 4 November 1950, ETS No. 5.

\(^{113}\) 29 UNTS 89 as found at http://www1.umn.edu/humanrts/euro/z31escch.html accessed 12-06-02.

\(^{114}\) As found at http://www.oas.org/juridico/english/charter.html accessed 12-06-02.

\(^{115}\) 1144 UNTS 123 in Mtshaulana (n47) 306.
The Charter of the OAS makes few references to human rights. It does, however, provide that fundamental rights are guaranteed to all individuals without any distinction based on race, nationality, creed, or sex.\footnote{Art 3(1).} The definition of these rights is provided by the American Declaration of the Rights and Duties of Man.\footnote{OAS Res XXX found at http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm accessed 12-06-02.} The American Declaration recognises civil and political rights, as well as social and economic rights.\footnote{Chapter 1.} It also places duties upon every person.\footnote{Chapter 2.}

The second American system employs the American Convention. Chapter II of the American Convention recognises civil and political rights,\footnote{Arts 3-25.} while Chapter III recognises economic, cultural and social rights.\footnote{Art 26.} The Convention further provides for limitations to be placed on rights under exceptional circumstances.\footnote{Arts 27-31.} As with the European Convention, the American Convention provides for its enforcement at both State and regional level. The enforcement mechanisms of both these systems will be discussed below.

\subsection{AFRICA}

The Charter of the Organisation for African Unity (established 1963) does not recognise protection of human rights as one of its primary goals. However, the Organisation did adopt the African Charter on Human and People’s Rights (Banjul Charter)\footnote{21 ILM 58 (1082), as found in Mtshaulana (n47) 282.} in 1981. The Banjul Charter, as with the American Declaration, recognises both rights (civil, political, economic, social and cultural) and duties.\footnote{Chapter I – Rights & Chapter II – Duties.} The Banjul Charter further recognises not only individual rights but peoples’ rights as well.\footnote{Arts 19-24.} However, despite wide recognition of various rights, the
Banjul Charter goes on to allow broad limitations and restrictions on the exercise of the rights contained therein.\textsuperscript{126} Enforcement procedures are dealt with below.

3. **THE IMPORTANCE OF VARIOUS HUMAN RIGHTS**

There have been numerous rights recognised by the international community, whether through the United Nations, or through regional bodies, or even national constitutions. While it is true that it cannot be said that all nations recognise all rights, there are at least certain rights (albeit few) which are accepted as more important than the others. The rights are guaranteed in their own specific conventions, some of which elevate infringement of these rights to the level of international crimes.

The rights to life, human dignity, bodily integrity and equality appear to be the most universally recognised and extensively protected in conventions both general\textsuperscript{127} and specific. A few of these specific conventions are highlighted below.

3.1 **THE RIGHT TO LIFE**

3.1.1 **CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE**

This Convention\textsuperscript{128} confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law.\textsuperscript{129} The Convention goes on to state that

\begin{quote}
“…genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
\end{quote}

\textsuperscript{126} A number of the rights appear with the restriction “in accordance with the provisions of the law” [arts 9(2), 11, 12(1), 13(1)]. This has the effect of restricting the right to that which is determined by the very power against whom protection is sought.

\textsuperscript{127} ICCPR art 4(2) states that no derogation is allowed from the rights to life, bodily integrity, freedom from slavery and freedom of religion, conscience and thought.

\textsuperscript{128} GA Res 260 (III) 1946.

\textsuperscript{129} Art I.
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.”

This definition makes it clear that it is a crime to infringe the rights to life (paragraphs (a) & (d)), bodily and mental integrity, and human dignity (paragraphs (b), (c) & (e)) especially when those actions are coupled with infringements of the right to equality (intent to destroy ... a ... group).

3.2 THE RIGHT TO HUMAN DIGNITY AND BODILY INTEGRITY

3.2.1 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Convention against Torture defines ‘torture’ as

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” [Author’s emphasis].

The Convention places a duty on States Parties to take measures to prevent torture in any territory under its jurisdiction and to ensure that all acts of torture are offences under criminal law. The Convention provides further that neither war, nor the threat of war, nor internal political instability, nor any other public emergency may be invoked as a justification

---

130 Art II.

131 24 ILM 535 in Mtshaulana (n47) 229.

132 Art 1(1).

133 Art 2(1).

134 Art 4(1).
of torture.\textsuperscript{135} The prohibition of torture is extended by the fact that it is an accepted rule of customary international law.\textsuperscript{136}

3.2.2 \textbf{SLAVERY, SERVITUDE AND FORCED LABOUR}

The 1926 League of Nations Slavery Convention was adopted by the United Nations in 1953.\textsuperscript{137} The Slavery Convention places a duty upon States Parties to prevent and suppress the slave trade and to abolish slavery in all its forms.\textsuperscript{138} Slavery is defined\textsuperscript{139} as the “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” The 1956 Supplementary Convention on the Abolition of Slavery\textsuperscript{140} expanded the protection to include prohibitions against debt bondage,\textsuperscript{141} serfdom,\textsuperscript{142} sale or transfer of women\textsuperscript{143} and children.\textsuperscript{144} These Conventions and others abolishing forced labour recognise the right of all people to be treated in a manner respectful of their humanity and their dignity as human beings.

\textsuperscript{135} Art 2(2).

\textsuperscript{136} \textit{Filartiga v Pena Irala} 630F 2d 876 (2\textsuperscript{nd} Cir 1980) cited in Dugard (n67) 251.

\textsuperscript{137} 60 LNTS 253 at \url{http://www1.umn.edu/humanrights/instree/f1sc.htm} accessed 12-06-02.

\textsuperscript{138} Art 2.

\textsuperscript{139} Art 1(1).

\textsuperscript{140} Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery, as found in \textit{Human Rights: A Compilation of International Instruments} 1988 160.

\textsuperscript{141} Art 1(a).

\textsuperscript{142} Art 1(b).

\textsuperscript{143} Art 1(c).

\textsuperscript{144} Art 1(d).
3.3 THE RIGHT TO EQUALITY

3.3.1 THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

This Convention\textsuperscript{145} places a duty on all States Parties to condemn racial discrimination and take all appropriate means to eliminate racial discrimination in all its forms.\textsuperscript{146} The Convention defines\textsuperscript{147} ‘racial discrimination’ as

\begin{quote}
\textldots{}any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.\textldots{}
\end{quote}

The Convention further obligates States Parties specifically to condemn racial segregation and apartheid. Greater emphasis was placed on the eradication of discrimination by the promulgation of a further two important treaties dealing with the topic.

3.3.2 THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

This Convention\textsuperscript{148} declares apartheid not only to be a crime against humanity, but also to be a serious threat to international peace and security.\textsuperscript{149} Those persons committing acts of apartheid shall be held responsible in terms of international criminal law.\textsuperscript{150} The Convention defines\textsuperscript{151} apartheid as

\begin{quote}
\textldots{}acts committed for the purpose of establishing and maintaining domination by one [race] \ldots{} over any other [race] \ldots{} and systematically oppressing them [including]:
\end{quote}

\textsuperscript{145} 660 UNTS 195 as found in Mtshaulana (n47) 209.

\textsuperscript{146} Art 2.

\textsuperscript{147} Art 1.

\textsuperscript{148} GA Res 3068 (XXVIII) 1974 in Mtshaulana (n47) 204.

\textsuperscript{149} Art 1.

\textsuperscript{150} Art 3.

\textsuperscript{151} Art 2.
(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person…
(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
(c) Any…measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country…
(d) Any measures…designed to divide the population along racial lines…
(e) Exploitation of the labour of the members of a racial group or groups…
(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.”

3.3.3 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

This Convention\textsuperscript{152} condemns discrimination against women in all its forms.\textsuperscript{153} Discrimination against women is defined\textsuperscript{154} as

“…any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The importance of these rights are further emphasised by the protection offered to them through the development of various international crimes. Genocide (paragraph 3.1.1) is also an international crime. The most relevant of these are crimes against humanity.

3.4 CRIMES AGAINST HUMANITY

As defined in the Rome Statute of the International Criminal Court\textsuperscript{155} crimes against humanity are

“any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a) Murder;
b) Extermination;
c) Enslavement;

\textsuperscript{152}GA Res 34/180 1979 in Mtshaulana (n47) 219.

\textsuperscript{153}Art 2.

\textsuperscript{154}Art 1.

\textsuperscript{155}UN Doc A/Conf 183/9 1998 \textit{ILM} 999 art 7.
d) Deportation or forcible transfer of population;

e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f) Torture;

g) Rape, sexual slavery… or any other form of sexual violence of comparable gravity;

h) Persecution against any identifiable group or collectivity on… [any] grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph…;

i) Enforced disappearance of persons;

j) The crime of apartheid;

k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

This provision serves to illustrate that certain infringements of the rights to life, bodily and mental integrity, human dignity and equality are considered international crimes. Another aid to determining the importance of human rights may be found in humanitarian law.

3.5 HUMANITARIAN LAW

It is true that the texts above, both general and specific, lay down standards of general application to all human beings, which should be adhered to at all times. During war, however, many of these rights are suspended. Despite this, even during these periods of conflict, certain fundamental rights of non-combatants must still be respected by combatants. These rights are the core human rights from which no derogation is permitted whether during peace or during war. These are the same rights as listed above:

- Right to life
- Right to human dignity
- Right to bodily and mental integrity
- Right to equality.

156 Robertson & Merrills (n88) 311.

157 Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 art 3(1)(a).

158 Art 3(1)(c).

159 Art 3(1)(a).

160 Art 3(1).
Through the discussion on protection of human rights it is made clear that certain rights are non-derogable. Having accepted this, it becomes clear that where a State is either actively involved, or complacent, in the wholesale disregard for these rights, that State violates international law. Either the State or the individuals responsible for the perpetration of such acts must be prevented from continuing and must be held accountable for it or their actions. It is to this aspect that this chapter now turns.

4. **ENFORCEMENT OF HUMAN RIGHTS**

The various human rights instruments listed above have been ratified by numerous States. This act of recognition does not, however, always find acceptance and enforcement at ground level in the individual States. The result is that the State may outwardly purport to recognise human rights while doing nothing to protect the rights of its own people. How then are the rights in these international instruments enforced?

The usual means to ensure compliance with international obligations has been the use of bodies created to enforce individual Conventions, with the UN General Assembly and Security Council having the ultimate authority. These include:

- Human Rights Committee (to enforce the Civil and Political Covenant)
- Economic and Social Council (to enforce the Economic and Social Covenant)
- Committee against Torture (to enforce the Torture Convention)
- Committee for the Elimination of Racial Discrimination (to enforce the Convention against Racial Discrimination)
- Committee for the Elimination of Discrimination against Women (to enforce the Women’s Convention)
- The African Commission (to enforce the African Charter)
- The American Commission (to enforce the American Declaration)
- The European Commission (to enforce the European Convention).
The Committees, Commissions and Council may hear complaints brought by States Parties to the specific Conventions,\textsuperscript{161} individuals,\textsuperscript{162} groups,\textsuperscript{163} and even non-governmental organisations.\textsuperscript{164} The proviso, of course, is that the State accused of human rights violations has recognised the competence of the specific body to hear such complaints. When such complaints find their way to the relevant body, there are various actions which may be taken. The body may require reports from States regarding their efforts in the field of human rights.\textsuperscript{165} There may be an investigation,\textsuperscript{166} or hearings may be held.\textsuperscript{167} The final comments and suggestions either of a general nature or regarding the actions of the State in question\textsuperscript{168} will then be made by the body.

There exists another option in addition to the numerous Commissions and Committees. This is an international court. At the time of writing three are in existence:

- **Inter-American Court of Human Rights:** Article 33(b) of the American Convention establishes the Court. Only States Parties and the Inter-American Commission may bring

\textsuperscript{161} ICCPR (n30) art 41(1); Convention against Racial Discrimination (n145) art 11(1); Convention against Torture (n131) art 21(1)(u); African Charter (n123) arts 47 & 49; European Convention (n112) art 24; American Convention (n115) art 45.

\textsuperscript{162} Optional Protocol to the ICCPR 999 UNTS 171 in Mtshaulana (n47) 190 art 1; Convention against Racial Discrimination (n145) art 14(1); Convention against Racial Discrimination (n145) art 14(1); Convention against Torture (n131) art 22(1); African Charter (n123) arts 55 & 56; European Convention (n112) art 25(1); American Convention (n115) art 44.

\textsuperscript{163} Convention against Racial Discrimination (n145) art 14(1); African Charter (n123) arts 55 & 56; European Convention (n112) art 25(1); American Convention (n115) art 44.

\textsuperscript{164} African Charter (n123) arts 55 & 56; European Convention (n112) art 25(1); American Convention (n115) art 44.

\textsuperscript{165} ICCPR (n30) art 40(1); ICESCR (n30) art 16; Convention against Racial Discrimination (n145) art 9; Convention against Torture (n131) art 19; Women’s Convention (n152) art 18; African Charter (n123) art 62; American Convention (n115) art 42.

\textsuperscript{166} ICCPR (n30) art 41(1); Convention against Torture (n131) art 20; African Charter (n123) art 46; European Convention (n112) art 28.

\textsuperscript{167} ICCPR (n30) art 42; Convention against Racial Discrimination (n145) art 12; Convention against Torture (n131) art 21(1)(e); African Charter (n123) art 46;

\textsuperscript{168} ICCPR (n30) arts 40(4), 41(1)(h) & 42(7); ICESCR (n30) art 21; Convention against Racial Discrimination (n145) arts 9(2), 13 & 14(7)-(8); Convention against Torture (n131) art 19(4); Women’s Convention (n152) art 21; African Charter (n123) arts 52-4; European Convention (n112) arts 30 & 31; American Convention (n115) arts 49 & 50.
cases before the Court\textsuperscript{169} regarding the interpretation and application of the American Convention.\textsuperscript{170}

- **European Court of Human Rights:** This Court is established in terms of article 19(2) of the European Convention. Only High Contracting Parties and the European Commission may bring cases before the Court\textsuperscript{171} concerning interpretation and application of the European Convention.\textsuperscript{172}

- **International Court of Justice:** This Court is established in terms of Chapter XIV of the UN Charter. The Statute of the ICJ\textsuperscript{173} provides that only States may be parties in cases before it.\textsuperscript{174} States may refer to the Court the existence of any fact which, if established, would constitute a breach of an international obligation.\textsuperscript{175} It is into this category that alleged human rights violations would fall.

The establishing documents provide for compliance with and enforcement of the Courts’ decisions.\textsuperscript{176} In truth, however, the Courts rely on the good faith of the States to abide by their decisions. The States are required to accept the decisions of the Courts as binding and

\begin{itemize}
  \item \textsuperscript{169} American Convention (n115) art 61(1).
  \item \textsuperscript{170} American Convention (n115) art 62(3).
  \item \textsuperscript{171} European Convention (n112) art 44.
  \item \textsuperscript{172} European Convention (n112) art 45.
  \item \textsuperscript{173} http://www.icj-cij.org/icjwww/fibasic_documents/Basetext/istatute.html last accessed 30/11/02.
  \item \textsuperscript{174} Art 34(1).
  \item \textsuperscript{175} Statute of the ICJ (n173) art36(2)(c).
  \item \textsuperscript{176} American Convention (n115) art 68; European Convention (n112) art 54; Statute of the ICJ (n173) art 59.
\end{itemize}
most States are thus likely to abide by the decisions of the Courts. Diplomatic and economic pressure, in any event, is usually adequate to ensure compliance.

When the Committees and Courts are ignored and the State continues its unlawful infringement of human rights, there arises a need for enforcement mechanisms which will ensure compliance with the law in question. Various they consist of:

- **Diplomacy** – This is the development of channels of communication while seeking the attainment of goals by means of compromise, persuasion and conciliation.

- **Economic Strategies** – Such strategies include economic reward, such as foreign aid, and economic sanctions, such as embargoes on exports and boycotts on imports.

- **Subversion** – This is the destabilisation of a regime or an attempt to change attitudes in a society.

- **Military Strategies** – These may take the form of non-use of force (demonstrations of military resources, issuing ultimatums and mobilisation of troops indicating preparedness to use force) or actual use of force in the form of ground, air or sea assaults.\(^{177}\)

Regarding the question of the legitimacy of these strategies, the UN Charter provides for only the following legitimate actions:

> “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the State’s] own choice.”\(^{178}\)

The Charter goes on to state that:

\(^{177}\) Hocking & Smith (n38) 204 –210.

\(^{178}\) Art 33.
“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

In the event that all these actions prove futile the international community may find itself in a position where the use of force is required. This option may only be exercised if all other pacific means are exhausted, or if the unlawful action by the State is of such a nature that the pacific means would be futile and delay would only allow for an aggravation of the situation.

Often, however, even when use of force may be required to protect human life, such action may be vetoed by a Permanent Member of the Security Council of the UN, or by a majority vote. It may then appear necessary to a group of States or an individual State to intervene in the situation in the deviant State without the requisite UN authorisation. It is to this scenario that Chapter 4 now turns.

---

179 Art 41.

180 UN Charter art 42.

181 The Permanent Members of the Security Council, as a group, shall hereafter be referred to as the P-5.
4

HUMANITARIAN INTERVENTION BY STATES

“If we believe a thing to be bad, and if we have a right to prevent it, it is our duty to try to prevent it and to damn the consequences.”

Lord Alfred Milner

A vehement statement by Lord Milner, wherein lies the rub of humanitarian intervention. Does a right to prevent human rights abuses exist? Is there a concomitant duty upon States or individuals to prevent such abuse? Can one, even for the briefest instant, ‘damn the consequences’? An examination of these issues follows.

1. IF WE BELIEVE A THING TO BE BAD

Human beings have certain fundamental and inalienable rights. The right to life and the right to human dignity are examples of these. Such rights are so important that they have become universally respected. So widely recognised are human rights that many consider them no longer to be the exclusive domain of the individual State, but rather to be the main concern of the world at large. For this reason all States have an obligation erga omnes to respect and protect human rights. There are times, however, when men are corrupted and they come to


184 Simma B ‘NATO, the UN and the Use of Force: Legal Aspects’ http://www.ejil.org/journal/Vol10/No1/ab1-1.html accessed 18-03-01; Cassese (n183); Van der Wense W ‘Human rights through force: What says international law?’ http://www.ishr.org/themes/forum/wense.htm accessed 23/04/02.
believe they are above all law. It is at times like these that genocide and the other crimes against humanity are committed. The leaders who orchestrate these horrors are universally considered evil, and this word is not used lightly: Adolf Hitler, Joseph Stalin, Idi Amin, Pol Pot. There are others, perhaps not as infamous, but just as evil. Humanity recognises that the actions of these people are morally unconscionable, and so has made laws against them, declaring, in effect, that such atrocities may give rise to an aggravated form of State responsibility which invokes countermeasures stronger than those contemplated for delictual responsibility. Yet, to what extent are the victims and potential victims of these crimes actually protected?

2. IF WE HAVE A RIGHT TO PREVENT IT

The international community at large regards gross human rights violations as unconscionable. There are proscriptions against such conduct, but what are the mechanisms used to enforce such proscriptions? It is to this that the study now turns.

2.1 ACTION AUTHORISED BY THE UNITED NATIONS

2.1.1 ACTION BY THE SECURITY COUNCIL

The UN Security Council has the primary responsibility to maintain international peace and security. Accordingly, the Security Council decides what measures are taken, in accordance with the Charter, to maintain and restore peace and security. The Charter thus prohibits individual States and regional organisations from using force except with

---

185 See Chapter 3 supra.


187 UN Charter art 24.

188 UN Charter art 39.


190 UN Charter art 53.
Security Council approval. These provisions have the effect of granting the right to intervene forcibly solely to the Security Council. This right may extend even to cases of civil strife as internal conflict takes not only a toll on human life, but also often has repercussions beyond national borders. While the Security Council, to date, has not expressly authorised a State, or group of States, to use force to end a human rights emergency where it lacked consent of the target State or where the State had already collapsed, there is evidence, largely from the practice of the 1990’s, that the Security Council has gone so far as to define humanitarian crises as constituting a threat to international peace and security under article 39 of the Charter. The Security Council has previously also specifically authorised its forces, during their missions, to protect civilians under imminent threat of violence.

The result of this is that the sole right of armed intervention on humanitarian grounds exists only if the Security Council determines that gross violations of human rights by the target State against its own population constitutes a breach of peace or threat to international peace.

---


192 Report of the Secretary-General on the Work of the Organization (September 1990) UN Doc A/45/1 s iv in Barrie (n191) 156; Vogel (n189).

193 Wheeler (n183) 552.


and security within the meaning of article 39 of the UN Charter and accordingly decides upon enforcement measures.\textsuperscript{196}

2.1.2 REGIONAL ORGANISATIONS AND STATES UNDER SECURITY COUNCIL MANDATE

It can be concluded from the above paragraph that there is no right of States or regional organisations to intervene forcibly outside the authority of the UN Charter.\textsuperscript{197} The primary means of authorising the use of force is through the mandate of the UN Security Council. This mandate may be given to regional organisations\textsuperscript{198} or to individual States.\textsuperscript{199}

In certain cases express authorisation may be lacking despite the Security Council labelling the crisis a threat to international peace and security. The primary reason for such a situation occurring is the veto by the P-5, or the threat of such veto. It has been suggested\textsuperscript{200} that the P-5 should practice “constructive abstention” in the situation where protective action is called for and they have no interests in the matter. This would alleviate some of the deadlock.

However, in cases of a veto, the intervening forces may sometimes rely either on \textit{ex post facto} ratification or implied consent for the actions. It has been argued that ‘art 53(1) [of the UN Charter] does in good faith leave room for the possibility of implicit as well as \textit{ex post facto} authorisation.’\textsuperscript{201} This does not, however, extend to tacit authorisation.\textsuperscript{202} This means that there must be evidence in the Security Council’s resolutions that action is called for,

\begin{itemize}
\item \textsuperscript{197} Vogel (n189); \textit{The Responsibility to Protect} (n183) 47-48.
\item \textsuperscript{198} In terms of arts 52-53 of the UN Charter.
\item \textsuperscript{199} As in the case of \textit{Operation Turquoise}, the French Intervention in Rwanda authorised by UNSC Res 929/1994.
\item \textsuperscript{200} \textit{The Responsibility to Protect} (n183) 51.
\item \textsuperscript{201} Simma (n184).
\item \textsuperscript{202} Simma (n184).
\end{itemize}
although not specifically authorised, or that past action is acceptable and welcome. If the
Security Council simply ignores the action, neither acknowledging it as acceptable, nor
criticizing it, the action will not be found to have been authorised by the Security Council.

When the Economic Community of West African States (ECOWAS) intervened in Liberia,
the Security Council resolved\(^\text{203}\) that the situation in Liberia constituted a threat to
international peace and commended ECOWAS’ efforts in the country. It has been
suggested\(^\text{204}\) that this could be construed as \textit{ex post facto} approval of the decision to
intervene. Another intervention that initially lacked Security Council authorisation was the
NATO intervention in Kosovo. NATO argued that it had clearly acted with the support of
previous Security Council decisions. The primary resolution relied on by NATO Secretary-
General Solana\(^\text{205}\) as supporting the Kosovo intervention was UNSC Resolution 1199/1998
which determined that the situation in Kosovo constituted a threat to international peace and
security.

There is, however, a danger in the doctrine of implied authorisation. Gray points out\(^\text{206}\) that
the Security Council may be reluctant to pass resolutions under Chapter VII condemning
States’ actions if these resolutions might be relied on as providing implied justification for
regional or unilateral use of force. Thus express Security Council authorisation remains the
primary means of mandating regional and State intervention.

2.1.3 REGIONAL ORGANISATIONS AND STATES UNDER ARTICLE 51

The only other exception to the article 2(4) and (7) prohibitions is the self-defence provision
in article 51 of the UN Charter. In certain circumstances, occurring with increased frequency,
civil strife has the consequence of conflict spilling over national boundaries. This is


\(^{204}\) Barrie (n191) 160; Roberts A ‘Intervention: Suggestions for Moving the Debate Forward’ London Round
Table Consultation of the ICISS 3 February 2001 Discussion Paper http://web.gc.cuny.edu/icissresearch/
london \%20discussion\%20paper.htm accessed 10/09/01.

\(^{205}\) ‘Legality of Use of Force’ Yugoslavia v United States of America ICJ Press Communiqué 2 June 1999
referred to by Burger JA ‘International Humanitarian Law and the Kosovo Crisis’ (2000) 82 \textit{Int’l Review of
the Red Cross} 129 at 130 n 3 cited in Barrie (n191) 163.

\(^{206}\) (n191) 195.
especially true when human rights abuses cause massive refugee flows.\textsuperscript{207} When this occurs the civil strife may be defined as a threat to or a breach of international peace and security by the Security Council. If the Security Council does not authorise action against this threat or breach, the neighbouring States which are affected may act in terms of article 51.\textsuperscript{208}

### 2.1.4 GENERAL ASSEMBLY RECOMMENDATIONS

There is always a possibility that a humanitarian crisis will arise which cannot be countered by article 51 action and where the Security Council does not authorise action. What recourse exists? Some\textsuperscript{209} say none exists. But there remains at least one other recourse to the United Nations. This is the 1950 General Assembly ‘Uniting for Peace’ Resolution.\textsuperscript{210}

This resolution calls for a two-thirds or better majority determination in the General Assembly that a humanitarian catastrophe is present or imminent. Effectively, this suggests that the veto right is superseded by the two-thirds or better determination by ‘a coalition of the willing.’\textsuperscript{211} That a two-thirds or better majority is more acceptable, is a reasonable suggestion as it gives a high threshold of international legitimacy to an intervention.\textsuperscript{212} This ensures that the action cannot be used for selfish reasons.\textsuperscript{213}

The predominant reason that interventions are rarely authorised, is that many States, whether in the Security Council or the General Assembly, are privately opposed to humanitarian intervention, as they may be future targets of such action.\textsuperscript{214} Additionally, the lengthy procedure at the General Assembly is problematic. The primary factor that discourages the

\begin{itemize}
\item \textsuperscript{207} Vogel (n189); Sources cited at n 184 supra.
\item \textsuperscript{209} Baranovsky (n186).
\item \textsuperscript{210} GA Res 377(v) UNGAOR (302\textsuperscript{nd} plenary meeting) A/Res/377(v)A (1950); Wheeler (n183) 561.
\item \textsuperscript{211} Independent International Commission on Kosovo \textit{The Kosovo Report} (2000) 194.
\item \textsuperscript{212} \textit{The Responsibility to Protect} (n183) 53.
\item \textsuperscript{213} Wheeler (n183) 562.
\item \textsuperscript{214} Wheeler (n183) 562; \textit{The Responsibility to Protect} (n183) 52.
\end{itemize}
use of this procedure is the fact that the General Assembly can only make recommendations which are not binding.\textsuperscript{215} This leaves the regional organisation or State in the same predicament it was in before the General Assembly recommendation: it lacks the authority to take action against human rights abuses.

\section*{2.2 CUSTOMARY INTERNATIONAL LAW}

It has been established that no Charter right exists for regional organisations or individual States to intervene forcibly where there is neither Security Council authorisation nor a threat against that State or organisation. What of a customary international law right of humanitarian intervention? For a right to exist in customary international law, it must fulfil the two requirements of \textit{opinio juris} and State practice.

\subsection*{2.2.1 \textit{OPINIO JURIS}}

This requirement asks whether or not the international community considers the norm to be legally binding. There are two aspects that must be considered here: First, the primacy of human rights and, secondly, the use of force to protect human rights. That the international community considers the protection of human rights as one of its main concerns is evidenced by the numerous human rights conventions that have proliferated over the last century.\textsuperscript{216} It has also been established that a core set of rights are to be protected by States, and that this protection is an obligation \textit{erga omnes}. These rights include the prohibitions against genocide, the slave trade, racism and crimes against humanity. It has been argued\textsuperscript{217} that States are bound to uphold this law for the whole of the community of nations, not only for its own citizens. Further, should these rights be infringed, protective action is required.

What type of protective action is appropriate? While the countermeasures will, of necessity, differ from those deemed adequate for delictual responsibility, it must be emphasised that a State that takes responsibility upon itself to protect the victims of abuse may only use

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{215} As pointed out in Roberts (n204).
\item \textsuperscript{216} See Chapter 3 \textit{supra}.
\item \textsuperscript{217} Van der Wense (n184).
\end{itemize}
\end{footnotesize}
measures short of the use of force to ensure respect for human rights. The use of force has not been accepted as an appropriate remedy against human rights violations. This is evident from the numerous provisions against the use of force and in favour of pacific settlement of disputes. The result is that, while opinio juris favours an obligation erga omnes to protect human rights, it does not favour the use of force as a means of protection.

2.2.2 STATE PRACTICE

This requirement considers whether States act in accordance with their opinio juris. Having established that States recognise the importance of human rights but do not accept use of force as a remedy against human rights abuses, the question arises whether or not there is evidence of this belief in State practice.

It is submitted that State practice does conform to the current opinio juris. Although States intervene in humanitarian crises, it is evident from the reasons given that the crises themselves are not the reason for the intervention. Rather, the States rely on self-defence, or the fact that the Security Council has declared the situation a threat to or breach of international peace and security.

During the intervention in Iraq to protect the Kurds, the Western States relied on the fact that the Security Council called the situation a threat to international peace and security. A similar case was made for the interventions in Somalia in 1992-1993, Bosnia in 1992-1993, ECOWAS in Liberia and NATO in Kosovo in 1999. Even where States base their intervention on humanitarian grounds, it is evident that they also have national interests to protect. Such was the case in the interventions by India in East Pakistan (Bangladesh), by

---

218 Cassese (n183); Simma (n184).
219 See Chapter 2 supra.
220 Barrie (n191) 157.
221 Barrie (n191) 158.
222 Barrie (n191) 159.
223 Barrie (n191) 160.
224 Barrie (n191) 163.
Vietnam against Pol Pot in Cambodia, Tanzania against Idi Amin in Uganda, and France against ‘Emperor’ Bokassa in the Central African ‘Empire.’

It is for the reason that use of force is not yet universally recognised as an acceptable remedy against human rights abuses either in *opinio juris* or in State practice that the conclusion must be drawn that “a customary rule of international law that use of military force by a group of States in absence of prior Security Council authorisation [to halt or prevent human rights atrocities] is only ‘evolving’ and does not yet exist.” How far then has this rule evolved?

3. **IT IS OUR DUTY TO TRY TO PREVENT IT**

3.1 **MORAL DUTY**

In the previous paragraphs two facts were established: First, human rights abuses are unacceptable and, secondly, no State may forcibly intervene in humanitarian crises unless authorised by the UN Security Council or under article 51 of the UN Charter. It is also commonly accepted that there is a moral duty to take action in circumstances in which universally accepted human rights are being violated on a massive scale. Although this duty usually rests with the Security Council, it is emphasized precisely when the Security Council refuses or is unable to act. This moral duty is predicated upon our common humanity. The chief obligation flowing from this fact is the obligation to protect the lives of fellow human beings whenever these are threatened, regardless of where this happens.

---

225 Widner (n189).

226 Ambos K ‘NATO, the UN and the Use of Force: Legal Aspects’ [Link](http://www.ejil.org/journal/Vol10/No1/coma.html) accessed 18/03/01; *The Responsibility to Protect* (n183) 15-16.


228 Alvear (n226); *Report from the Ottawa Roundtable* (n2); Robertson (n91) 410.
3.2 STATE INTERESTS

The duty to protect human lives has not remained confined to morality. It has crept into the field of politics, especially in the sphere of national interest. Article 51 of the Charter is evidence of this. The provision allows for action in self-defence. The interpretation of this provision has been extended to include defence of one’s own nationals in foreign States.\textsuperscript{229} This interpretation makes such action acceptable to the international community.

Other national interests have not been accepted as justifying a State’s interference in another State.\textsuperscript{230} There are two problematic issues arising from this. The first is that a State will not intervene unless it has a vested interest in a situation.\textsuperscript{231} The second is that an intervention based primarily and overwhelmingly on humanitarian considerations will inevitably be influenced by some national interest of the intervening State.\textsuperscript{232}

It is true that the greatest obstacle to overcome before attempting an intervention is political will.\textsuperscript{233} Sadly, this was demonstrated by the lack of interest in the Rwandan crisis in 1994. The majority of the powerful States that could have stopped the genocide lacked the political will to intervene because they had no interests in a small central African State. This problem can, however, be overcome. States can and should be made aware that humanitarian crises anywhere affect people and States everywhere.\textsuperscript{234} The best example of this is a civil war where human rights atrocities are committed. The collapse of national security and the attendant collapse of human security may cause a spill-over into neighbouring States, especially in the case of refugee flows or combatants crossing borders for protection or assistance. In these situations international security is threatened. The entire international

\begin{itemize}
  \item \textsuperscript{229} An example of this is the 1976 Israeli raid on Entebbe.
  \item \textsuperscript{230} UN Charter art 2(7).
  \item \textsuperscript{231} Posen BR ‘Military Responses to Refugee Disasters’ \textit{International Security} 21:1 (Summer 1996) 94 cited in Vogel (n189); Baranovsky (n186).
  \item \textsuperscript{232} Vogel (n189); Roberts (n204); London Round Table Consultation Rapporteur’s Report (n194); \textit{The Responsibility to Protect} (n183) 36.
  \item \textsuperscript{233} Vogel (n189); Zürn M & Zangl B ‘Weltpolizei oder weltinterventionsgericht’ \textit{Internationale Politik} 54(8) 1999 20 in Hansen (n191) 20; Ottawa Round Table Consultation Rapporteur’s Report (n2); \textit{The Responsibility to Protect} (n183) 52.
  \item \textsuperscript{234} Jentleson cited in Widner (n189); \textit{The Responsibility to Protect} (n183) 5.
\end{itemize}
community has an interest in this problem. The only way to stop the threat would be to intervene either under the UN Charter or independently of it, if the Charter mechanisms fail.

The intervention may also be in the interests of governments as their civilian populations’ opinions shift in favour of protection of human rights, causing them to call on their governments to intervene in the situations that are so graphically portrayed by the news networks. If a government fails to respond to humanitarian emergencies it may be accused of moral indifference and lose ground to opposition at home. The State may also lose credibility on other issues if it turns its back on humanitarian tragedies. By recognising this fact the necessary political will may be mobilized to overcome the unfortunate situation of a P-5 veto, as all members of the Security Council might, one day, accept that action in defence of human rights is in the interests of all. Alternatively, it may ensure sufficient political will to take action in foreign States when the Charter mechanisms fail.

Here lies the second problem. States that intervene in humanitarian crises are assured that someone, somewhere, will accuse them of acting out of self-interest. As shown above, with the correct interpretation of ‘national interest,’ this is inevitable and hardly open to criticism. Even in the absence of this interpretation, national interest always plays a role. After all, “States don’t send their soldiers into other States…only in order to save lives. The lives of foreigners don’t weigh that heavily in the scales of domestic decision-making.”

---

235 Vogel (n189); Report from the Ottawa Roundtable (n2); Rugumamu (n183); Rojas-Aravena F ‘Human Security: An Academic Perspective from Latin-America’ Santiago Round Table Consultation of the ICISS 4 May 2001 Discussion Paper http://web.gc.cuny.edu/icissresearch/Reports/Santiago.discussion.paper.Rojas.ENG.htm accessed on 28/09/01; The Responsibility to Protect (n183) 6 & 15.

236 UN Secretary-General: Speech at the University of Bordeaux in 1991 in Abiew FK The evolution of the doctrine and practice of humanitarian intervention (1999) 206 cited in Barrie (n191) 165; Corell (n2) 5; Widner (n189); Axworthy in Widner (n189).


238 Lake (n227) 115.

239 Fisher in Ipsen K Völkerrecht 3 ed (1990) 872 885 in Malanczuk (n192); Ottawa Round Table Consultation Rapporteur’s Report (n2); Maputo Round Table Consultation of the ICISS 4 May 2001 Rapporteur’s Report http://web.gc.cuny.edu/icissresearch/Maputo%20rapporteurs%20report%20ming.htm accessed 10/09/01.

240 Wheeler (n183) 558.

241 Walzer M Just and Unjust Wars: A Moral Argument with Historical Illustrations (1977) 101-2 in Wheeler (n183) 558; The Responsibility to Protect (n183) 36.
Since national interest will always play a role in even the most noble humanitarian action, it has been suggested that it should be harnessed to work for the affected population. Those States which are directly affected, such as neighbouring States, have a greater interest in the intervention. These States and the relevant regional organisations could be approached to intervene on behalf of the international community. Ideally, this should be done with a Security Council mandate. However, the action may yet be accepted without such authority, and even more so, precisely because it has a vested interest in the resolution of the conflict.

There is one problem with this suggestion: How does one determine the real cause of the intervention, whether it is humanitarian concerns or the national interest of the intervenors? This is an important question and one of the main reasons humanitarian intervention is deemed either illegal or a contradiction in terms. This is discussed in this chapter at paragraph 4.7.

### 3.3 RESPONSIBILITY TO PROTECT

From the discussion so far, it is clear that a ‘right to intervene’ outside of the UN Charter mechanisms does not exist. It is also clear that the ‘duty to intervene’ stands on the shaky ground of ‘morality’ and ‘national interest’ or ‘political will.’ These ideas, while either noble or politically expedient, do not yet offer a legal basis for humanitarian intervention. So, there is neither a legal right nor a legal duty (outside of the Charter) to intervene on humanitarian grounds. Yet it has been accepted that there is a responsibility to protect populations against

---

242 Vogel (n189); Ottawa Round Table Consultation Rapporteur’s Report (n2); Roberts (n204).

243 Holzgref in Widner (n189); Hansen (n191) 22; *The Responsibility to Protect* (n183) 54.

244 *Report from the Ottawa Roundtable* (n2); *The Responsibility to Protect* (n183) 53.

human rights abuses. It has been suggested\(^{246}\) that the terms ‘humanitarian intervention’ and ‘right or duty to intervene’ be replaced by the concept ‘responsibility to protect.’

The change in terminology implies an evaluation of issues from the point of view of the ‘victims’ in the target State rather than that of the coalition wanting to intervene. It also recognises that the primary responsibility to protect human rights rests with the target State. This responsibility shifts to the international community only when the target State fails to fulfil its responsibility. The change in terminology allows the definition to include the responsibility to react, the responsibility to prevent and the responsibility to rebuild.\(^{247}\)

Acting on the responsibility to protect, without a UN mandate, is unlawful. Such actions may, however, be considered legitimate under certain circumstances.\(^{248}\) In such cases it is important to avoid conflict with either the UN Charter or customary international law. It follows that the prohibitions against the use of force and against intervention still stand as inviolable principles. However, international law does recognise the concept of necessity. For this reason, action in terms of the responsibility to protect may be considered legitimate only if the intervening State can prove\(^{249}\) that its protective action was an exception to the norms of non-use of force and non-intervention that fulfils the requirements of necessity.\(^{250}\)

### 3.4 NECESSITY

Necessity is used as a defence on an \textit{ad hoc} basis.\(^{251}\) This approach relies on the fact that “we’ll know it, if we see it.” The problem with using this definition at international level is

\(^{246}\) Corell (n2) 4; Annan in Corell (n2) 11; Geneva Round Table Consultation of the ICISS 31 January 2001 Rapporteur’s Report \url{http://web.gc.cuny.edu/icissresearch/Reports/Geneva.rapporteur.report.Milliken.htm} accessed 28/09/01; London Round Table Consultation Rapporteur’s Report (n194); Maputo Round Table Consultation Rapporteur’s Report (n239); Cairo Round Table Consultation Rapporteur’s Report (n245); Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); Banerjee (n227); \textit{The Responsibility to Protect} (n183) 8-11.

\(^{247}\) \textit{The Responsibility to Protect} (n183) 9, 15-17.

\(^{248}\) Cairo Round Table Consultation Rapporteur’s Report (n245).

\(^{249}\) Roberts (n204).

\(^{250}\) Simma (n184); Corell (n2) 5; Roberts (n204); Geneva Round Table Consultation Rapporteur’s Report (n242); Robertson (n91) 407.

\(^{251}\) Corell (n2) 8; Roberts (n204).
that politics play a significant role, something that rarely happens at municipal level. It is for this reason that threshold principles must be established to determine the legitimacy of the protective action. It is hoped that such principles and criteria will prevent the Security Council turning a blind eye to human rights abuses, and, in the unfortunate event of that happening, allow regional organisations and States the opportunity to rely on fulfilment thereof to lend at least some legitimacy to their actions. It is to this end that the requirements for a legitimate action in defence of human rights follow.

4. REQUIREMENTS FOR THE LEGITIMATE USE OF FORCE IN THE PROTECTION OF HUMAN RIGHTS

The defence of human rights suffers from double standards. The nature and scope of international responses are inconsistent, evidenced by the disproportionate spread of resources between the developed and developing worlds. In some cases an international response is absent. This state of affairs is due largely to the fact that interventions occur only in regions where the intervenors have non-humanitarian interests. Threshold principles and criteria are necessary if a consistent practice, irrespective of the area of intervention, is to be established. Such requirements are also necessary to provide a basis from which the extent of the accountability for action falling short of the required standard may be determined.

A distinction must be made between legality and legitimacy. The criterion for legality is clear – Security Council authorisation. However, legality does not always equate with legitimacy. Decisions of the Security Council are often held to be less than credible as a result of the lack of democracy in the decision-making process, especially due to the P-5 veto power, and the abovementioned inconsistency of action.

Thus, the primary reason for such a list of requirements is not to give States or groups of States greater authority than is found in the UN Charter or customary international law. The reason for these requirements is to provide the Security Council with something upon which to base its decisions whether or not to intervene. It also provides a means of emphasizing the Security Council’s failure to act if such a situation should arise. In such a scenario the requirements may well provide a basis for regional organisations and States to determine

252 Wheeler (n183) 567.

253 Wheeler (n183) 566.
whether or not to intervene, as well as providing a mechanism to enable them to justify such determinations and consequent actions.

The following requirements and caveats are not merely mechanical criteria that result in simple answers. They are a way of moral reasoning to discern the ethical limits of an action. As such they are only a starting point for the determination of whether or not the use of force may be legitimised by the reliance on human rights, and as such, are not a numerus clausus.

4.1 HUMAN RIGHTS ABUSES

There must be a just cause for the use of force. What better cause exists than the protection of human beings from violations of their rights? The definition of humanitarian intervention given in Chapter 1 provides that the responsibility to protect exists in circumstances of ‘arbitrary and persistent human rights abuses which exceed the limits of the authority within which sovereign States are presumed to act.’ Two questions arise. Firstly, which human rights are so valuable that their protection calls for foreign intervention? Secondly, what degree of violation must be reached before the intervention is allowed?

4.1.1 NATURE OF HUMAN RIGHTS

The rights to life and to bodily integrity are considered to be the most important rights. These two rights form the basis of the group of rights deemed valuable enough to warrant use of force in their protection. Others that may be included in this list are the right to

254 American Bishops Injunction in Beach ‘Secession, Interventions and Just War Theory’ 1999 Pugwash Occasional Papers 35-6 in Wheeler (n183) 554.
255 Wheeler (n183) 554; The Responsibility to Protect (n183) 32.
256 Supra 4.
257 Supra Chapter 3.
258 Chandrasasan N ‘Use of Force to ensure Humanitarian Relief – A South Asian Precedent Examined’ 1993 ICLQ 644 670; Fixdal M & Smith D ‘Humanitarian Intervention and Just War’ (1998) 42 (2) Mershon Int’l Studies Review 283 296-7 in Wheeler (n183) 554; Hammarskjöld (n227); Annan (n228); Stedman SJ ‘Spoiler problems in peace processes’ Int’l Security 22 (2) 1998 51 in Hansen (n191) 23; Khobe MM ‘The Evolution and Conduct of ECOMOG Operations in West Africa’ in Malan (ed) Boundaries of Peace Support Operations (n191) 103 107-8; Cassese (n183); The Kosovo Report (n211) 293.
equality,\textsuperscript{259} the right to self-determination,\textsuperscript{260} and even some civil liberties.\textsuperscript{261} However, these three rights and any others will \textit{not} be considered unless the repression takes a form in which the rights to life and bodily integrity are threatened.\textsuperscript{262} It has also been suggested that purely pro-democratic intervention probably will not be considered for this list.\textsuperscript{263} The reason for these exclusions and for wanting to keep the types of abuses to a minimum is the necessity of avoiding abuse of situations by States with interests in the target State.\textsuperscript{264}

4.1.2 \textbf{EXTENT OF ABUSES}

As with the nature of human rights protected, the threshold for the extent of the violations needs to be narrowly defined in order to prevent abuse.\textsuperscript{265} Currently, the international community holds the threshold to be imminent or present\textsuperscript{266} massive violations\textsuperscript{267} of human

\begin{itemize}
\item Van der Wense (n184); Ayebare (n183); Khudoley (n196).
\item Khudoley (n196); Ayebare (n183); Roberts (n204); Cairo Round Table Consultation Rapporteur’s Report (n245).
\item Farrar [in Widner (n189)] lists long-term detention without trial and detention in brutal conditions.
\item El-Shafie O ‘Intervention and State Sovereignty’ Cairo Round Table Consultation of the ICISS 21 May 2001 Discussion Paper \url{http://web.gc.cuny.edu/icissresearch/Reports/Cairo.discussion.paper.OMRANSHAFEI.htm} accessed on 28/09/01; \textit{The Responsibility to Protect} (n183) 34.
\item Santiago Round Table Consultation of the ICISS 4 May 2001 Rapporteur’s Report \url{http://web.gc.cuny.edu/icissresearch/Reports/Santiago.rapporteur.report.Bitencourt.htm} accessed 28/09/01, which provides the reason that even the concept ‘democracy’ is open to interpretation; Ottawa Round Table Consultation Rapporteur’s Report (n2); Geneva Round Table Consultation Rapporteur’s Report (n246); \textit{The Responsibility to Protect} (n183) 34.
\item Ottawa Round Table Consultation Rapporteur’s Report (n2); Cairo Round Table Consultation Rapporteur’s Report (n245).
\item Wheeler (n183) 555.
\item \textit{The Kosovo Report} (n211) 194; \textit{The Responsibility to Protect} (n183) 32.
\item Reisman WM ‘Kosovo’s Antimonies’ 1999 \textit{AJIL} 860 861; Annan K ‘We the peoples: The role of the United Nations in the twenty-first century’ UN Doc A/54/2000 par 217; Cassese (n183); Ottawa Round Table Consultation Rapporteur’s Report (n2); Ayebare (n183); New Delhi Round Table Consultation Rapporteur’s Report (n232); Axworthy in Widner (n189); Baranovsky (n186); Rugumamu (n183); Petrasek D ‘New Terms for an Old Debate’ Geneva Round Table Consultation of the ICISS 31 January 2001 Discussion Paper \url{http://web.gc.cuny.edu/icissresearch/geneva%20papers.htm} accessed on 10/09/01; Cairo Round Table Consultation Rapporteur’s Report (n245); El-Shafie (n262); Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); Banerjee (n227); Annan (n228); Chandrahasan (n258) 670; Farrar in Widner (n189); Roberts (n204); Khudoley (n196); \textit{The Responsibility to Protect} (n183) 33.
\end{itemize}
rights resulting in a humanitarian emergency on a level that may be deemed not only a crisis but also a catastrophe. These violations must be systematic, sustained, widespread and so severe that they constitute a shock to the conscience of mankind and a threat to international or regional stability. Genocide, crimes against humanity and war crimes are examples of the type and extent of abuses that reach the threshold level for the use of force.

Merely formulating the criterion in this manner does little to clarify the extent of the violations required to provoke use of force for the protection of the victims in the target State. In order to provide a practical guide to this requirement, it is necessary to consider the conditions which have moved international organizations to intervene in the past.

---

268 Robertson (n91) 411; Wheeler (n183) 555; UK Draft paper circulated among the P-5 in late 1999 in Wheeler (n183) 564; Gray (n195) 30; Ottawa Round Table Consultation Rapporteur’s Report (n2).

269 Chadrahasan (n258) 670; Report from the Ottawa Roundtable (n2); New Delhi Round Table Consultation Rapporteur’s Report (n237).


271 Annan (n267); Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); The Responsibility to Protect (n183) 33.

272 The Kosovo Report (n211) 293.

273 NATO, AJP – 3.4.1 Peace Support Operations 2nd Study Draft 1999 p3-12 in Malan (n191) 168; Annan (n227).

274 The Kosovo Report (n211) 293.

275 26 UN SCOR (1606th meeting, 4 December 1971) 14 in Wheeler (n183) 555; Annan (n267); The Responsibility to Protect (n183) 31.

276 ECOWAS Non-Aggression Treaty Protocol on Mutual Defence Assistance (1989) art 18(2) in Khobe (n253) 106; Rugumamu (n183); Khudoley (n196); The Responsibility to Protect (n183) 31.

277 Annan (n228); Van der Wense (n184); Simma (n184); Petrasek (n267); Geneva Round Table Consultation Rapporteur’s Report (n246); Roberts (n204); Cairo Round Table Consultation Rapporteur’s Report (n245); New Delhi Round Table Consultation Rapporteur’s Report (n237); Ayebare (n183); St Petersburg Round Table Consultation Rapporteur’s Report (n245); The Responsibility to Protect (n183) 33.

278 Robertson (n91) 409, 413; Van der Wense (n184); Farrar in Widner (n189); Cassese (n183); Roberts (n204); Petrasek (n262); El-Shafie (n262); Cairo Round Table Consultation Rapporteur’s Report (n245); The Responsibility to Protect (n183) 33.

279 Petrasek (n262); Cairo Round Table Consultation Rapporteur’s Report (n245); The Responsibility to Protect (n183) 33.
In Somalia in 1992, 1.2 million persons were displaced, 4.5 million were threatened with severe malnutrition and 300 000 had died. This prompted UNSC Resolution 794 of 1992 which recognised the magnitude of the human tragedy and determined that it amounted to a threat to international peace and security.\(^{280}\) In Bosnia, also in 1992, ethnic cleansing, genocide and forced evacuations resulted in 2 million displaced persons and hundreds of thousands of fatalities. As in Somalia, a resolution, UNSC Resolution 77 of 1992, determined that the situation constituted a threat to international peace and security.\(^{281}\)

In Liberia, from 1989 until the ECOWAS intervention, thousands fled the country or were displaced as a result of the civil war. UNSC Resolution 788/1992 determined that the situation amounted to a threat to international peace and security and went on to applaud the ECOWAS intervention.\(^{282}\)

By August 1994 the situation in Rwanda was disastrous. From a pre-war population of 7 million, 500 000 were dead, 3 million persons were internally displaced, 2 million were refugees. Additionally, 47 000 children had been orphaned, between 250 000 and 500 000 women had been raped and between 2000 and 5000 children had been abandoned. This eventually prompted the Security Council to authorise the French \textit{Operation Turquoise}.\(^{283}\)

In Kosovo in 1998, ethnic violence resulted in vast numbers of internally displaced persons and refugee flows. This situation was determined by UNSC Resolution 1199 of 1998 to be a humanitarian crisis and a threat to international peace and security. NATO considered this constituted sufficient grounds for intervention.\(^{284}\)

From these decisions it can be seen that there are various abuses, other than the loss of life, to consider before determining that a situation warrants intervention. The second most

\(^{280}\) Barrie (n191) 157-58.

\(^{281}\) Barrie (n191) 159.

\(^{282}\) Barrie (n191) 161.

\(^{283}\) Malan (n191) 181; Barrie (n191) 159.

\(^{284}\) Barrie (n191) 163-64.
important abuse to consider is large-scale ethnic cleansing. This includes many of the abuses listed in the practical examples supra: forced expulsions, acts of terror to cause mass migrations and mass rape for political purposes. Each situation should be investigated to determine the precise extent of these interrelated violations of human rights.

4.1.2.1 EVIDENCE OF THE ATROCITIES

In order to determine whether a situation reaches the threshold for use of force, there must be adequate evidence of atrocities to support the determination. Due to the diverse factors playing a role in the determination, an ad hoc approach should be followed. It is essential that a disinterested and impartial agency on the ground assess the humanitarian situation in order to verify independently whether or not the criteria are met. NGO’s do play an active role in drawing attention to desperate situations and will continue to be a valuable source of information. The news media also plays an important role in providing evidence of human rights abuses.

A problem arises in this respect: the CNN-syndrome. Symptomatic of this dangerous disease is the tendency to believe that only those violations appearing in the news are worthy of concern. The result is that waning coverage results in the, quite often mistaken, belief that the atrocities are no longer being committed. In addition to waning interest, there may well be action in the opposite extreme. News coverage may result in excessive force. For this reason media images must be corroborated by other organisations on the ground.

285 The Responsibility to Protect (n183) 32.
286 The Responsibility to Protect (n183) 32-33.
287 Hansen (n191) 24.
288 Chandrahasan (n258) 670; Roberts (n204); Ottawa Round Table Consultation Rapporteur’s Report (n2); Cairo Round Table Consultation Rapporteur’s Report (n245).
289 Petrasek (n267); The Responsibility to Protect (n183) 35.
290 Ottawa Round Table Consultation Rapporteur’s Report (n2); The Responsibility to Protect (n183) 35.
291 The Responsibility to Protect (n183) 5.
It is important to remember that a humanitarian situation may be serious even if there are only a few casualties.\textsuperscript{292} If the case studies above are considered, it will be noticed that actual deaths make up a lesser part of the atrocities. It is more important that the circumstances of the deaths and casualties be considered.\textsuperscript{293} A very good method of determining the extent of atrocities is to determine the number of refugees from and internally displaced persons in the target State. This is especially important as these have the potential to disrupt regional stability.\textsuperscript{294}

\subsection{4.1.2.2 HOW MANY DEATHS WILL IT TAKE TO KNOW THAT TOO MANY PEOPLE HAVE DIED?}

What use is evidence of human rights violations? Ideally, the evidence should spur the international community to action. But how much suffering, on what scale, is so intolerable to invoke use of force in the protection of human rights? The sad truth is that there is no universal measure. The amount of suffering varies according to mass media exposure, ethnic affinity and perceived national interest.\textsuperscript{295}

Ethnic affinity plays an exaggerated role in this determination. Greater suffering is tolerated in Africa than in Europe or the Americas. This is evidenced by the difference in reaction to Kosovo and to Rwanda.\textsuperscript{296} Additional evidence of this is the lack of proportionality between casualties of the Western forces and those of non-Western civilians.\textsuperscript{297}

A consideration which overlaps between ethnic affinity and perceived national interest is the so-called ‘Mogadishu Factor.’ This factor has been emphasized since the failed UN mission in Somalia in 1992. The factor is best summed up in the question “How many Somali lives

\begin{footnotes}
\item[292] Roberts (n204).
\item[293] Roberts (n204).
\item[294] Vogel (n189); Roberts (n204); Scheffer DJ ‘Toward a Modern Doctrine of Humanitarian Intervention’ 23 \textit{U.Tol.L.Rev.} (1992) 253 287 in Donovan & McLaughlin (n194).
\item[295] Malan (n191) 168-9; Reisman (n267) 861.
\item[296] \textit{Report from the Ottawa Roundtable} (n2).
\item[297] Wheeler (n183) 555; \textit{Report from the Ottawa Roundtable} (n2); Banerjee (n227).
\end{footnotes}
is one American life worth?" This is the crux of the problem. The success of a mission to protect human rights is measured by the number of lives saved, not by the number of actual deaths. Therefore, a delayed action may be too little, too late. For this reason the International Commission on Intervention and State Sovereignty suggests action may be legitimate in anticipation of genocide, provided there is clear evidence of likely large-scale killing. On the other hand, however, pre-emptive use of force will face a P-5 veto and a strong argument of illegality as well as illegitimacy.

In practice “large-scale” as a concept should not generate much disagreement. It is the borderline cases that prove problematic. The goal for which the international community must strive, is the determination of a humanitarian crisis at a point which is sure to have it fall within such a definition, but, at the same time, early enough to ensure that the victims suffer the minimum amount required to meet the threshold.

The question now raised, is what happens if the evidence shows a situation that warrants being called a humanitarian catastrophe, the extent of which demands action be taken to protect the victims of the atrocities. Under ordinary circumstances, the State in which the atrocities occur is obliged to put a stop to them. What if it does not? Who looks after people whose governments ignore them? The second requirement for legitimate use of force is thus that the target State must be unwilling or unable to impede the atrocities.

4.2 THE TARGET STATE IS UNWILLING OR UNABLE TO IMPEDE THE ATROCITIES

States have sole control over their territories subject only to their international obligations. Certain of these obligations provide for the protection of fundamental human rights. Thus, where these human rights are violated, the individual State has a duty to put a stop to the

298 Wheeler (n183) 555; Report from the Ottawa Roundtable (n2); Banerjee (n227); Robertson (n91) 415.

299 Roberts (n204).

300 Maputo Round Table Consultation Rapporteur’s Report (n239); Cairo Round Table Consultation Rapporteur’s Report (n245).

301 The Responsibility to Protect (n183) 33.

302 Wheeler (n183) 555-6.

303 The Responsibility to Protect (n183) 33.
violations.\textsuperscript{304} In certain situations, however, States are unable or unwilling to impede the atrocities.

4.2.1 \textbf{INABILITY TO IMPEDE ATROCITIES}

For the protection of human rights to be removed from the control of the target State, there must be evidence of that State’s inability to prevent human rights abuses.\textsuperscript{305} A State will lack the requisite capacity where there is a total collapse of public order or government authority.\textsuperscript{306} Such a failed State is evidenced by internal chaos,\textsuperscript{307} anarchy or civil war.\textsuperscript{308} In the case of inability to impede atrocities, there must be proof that the central authority is utterly unable to halt the crimes. In addition to this, the authority must refuse to call upon or allow other States or international organisations to enter its territory to assist it.\textsuperscript{309}

4.2.2 \textbf{LACK OF POLITICAL WILL TO IMPEDE ATROCITIES}

Where the State is unable to halt human rights violations the responsibility shifts to the international community. This shift may also occur as a result of a government doing nothing in the face of human rights violations, simply because it lacks the political will to do so.\textsuperscript{310} Worse than inaction in the face of human rights violations is the promotion by central government authorities of hostilities against a group,\textsuperscript{311} or violations by groups acting with

\textsuperscript{304} \textit{The Responsibility to Protect} (n183) 17.

\textsuperscript{305} Chandrasahsan (n258) 670; Annan (n228); Gray (n195) 30; UK Foreign Secretary – Framework to Guide Intervention (n270); Geneva Round Table Consultation Rapporteur’s Report (n246); Roberts (n204); \textit{The Responsibility to Protect} (n183) 17, 32.

\textsuperscript{306} Chandrasahsan (n258) 670; Cassese (n183); \textit{Report from the Ottawa Roundtable} (n2); Ayebare (n183); Rugumamu (n183); Maputo Round Table Consultation Rapporteur’s Report (n239); \textit{The Kosovo Report} (n211) 293; \textit{The Responsibility to Protect} (n183) 33.

\textsuperscript{307} Khudoley (n196); St Petersburg Round Table Consultation Rapporteur’s Report (n245).

\textsuperscript{308} Khudoley (n196); St Petersburg Round Table Consultation Rapporteur’s Report (n245).

\textsuperscript{309} Cassese (n183).

\textsuperscript{310} Chandrasahsan (n258) 670; Gray (n195) 30; UK Foreign Secretary – Framework to Guide Intervention (n270); Annan (n227); Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); \textit{The Responsibility to Protect} (n183) 17, 32.

\textsuperscript{311} Chandrasahsan (n258) 670; UK Foreign Secretary – Framework to Guide Intervention (n270); Ayebare (n183); Khudoley (n196); Banerjee (n227); Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); \textit{The Responsibility to Protect} (n183) 32.
government support. In this scenario there must be proof that the central authority has consistently withheld their cooperation from the UN or other international organisations, or that it has refused to comply with decisions of such organisations.

Only if one of these scenarios is proven as existing will the responsibility to protect fall to the international community. This responsibility vests in the United Nations Security Council.

4.3 THE UNITED NATIONS REFRAINS FROM ACTION

The primary responsibility to protect rests with the UN Security Council. In fact, the Security Council is the only body that may authorize use of force to protect human rights.

Authorisation of any action hinges on political will and consensus among States. Such consensus is difficult to achieve in a situation where five members of the Council have a veto power. This veto often results in paralysis of decisions, especially in hard cases - a category into which the responsibility to protect often falls. Ideally, the answer would be to make the Security Council work instead of trying to find alternatives to it. However, this is not always possible.

As a result of a veto or the reasonable anticipation of a veto, recourse to the Security Council may not be conclusive. Thus the Security Council may itself be unwilling or unable to

---

312 Robertson (n91) 421; Cassese (n183); Roberts (n204).
313 Cassese (n183).
314 UN Charter art 24; Wheeler (n183) 561; Cassese (n183); Henkin L ‘Kosovo and the Law of “Humanitarian Intervention’” 1999 AJIL 824 826; The Responsibility to Protect (n183) 47.
315 Roberts (n204); El-Shafie (n262); The Responsibility to Protect (n183) 47-48.
316 Hansen (n191) 20.
317 The Responsibility to Protect (n183) 51.
318 Barrie (n191) 164.
319 El-Shafie (n262).
320 The Responsibility to Protect (n183) 49.
321 The Kosovo Report (n211) 293.
authorise protective action. In refraining from action the Security Council may confine itself to condemning the massacres and labelling the situation a threat to peace and security.

There are those that believe the lack of authorisation negates any possibility of protective action. However, this inaction by the Security Council may be seen by the international community to be unacceptable under the specific circumstances. It is in circumstances such as these, when the UN institutions fail to respond adequately or fail to act with credibility, that they leave others no choice but to act in the spirit of the Charter. If the ad hoc coalition chooses to act and then does so fully observing all the criteria for legitimacy, this will have a great impact on the credibility of the United Nations itself.

4.4 EXHAUSTION OF PEACIFIC REMEDIES COMMENSURATE WITH THE URGENCY OF THE SITUATION

There is a high threshold for the use of military force. Strong motivations are required to make use of force legitimate. Force may only be used as a last resort. This means that all peaceful and consent-based local and international remedies commensurate with the

322 Wheeler (n183) 561; Henkin (n314) 825, 827; Cassese (n183).
323 Cassese (n183).
324 Baranovsky (n186).
325 Barrie (n191) 164.
326 Chinkin (n269) 843; Wheeler (n183) 562.
327 Corell (n2) 5.
328 The Responsibility to Protect (n183) 55.
329 Hansen (n191) 13.
330 UK Foreign Secretary – Framework to Guide Intervention (n270); Van der Wense (n184); Geneva Round Table Consultation Rapporteur’s Report (n246); Santiago Round Table Consultation Rapporteur’s Report (n262); El-Shafie (n262); Banerjee (n227).
331 Chinkin (n270) 843; Franck TM ‘Lessons of Kosovo’ 1999 AJIL 857 859; Wheeler (n183) 556; Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); Banerjee (n227); The Kosovo Report (n211) 294; Reisman (n267) 861; Cassese (n183); Van der Wense (n184); Geneva Round Table Consultation Rapporteur’s Report (n246); Roberts (n204); Malan (n191) 174; Yermolaev M ‘Russia’s international peacekeeping and conflict management in the post-Soviet environment’ in Malan (ed) Boundaries of Peace Support Operations (n191) 63 72; The Responsibility to Protect (n183) 23-27, 36.
urgency of the situation\textsuperscript{332} and likely to prove successful in stopping the violations\textsuperscript{333} must be exhausted. Such pacific alternatives include mediation, coercion, observers, economic and diplomatic smart-sanctions, embargoes and International Criminal Court prosecutions.\textsuperscript{334}

These alternatives must be explored in a sincere and convincing manner,\textsuperscript{335} bearing in mind that it may not always be necessary to attempt each individual alternative in the face of overwhelming humanitarian catastrophe, especially if it is evident that those alternatives are neither commensurate with the urgency of the situation nor are they likely to halt the violations.\textsuperscript{336}

The questions which immediately spring to mind are: At which moment do the pacific means fail? At what point are they considered to be exhausted? The answers to these questions are not simple. It is necessary to know all the facts about the situation and then balance the extent of the violations with the appropriate remedy. Two broad guidelines may be followed. Firstly, if doubt exists that all pacific remedies are exhausted, it is preferable to continue through the use of non-violent means.\textsuperscript{337} The second is that, should further delay reasonably be deemed significantly to increase the prospect of a humanitarian catastrophe, use of force should be considered.\textsuperscript{338} The most important factor is that there should be an objective determination that force is the only practical means to avoid a humanitarian catastrophe.\textsuperscript{339}

If the use of force is the only means left to protect the victims against human rights violations, who may wield this power?

\begin{itemize}
\item \textsuperscript{332} Wheeler (n183) 556; Cassese (n183); Geneva Round Table Consultation Rapporteur’s Report (n246); Roberts (n204); \textit{The Responsibility to Protect} (n183) 23-27.
\item \textsuperscript{333} Wheeler (n183) 556; Reisman (n267) 861.
\item \textsuperscript{334} Geneva Round Table Consultation Rapporteur’s Report (n246); Roberts (n204); \textit{The Kosovo Report} (n211) 294; \textit{The Responsibility to Protect} (n183) 29-31, 36.
\item \textsuperscript{335} Falk (n269) 856; El-Shafie (n262); \textit{The Kosovo Report} (n211) 293; \textit{The Responsibility to Protect} (n183) 36.
\item \textsuperscript{336} Roberts (n204); \textit{The Responsibility to Protect} (n183) 36.
\item \textsuperscript{337} Wheeler (n183) 556.
\item \textsuperscript{338} \textit{The Kosovo Report} (n211) 294.
\item \textsuperscript{339} ‘UK Materials on International Law’ 63 \textit{BYIL} (1992) 826 827 in Gray (n195) 30; Farrar in Widner (n189); UK Foreign Secretary – Framework to Guide Intervention (n270); UK draft paper circulated among the P-5 in late 1999 in Wheeler (n183) 564.
\end{itemize}
4.5 MULTILATERAL FORCE

The force chosen to execute the protective action will have extraordinary power over the target State. The more States sharing this power, the less likely it is that the action will be for ulterior motives, or that the power will be abused.\(^\text{340}\)

Ideally, the UN Security Council would authorise the action and draw on its members’ forces to ensure a diverse group of States. When the UN fails to authorise such action, however, the choice of forces becomes more difficult. Above all else, the one thing to be avoided is a unilateral action. The force should consist of a group of States.\(^\text{341}\) Preferably, the group should be a regional organization, such as the Economic Community of West African States – ECOWAS – or a sub-regional organization, such as the Southern Africa Development Community – SADC.\(^\text{342}\) A regional organization is favoured because the proximity of regional neighbours to a given conflict implies a more immediate interest in its solution.\(^\text{343}\) The alternative to these organizations is a coalition of willing UN member States.\(^\text{344}\) This coalition must not consist solely of a power with support of its allies or its client States.\(^\text{345}\)

From the above paragraph it is evident that UN action is more favourable than regional organization action, which in turn is more favourable than sub-regional organization action. It is also evident that unilateral action by States is the least acceptable form of action. This relationship between the number of States taking part and legitimacy is carried over to the number of States supporting or not opposing the action.

\(^{340}\) Van der Wense (n184); Hansen (n191) 24; The Responsibility to Protect (n183) 36.

\(^{341}\) Chinkin (n270) 843; Whitman J ‘A Cautionary Note on Humanitarian Intervention’ Journal of Humanitarian Assistance 15 Sept 1995 in Vogel (n189); UK Foreign Secretary – Framework to Guide Intervention (n270); Geneva Round Table Consultation Rapporteur’s Report (n246); Cairo Round Table Consultation Rapporteur’s Report (n245); Roberts (n204); The Kosovo Report (n211) 294.

\(^{342}\) New Delhi Round Table Consultation Rapporteur’s Report (n237); Khudoley (n196); Report from the Ottawa Roundtable (n2); Nhara W ‘Conflict management and peace operations: The Role of the Organization of African Unity and sub-regional organisations’ in Malan M (ed) Resolute partners: Building peacekeeping capacity in southern Africa 21 ISS Monograph February 1998 39 in Malan (n191) 171.

\(^{343}\) Hansen (n191) 22; Malan (n191) 172; The Responsibility to Protect (n183) 54.

\(^{344}\) Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227); Robertson (n91) 409, 421.

\(^{345}\) Cassese (n183).
4.6 SUPPORT OR NON-Opposition of tHe MAJORITY OF tHE MEMBERS of tHE UNITED NATIONS

When gross human rights violations spur a coalition of the willing to decide that force is the last hope for an acceptable resolution, authorization for the execution of the decision must be granted. This consent must originate somewhere other than the coalition. The Charter makes it clear that the UN Security Council is the only body that may authorise the use of force.\textsuperscript{346} It is, therefore, of the utmost importance that the coalition attempts to obtain Security Council authorization for the proposed action.\textsuperscript{347} However, since any of the P-5 States with sufficient interest in the situation can veto such a resolution, it has been suggested\textsuperscript{348} that Security Council authorization is not essential.

This is a dangerous suggestion, as the possibility exists that this becomes the belief regarding Security Council resolutions in general. Security Council authorization is essential to legalize any use of force outside of article 51 of the Charter. It is a valid point, however, that some reform of the Security Council with regard to the veto power is urgently required to ensure that such suggestions do not find the wide support that may arise from recurrent Security Council paralysis. This paralysis ensures that any use of force by a coalition of willing States will be considered illegal.

Despite this unfortunate fact, the Security Council is often paralysed and willing States are forced to look elsewhere for a sufficient degree of consent\textsuperscript{349} before acting. This consent must take the form of a multilateral decision\textsuperscript{350} showing the support or non-opposition of the majority of the member States of the UN.\textsuperscript{351} An important part of this consent is the extent

\textsuperscript{346} UN Charter art 24, Chapters VII & VIII.

\textsuperscript{347} Widner (n189); Roberts (n204); 2nd Meeting of the Chiefs of Defence Staff of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution – Harare, Zimbabwe 24-25 October 1997 in Malan (n191) 174; The Responsibility to Protect (n183) 50.

\textsuperscript{348} Geneva Round Table Consultation Rapporteur’s Report (n246); Roberts (n204); Khudoley (n196); Robertson (n91) 411.

\textsuperscript{349} Hansen (n191) 23.

\textsuperscript{350} Geneva Round Table Consultation Rapporteur’s Report (n246).

\textsuperscript{351} Cairo Round Table Consultation Rapporteur’s Report (n245); Cassese (n183); Hansen (n191) 9; The Kosovo Report (n211) 294; Khobe (n258) 113.
of the support given to the action by the Security Council. The action must be supported by the majority of the permanent members of the Security Council.\textsuperscript{352} In addition there must be no formal act of censure or condemnation of the action by the Security Council.\textsuperscript{353}

Evidence of legitimacy may also be found in the degree of support for the action received from the relevant regional organization.\textsuperscript{354} Regional support is important for another reason. Neighbouring States have greater interests in regional stability or, in some cases, instability. For this and operational reasons, it has been pointed out\textsuperscript{355} that regional support is important if the action is to be a success.

While it may be difficult to garner support from the international community, it is important to do so. The wider and more diverse the support, the less likely it is that the States are acting in their own interests.\textsuperscript{356} Greater support also provides a better chance for \textit{ex post facto} ratification,\textsuperscript{357} especially if the majority of the Security Council supported the action. The chance of acceptance of the legitimacy of the action, as well as the chance of \textit{ex post facto} ratification is increased by a Security Council resolution condemning the violating State.\textsuperscript{358} This is even more so when the Security Council resolves that the situation amounts to a threat or breach of international peace and security.\textsuperscript{359}

In soliciting support for protective action, it is important not to offend opposing States or risk igniting a major interstate conflict.\textsuperscript{360} This is crucial where the target State or another opposing State is a nuclear power.

\textsuperscript{352} Robertson (n91) 421.

\textsuperscript{353} The Kosovo Report (n211) 294.

\textsuperscript{354} Roberts (n204).

\textsuperscript{355} Hansen (n191) 22.

\textsuperscript{356} Geneva Round Table Consultation Rapporteur’s Report (n246).

\textsuperscript{357} Roberts (n204).

\textsuperscript{358} Robertson (n91) 409.

\textsuperscript{359} Examples: UNSC Res 788/1992 declared the situation in Liberia a threat to international peace and security; UNSC Res 1199/1998 declared the situation in Kosovo a threat to international peace and security.

\textsuperscript{360} Widner (n189); Cassese (n183); The Responsibility to Protect (n183) 37.
Support for such action is often difficult to achieve as there are always grave concerns regarding the true motivation of the coalition States. It is therefore essential that it be proved that the States have the appropriate intention.

4.7 RIGHT INTENTION

It is axiomatic that the only intention that the coalition States should have is the alleviation of human suffering and the ending of all atrocities. Such altruistic acts seldom, if ever, occur. Coalition States inevitably have some interest in the resolution of the conflict. This interest is a necessity if a State is to be asked to send troops into a situation which may result in the loss of lives. The question, therefore, is how significant must the humanitarian component of the intention be? The answer is obvious.

The humanitarian component should be the overwhelming consideration motivating the use of force. This means that the national interests of the coalition States must play as small a role as possible. Above all else, these interests must be regarded by other States as reasonable and compatible with the rights and interests of those being protected.

The interests of the coalition States will always come under the microscope, and the reasonableness thereof will always be contested. A sure way of dispelling any distrust regarding the altruistic nature of the action is to ensure that the action neither threatens the territorial integrity or political independence of the target State, nor is aimed at the acquisition of economic profit or other form of aggrandizement.

---

361 New Delhi Round Table Consultation Rapporteur’s Report (n237); Santiago Round Table Consultation Rapporteur’s Report (n263); Cassese (n183); The Kosovo Report (n211) 293; Report from the Ottawa Roundtable (n2); Roberts (n204); Khudoley (n196); Robertson (n91) 421; NATO, AJP – 3.4.1 Peace Support Operations 2nd Study Draft 1999 3-11 in Malan (n191) 118; The Responsibility to Protect (n183) 35.

362 The Responsibility to Protect (n183) 36.

363 Wheeler (n183) 558.

364 Roberts (n204).

365 Wheeler (n183) 558.

366 Ottawa Round Table Consultation Rapporteur’s Report (n2); Wheeler (n183) 558.

367 Robertson (n91) 421; The Kosovo Report (n211) 294; Roberts (n204).
The humanitarian nature of the action is thus strengthened if the coalition indicates in its plan of action, or accepts in its mandate that force will be used only for humanitarian reasons. Such humanitarian assistance includes the creation of humanitarian enclaves, creation of a secure environment for the delivery of humanitarian aid, and aiding in the delivery of necessities. The best evidence of the right intention is when the coalition is willing to give such humanitarian aid, without discrimination, to all victims of the atrocities irrespective of their affiliations in the conflict.

Having established that gross violations of human rights have motivated a coalition of willing States to use force to protect the victims, and that the international community supports such action, one question must be asked before any of the practical problems are addressed. Is there a reasonable prospect that the coalition’s actions will be successful in putting a stop to human rights abuses?

4.8 REASONABLE PROSPECT OF SUCCESS

Before use of force is authorised and at all subsequent stages, it must be determined that the action stands a reasonable chance of success. In order for such feasibility to be assessed, the body authorising or considering the action must have a clear idea of the tasks involved and a common understanding of the goal of the mission. This goal must be to rescue the victims of oppression and restore human rights. If this happens then the action may be deemed successful. How, then, is success ensured?

---

368 As in Iraq in 1991 and Rwanda in 1994.
370 As ECOWAS did in Liberia.
371 Robertson (n91) 421.
372 Wheeler (n183) 560; UK Foreign Secretary – Framework to Guide Intervention (n270); Hansen (n191) 23; Report from the Ottawa Roundtable (n2); Petrasek (n267); El-Shafie (n262); Banerjee (n227); Robertson (n91) 409; The Kosovo Report (n211) 194 & 293; The Responsibility to Protect (n183) 37.
373 Hansen (n191) 23.
374 Hansen (n191) 23; The Responsibility to Protect (n183) 59.
It must be borne in mind that the international community does not have the capacity to address all the massive violations of human rights. It is suggested that an *ad hoc* approach be followed, considering the extent of the violations, national interest and public pressure. This approach takes into account the reality that the human and financial cost of an operation is often more than most publics are willing to bear, and so avoids the worst donor fatigue.

It is hoped that this may ensure that States do not commit half-heartedly or inconsistently to protective actions. Further, such considerations ensure that States willing to take action are the same States that are willing and able to deploy forces sufficient to halt, or at the very least sharply to decrease, the violations without causing or sustaining collateral damage of a magnitude rivalling the destruction of humanitarian interests threatened by inaction.

The security provided by such commitment of resources indicates a greater chance of sustainability. This is important as it is often unreasonable to set an end-date for the completion of the mission, although this is most desirable.

In addition to these considerations, there are various factors which play a role in determining whether or not protective action will be successful. One such factor is that another powerful State does not strongly oppose intervention, as this increases the chance of a protracted conflict. It is also important that each coalition State has full support for its action by the majority of the political forces within its country and that the action will not attract mass protests even if protracted. In addition to this, it must be determined whether or not the

---

376 Hansen (n191) 24.
377 Hansen (n191) 24.
378 Paris Round Table Consultation with Civil Society Rapporteur’s Report (n227).
379 Farrar in Widner (n189); Mockaitis T ‘Civil Conflict Intervention: Peacekeeping or Enforcement’ in Morrison *et al* (eds) *Peacekeeping with Muscle: The use of force in international conflict resolution* 1997 48 in Hansen (n191) 24; Roberts (n204).
380 Santiago Round Table Consultation Rapporteur’s Report (n261); *The Responsibility to Protect* (n183) 60.
382 Roberts (n204); Banerjee (n227); *The Responsibility to Protect* (n183) 37.
383 Hansen (n191) 16; Khudoley (n196).
affected population favours intervention. It is true that most such populations would support such action. It is, nevertheless, important to conduct independent investigations, as it is difficult to fight against both the perpetrators and the victims.

When the coalition has determined that all these criteria are met, it must be determined what mandate will be followed. This is important. The mandate must be narrow enough to fall with the scope of ‘protection’ but must be flexible enough to ensure adaptability to changing circumstances. The mandate also determines the resources required.

In order to determine the mandate, it is necessary to have adequate and accurate intelligence. This implies strong intelligence and communications networks as well as information-sharing by the different forces. This poses a problem as it is in a State’s national interest to keep these resources secret. For an action to succeed, this difficulty must be overcome.

Intelligence also enables strategic thinking. An effective strategy is essential. One strategy is not sufficient, however. Due to the changeability of situations an effective contingency plan is essential in the event of the original strategy failing.

After the mandate is set, it is important to determine whether or not the concern translates into sufficient funding. Such funding ensures the supply of adequate resources and sufficient logistic support.

---

384 Petrasek (n267); *The Responsibility to Protect* (n183) 36.
385 People on War Survey by the International Committee of the Red Cross in Petrasek (n267).
386 *The Responsibility to Protect* (n183) 50.
387 Eide (n381) 56; Neethling T ‘Conditions for successful entry and exit: An assessment of SADC allied operations in Lesotho’ in Malan (ed) *Boundaries of Peace Support Operations* (n191) 141 146.
388 Eide (n381) 92-3; Neethling (n387) 150; *The Responsibility to Protect* (n183) 61.
389 Neethling (n387) 151.
390 Stedman in Hansen (n191) 24; Banerjee (n227).
391 Eide (n381) 51; *The Responsibility to Protect* (n183) 63.
392 Hansen (n191) 18.
393 Khobe (n258) 188; Banerjee (n227); *The Responsibility to Protect* (n183) 60.
Finally, it is important to bear in mind that there must be coordination between the different agencies, including the military, NGO’s, the UN, civilian organizations and authorities and the media. This must occur at all levels, in all spheres and for every step.\(^{394}\) Without this, there is sure to be clashes over authority and areas of interest.

Having determined that the use of force has a reasonable prospect of ending the violations, it is necessary to consider exactly what force will be employed. It must be borne in mind that the type of force employed must meet the requirement of proportionality.

### 4.9 THE FORCE EMPLOYED MUST BE PROPORTIONAL TO THE EXIGENCIES OF THE SITUATION

The force used by the coalition must be limited and proportional to achieving the humanitarian purpose of the action.\(^{395}\) This proportionality extends to the nature of the action and the selection of targets.

#### 4.9.1 PROPORTIONALITY OF ACTION

The means chosen to execute the mandate must not result in greater harm than those which the means are designed to prevent or halt.\(^{396}\) This is based upon the idea that more lives should be saved by the action than would be lost by a policy of non-intervention.\(^{397}\)

\(^{394}\) Hansen (n191) 17; Eide (n381) 42 & 91; Khobe (n258) 118; Dowyaro ET ‘ECOMOG Operations in West Africa: Principles and Praxis’ in Malan (ed) Boundaries of Peace Support Operations (n191) 122; The Responsibility to Protect (n183) 61-62.

\(^{395}\) Chinkin (n270) 844; UK draft paper circulated among the P-5 in 1999 in Wheeler (n183) 564; Cassese ‘Ex iniuria ius oritur’; UK Foreign Secretary – Framework to Guide Intervention (n270); ‘International Criminal Tribunal for the Former Yugoslavia: Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’ 39 ILM 1257 (2000) 1271; Tyler R ‘Support for Western military intervention provokes discussion within Amnesty International’ 25-08-00 http://www.wsws.org/articles/2000/Aug2000/amn-a25_prn.shtml last accessed 23/04/02; Petrasek (n267); El-Shafie (n262); New Delhi Round Table Consultation Rapporteur’s Report (n237); Robertson (n91) 409; The Responsibility to Protect (n183) 37.

\(^{396}\) Wheeler (n183) 556; Geneva Round Table Consultation Rapporteur’s Report (n246); Santiago Round Table Consultation Rapporteur’s Report (n263); The Responsibility to Protect (n183) 37.

\(^{397}\) Wheeler (n183) 557; Geneva Round Table Consultation Rapporteur’s Report (n246); The Responsibility to Protect (n183) 37.
Ideally, after entrance into the target State, all reasonable steps to prevent use of force in protective action should be taken. Should force be required, each separate act of force must be shown to have had a legal justification. In the event that there was legal justification for the force, only the minimum amount of force may be used. The minimum amount of force is defined as that amount of force that is absolutely necessary to achieve the immediate aim of the action. This includes a limit in the time and scope of the use of force. The action should cease after achieving the immediate aim.

Force should, therefore, be employed in such a way that the process of escalation is controlled. Only with an increase in urgency should there be an increase in the intensity and immediacy of the response.

There is a reluctance on the part of powerful States to deploy ground forces in combat situations where the distinction between friend and foe, or soldier and civilian is unclear. Despite this, a coalition State may not ‘employ military means that reduce its risks to a bare minimum if this leads to excessive harm being inflicted on the civilians in the target State.

Execution of the mandate must occur through the use of weapons and methods that comply with international law. These weapons and methods must be those which are the most likely to avoid or minimize incidental civilian casualties or property damage. There are

---

398 St Petersburg Round Table Consultation Rapporteur’s Report (n245).
399 Dowyaro (n394) 128.
400 Dowyaro (n394) 128; Ottawa Round Table Consultation Rapporteur’s Report (n2); El-Shafie (n262); Van der Wense (n184); Durch WJ UN Peacekeeping, American Politics and the Uncivil Wars of the 1990’s 5 in Donovan & McLaughlin (n194); The Responsibility to Protect (n183) 37.
401 Gray (n195) 30.
402 Dowyaro (n394) 128.
403 Ignatieff M ‘Human Rights, Sovereignty and Intervention’ Amnesty International lecture at Oxford (2 Feb 2001) 12-13 in Wheeler (n183) 557; The Responsibility to Protect (n183) 63.
404 Cassese (n182).
405 Malan (n191) 172.
406 Farer T in Wheeler (n183) 557.
407 Robertson (n91) 421; The Responsibility to Protect (n183) 37.
various factors which need to be considered during the choice of means. These include the stocks of different weapons, likely future demands, timeliness of the attack and the risk to troops.\textsuperscript{408} The extent to which a military commander is obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects, is a sensitive issue.\textsuperscript{409} The International Commission on Intervention has suggested\textsuperscript{410} that force protection is important but that it should not be allowed to become the primary objective of the force. If it does, withdrawal should be considered. One thing that can be said, for certain, is that high-altitude aerial bombing is risky at best and should not be considered, except as a last resort.

It has been established that while the doctrine of ‘overwhelming force’ is obviously useful, it is inappropriate.\textsuperscript{411} Similarly, carpet-bombing is inappropriate. Targets must be carefully selected.

4.9.2 PROPORTIONALITY IN THE CHOICE OF TARGETS

The military commander ordering the use of force must do everything practicable to verify that the objects to be attacked are military objectives.\textsuperscript{412} A military objective is defined\textsuperscript{413} as

\begin{quote}
“objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage.”
\end{quote}

It is essential that the importance of these targets be weighed against any incidental damage caused by the attack.\textsuperscript{414} This is doubly important if dual-purpose facilities are targeted. Such

\begin{itemize}
\item \textsuperscript{408} Rogers APV ‘Zero Casualty Warfare’ Vol 82 IRRC March 2000 178 in Final Report Reviewing NATO’s action against the FRY (n395) 1263; Final Report Reviewing NATO’s action against the FRY (n395) 1265.
\item \textsuperscript{409} Final Report Reviewing NATO’s action against the FRY (n395) 1271.
\item \textsuperscript{410} The Responsibility to Protect (n183) 63.
\item \textsuperscript{411} Ottawa Round Table Consultation Rapporteur’s Report (n2); The Responsibility to Protect (n183) 62.
\item \textsuperscript{412} Final Report Reviewing NATO’s action against the FRY (n395) 1265; The Responsibility to Protect (n183) 63.
\item \textsuperscript{413} By art 52 of the Protocol Additional to the Geneva Conventions and accepted as customary international law in Final Report Reviewing NATO’s action against the FRY (n395) 1266 & 1269.
\item \textsuperscript{414} Final Report Reviewing NATO’s action against the FRY (n395) 1263; Tyler (n395).
\end{itemize}
targeting, while often more effective, runs a greater risk of the attendant damage being deemed excessive. Thus, when targeting legitimate military objects, there is a need to avoid long-term collateral damage to the economic infrastructure and natural environment which would be clearly excessive in relation to the direct military advantage which the attack is expected to produce.

Proportionality in the nature and target of the use of force is important for what it adds to the legitimacy of the protective action. This is not the only reason. Attacks not directed against military objects and attacks causing disproportionate civilian casualties or civilian property damage may constitute the offence of unlawful attack, especially if committed intentionally or recklessly.

During the execution of the coalition’s mandate, this requirement regarding the proportionate use of force by the coalition is supplemented by another to ensure that the decision-makers and troops in the target State act in an acceptable manner.

4.10 THE ACTION MUST ACCORD WITH INTERNATIONAL HUMANITARIAN LAW

Legal constraints are necessary if protective action is to preserve public support. Paragraph 4.9 supra has already begun this discussion. Thus, whether protective action is carried out under the authority of the UN, or by a single State, or by a coalition of States without the authority of the UN, the participants are equally bound by the laws of armed conflict.

For the laws of armed conflict to apply all that is required is the existence of an armed conflict. It does not matter whether this conflict is a purely internal conflict or a full-scale World War. The Law of Geneva thus applies irrespective of the type of conflict situation.

415 Wheeler (n183) 558.
416 Rogers (n408); Rome Statute of the ICC Art 8(b)(iv); The Kosovo Report (n211) 293.
417 Final Report Reviewing NATO’s action against the FRY (n395) 1265.
418 Van der Wense (n184); Report from the Ottawa Roundtable (n2); Roberts (n204); El-Shafie (n262); Shearer I Rules of Conduct During Humanitarian Interventions http://www.unc.edu/depts/diplomat/articles/hum_intervention/hum_06_shearer.html accessed 09/07/01.
419 Geneva Conventions common art 2, also found in Additional Protocol I to the Geneva Conventions (1977).
Does the Law of the Hague also apply to such a broad spectrum of conflict? The Martens Clause, in the Preamble to the 2nd Hague Convention (1899)\(^{420}\) provides that

“… in cases not included in the Regulations adopted by [States Parties] … , populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience.”

It is for this reason that the growing body of customary law of armed conflict and human rights law are relevant sources of law to apply to any situation. In addition to this customary law, the national contingents of forces participating in an armed conflict would be bound by the conventions to which their States are parties.\(^{421}\) Not only are these forces bound by this law, there must be a stricter adherence to these important provisions than is found with standard military operations. This extends through all aspects of the military operation.\(^{422}\)

Such strict adherence requires that the members of the military be educated in the precepts of international humanitarian law and the law of war, and that they then apply these religiously. Is it possible to ensure that all coalition forces are applying the law of war? It has been pointed out\(^{423}\) that military forces will apply the law of war in its operations, regardless of how those operations may be characterised, if their training and doctrine has a firm law of war foundation.

The law of war is usually found in the rules of engagement included in basic military training and those rules determined for the specific action. For protective action the rules of engagement should be appropriate to the circumstances, reflecting the requirement of proportionality and the need for stringent observance of international humanitarian law.\(^{424}\)

---

\(^{420}\) Discussed in Shearer (n418).

\(^{421}\) Shearer (n418).

\(^{422}\) *The Kosovo Report* (n211) 294; *The Responsibility to Protect* (n183) 37.


\(^{424}\) *The Responsibility to Protect* (n183) 62.
What, then, are these important rules? The following rules (except for the last) precede any law of war treaty and, while found in the Geneva and Hague Conventions, are also considered to be part of the customary international law of war.

"1) Soldiers fight only enemy combatants.
2) Soldiers do not harm enemies who surrender. They must disarm them and turn them over to their superior.
3) Soldiers do not kill or torture prisoners.
4) Soldiers collect and care for the wounded, whether friend or foe.
5) Soldiers do not attack medical personnel, facilities or equipment.
6) Soldiers destroy no more than their mission requires.
7) Soldiers treat all civilians humanely.
8) Soldiers do not steal. Soldiers respect private property and possessors.
9) Soldiers should do their best to prevent violations of the Law of War. They must report all violations of the Law of War to their superior."

From the ninth point, it is evident that there exists a positive duty upon the individual soldier to prevent acts that would breach humanitarian law. This duty includes the obligation to avoid omissions that would cause grave breaches of the Law of Geneva. Failure to fulfil this duty results in liability. This is discussed in the last chapter.

In addition to these ten requirements, there are two important factors to consider before concluding this paragraph. In order to ensure that States do not abuse their power while in the target State, there must be a predefined exit strategy. This does not necessarily mean that there must be a predetermined end-date. It does mean that the coalition must withdraw as soon as the mandate has been achieved. At this point the sovereignty of the target State must be immediately reinstated.

Irrespective of how noble the protective action, or how legal and legitimate a UN authorised intervention may be, the most important thing is this: The immediate responsibility for

---

425 Parks (n423).
426 Protocol I to the Geneva Conventions arts 86-87.
427 Protocol I to the Geneva Conventions art 11.
428 Paris Round Table Consultation with Government Officials Rapporteur’s Report (n183); Yermolaev (n331) 72; The Responsibility to Protect (n183) 41& 64.
429 The Responsibility to Protect (n183) 41.
430 New Delhi Round Table Consultation Rapporteur’s Report (n237); The Responsibility to Protect (n183) 39.
halting violence rests with the State in which it occurs. Never must the parties to the conflict be relieved of the responsibility to bring about peace.  

5. **TO DAMN THE CONSEQUENCES**

There are consequences for the target State in a protective action. These consequences are diverse. They are political, economic, social, civil and, quite often, not very high on the list of priorities of the coalition States. These consequences are important. After the military action, the coalition must show a genuine commitment to helping the target State rebuild a durable peace, as well as to promoting good governance and sustainable development.

Equally important is the effect that the action may have on the international community. One of the most serious consequences, both for the target State and the international community, is the effect the action has on both the respect of State sovereignty, diminishing it, and the credibility of the UN Security Council, equally diminishing it.

It is for these reasons that provision must be made to hold liable those who intervene outside of the authority of accepted international law principles. Similarly those who exceed their legitimate mandate should be held responsible. Chapter 5 considers this liability.

6. **THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY**

The International Commission on Intervention investigated humanitarian intervention in great depth during 2001. Many of its findings are referred in this chapter. The Commission included a synopsis of the main decisions in its Report, *The Responsibility to Protect*. This is provided below for the reader’s convenience.

---

431 Hansen (n191) 26; UK Foreign Secretary – Framework to Guide Intervention (n270); *The Responsibility to Protect* (n183) 13 & 17.

432 *The Responsibility to Protect* (n183) 39.

433 *The Responsibility to Protect* (n183) xi-xiii.
6.1 SYNOPSIS OF THE REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION

“SYNOPSIS

THE RESPONSIBILITY TO PROTECT: CORE PRINCIPLES

(1) BASIC PRINCIPLES
A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) FOUNDATIONS
The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:
A. obligations inherent in the concept of sovereignty;
B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
D. the developing practice of states, regional organizations and the Security Council itself.

(3) ELEMENTS
The responsibility to protect embraces three specific responsibilities:
A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

(4) PRIORITIES
A. Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

THE RESPONSIBILITY TO PROTECT: PRINCIPLES FOR MILITARY INTERVENTION

(1) THE JUST CAUSE THRESHOLD
Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminent likely to occur, of the following kind:
A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
B. large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.
(2) THE PRECAUTIONARY PRINCIPLES
A. Right intention: The primary purpose of the intervention, whatever other motives
intervening states may have, must be to halt or avert human suffering. Right intention
is better assured with multilateral operations, clearly supported by regional opinion and
the victims concerned.
B. Last resort: Military intervention can only be justified when every non-military option
for the prevention or peaceful resolution of the crisis has been explored, with
reasonable grounds for believing lesser measures would not have succeeded.
C. Proportional means: The scale, duration and intensity of the planned military
intervention should be the minimum necessary to secure the defined human protection
objective.
D. Reasonable prospects: There must be a reasonable chance of success in halting or
averting the suffering which has justified the intervention, with the consequences of
action not likely to be worse than the consequences of inaction.

(3) RIGHT AUTHORITY
A. There is no better or more appropriate body than the United Nations Security Council
to authorize military intervention for human protection purposes. The task is not to find
alternatives to the Security Council as a source of authority, but to make the Security
Council work better than it has.
B. Security Council authorization should in all cases be sought prior to any military
intervention action being carried out. Those calling for an intervention should formally
request such authorization, or have the Council raise the matter on its own initiative, or
have the Secretary-General raise it under Article 99 of the UN Charter.
C. The Security Council should deal promptly with any request for authority to intervene
where there are allegations of large scale loss of human life or ethnic cleansing. It
should in this context seek adequate verification of facts or conditions on the ground
that might support a military intervention.
D. The Permanent Five members of the Security Council should agree not to apply their
veto power, in matters where their vital state interests are not involved, to obstruct the
passage of resolutions authorizing military intervention for human protection purposes
for which there is otherwise majority support.
E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time,
alternative options are:
   I. consideration of the matter by the General Assembly in Emergency Special
      Session under the “Uniting for Peace” procedure; and
   II. action within area of jurisdiction by regional or sub-regional organizations under
       Chapter VIII of the Charter, subject to their seeking subsequent authorization from
       the Security Council.
F. The Security Council should take into account in all its deliberations that, if it fails to
discharge its responsibility to protect in conscience-shocking situations crying out for
action, concerned states may not rule out other means to meet the gravity and urgency
of that situation – and that the stature and credibility of the United Nations may suffer
thereby.

(4) OPERATIONAL PRINCIPLES
A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.
B. Common military approach among involved partners; unity of command; clear and
unequivocal communications and chain of command.
C. Acceptance of limitations, incrementalism and gradualism in the application of force,
the objective being protection of a population, not defeat of a state.
D. Rules of engagement which fit the operational concept; are precise; reflect the principle
of proportionality; and involve total adherence to international humanitarian law.
E. Acceptance that force protection cannot become the principal objective.
F. Maximum possible coordination with humanitarian organizations.”
6.2 THE RECOMMENDATIONS OF THE INTERNATIONAL COMMISSION ON INTERVENTION

After careful consideration, the Commission made the following recommendations in order to avoid the deleterious effects of the UN Security Council refraining from action.

"8.28 The Commission recommends to the General Assembly:
That the General Assembly adopt a draft declaratory resolution embodying the basic principles of the responsibility to protect, and containing four basic elements:

- an affirmation of the idea of sovereignty as responsibility;
- an assertion of the threefold responsibility of the international community of states – to prevent, to react and to rebuild – when faced with human protection claims in states that are either unable or unwilling to discharge their responsibility to protect;
- a definition of the threshold (large scale loss of life or ethnic cleansing, actual or apprehended) which human protection claims must meet if they are to justify military intervention; and
- an articulation of the precautionary principles (right intention, last resort, proportional means and reasonable prospects) that must be observed when military force is used for human protection purposes.

8.29 The Commission recommends to the Security Council:
(1) That the members of the Security Council should consider and seek to reach agreement on a set of guidelines, embracing the “Principles for Military Intervention” summarized in the Synopsis, to govern their responses to claims for military intervention for human protection purposes.

(2) That the Permanent Five members of the Security Council should consider and seek to reach agreement not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.

8.30 The Commission recommends to the Secretary-General:
That the Secretary-General give consideration, and consult as appropriate with the President of the Security Council and the President of the General Assembly, as to how the substance and action recommendations of this report can best be advanced in those two bodies, and by his own further action."

These recommendations, if followed, might go a long way to assisting the international community to start dealing effectively with gross human rights abuses. There is always the chance, however, that the UN does react to abuses as it is meant to react in terms of these recommendations and other international law principles. If States should take it upon themselves, what then should happen?

434 The Responsibility to Protect (n183) 74-75.
In the event that the action was indeed taken without the consent of the Security Council, the author of the action would be liable under international law. This may result in the authors being brought before the International Court of Justice,\textsuperscript{435} before \textit{ad hoc} tribunals,\textsuperscript{436} or, when aggression has been defined in accordance with the Rome Statute,\textsuperscript{437} before the International Criminal Court. Even where the protective action is held to be legitimate, individual soldiers may have acted outside the scope of their mandate in order to protect victims of atrocities. Provision is made to bring these individuals before municipal courts within the target States, or before courts martial.

It is impossible “to damn the consequences” of excessive force. For this reason, the concern turns to responsibility for the protective action, both regarding the authors of and the participants in the protective action.

\textsuperscript{435} As was the case regarding the US action in Nicaragua.

\textsuperscript{436} The possibility of NATO being brought before the ICTY.

\textsuperscript{437} Art 5(2).
Responsibility for the protective action takes two forms. The first is the responsibility for initiating the action. This falls under the international crime of aggression. This crime usually results in State responsibility, but may also be attributed to individual authors. The second form is the responsibility of soldiers for exceeding their mandate or infringing international humanitarian law. While it is possible that both the State and the individual are charged with war crimes in these circumstances, it is usually the individual that is held responsible. It is for this reason that the discussion will focus on the responsibility for the crime of aggression and war crimes.

### 1. STATE RESPONSIBILITY

A State that commits an international wrong against another State incurs international responsibility. An international wrong is committed when a State fails to comply either with a treaty obligation owed to another State (similar to breach of contract under municipal law) or an obligation owed *erga omnes* (resulting in an international delict or tort). Such failure results in various legal consequences, including the necessity of the delinquent State making reparation to the wronged State. Such reparation has many forms, including compensation, satisfaction and restitution in kind.

---

438 Hogan-Doran J & Van Ginkel BT “Aggression as a crime under international law and the prosecution of individuals by the proposed International Criminal Court” 1996 *NILR* 321 328.

439 Dugard (n67) 205; Jennings & Watts (n2) 501 par 145; International Law Commission *Draft Articles on State Responsibility* 37 (1998) *ILM* 440 arts 1 & 19(1).

440 Dugard (n67) 205; Jennings & Watts (n2) 501 par 145; *Draft Articles on State Responsibility* (n439) arts 17 & 19(4).

441 Jennings & Watts (n2) 501 par 145; *Draft Articles on State Responsibility* (n439) arts 3 & 16.

442 *Draft Articles on State Responsibility* (n439) art 42.
Certain breaches of international law result in criminal responsibility of States. This is as a result of the special significance of the subject matter of the obligation that was breached.\textsuperscript{443} Such international criminal responsibility is incurred by the State and those acting on its behalf.\textsuperscript{444} While the individuals responsible are usually prosecuted, this does not relieve the State of its responsibility under international law, if the individual’s act is attributable to it.\textsuperscript{445}

Despite the international criminal liability of States being additional to and not exclusive of the liability of the individual perpetrators, there is no tribunal with the appropriate international criminal jurisdiction over States.\textsuperscript{446} For this reason, States are usually brought before the International Court of Justice on a charge of committing an international delict. It is interesting to note, however, that articles 36 and 38 of the Statute of the International Court do not preclude the adjudication of criminal charges in respect of States, and that, should the conduct of the Respondent State be criminalized in terms of either a treaty binding on the parties to the case or under customary law, the International Court may determine that such conduct does give rise to State criminal responsibility.\textsuperscript{447}

Should the Court determine that the conduct in question is criminal, it is not clear what the precise legal consequences of the determination would be.\textsuperscript{448} It has been suggested\textsuperscript{449} that the consequences would be more severe than those of a determination of delictual liability, in that there would be fewer limitations on the extent of the reparations that may be claimed.

As yet there have been no determinations of international criminal liability of States by the International Court of Justice. There have, however, been two important cases brought before it regarding delictual responsibility for aggression and war crimes resulting from

\textsuperscript{443} Jennings & Watts (n2) 503 par 146; \textit{Draft Articles on State Responsibility} (n439) art 19(2).

\textsuperscript{444} Jennings & Watts (n2) 533 par 157.

\textsuperscript{445} Jennings & Watts (n2) 535 par 157.

\textsuperscript{446} Jennings & Watts (n2) 535-536 par 157.

\textsuperscript{447} Jennings & Watts (n2) 535 par 157 n 13.

\textsuperscript{448} Jennings & Watts (n2) 535 par 157.

\textsuperscript{449} \textit{Draft Articles on State Responsibility} (n439) arts 51-53.
purported ‘humanitarian interventions.’ These are the Military and Paramilitary Activities Case\textsuperscript{450} and the case concerning the Legality of Use of Force.\textsuperscript{451}

1.1 AGGRESSION

There exists a distinct possibility that intervening States will be accused of the international crime of aggression against the target state. How then should the crime be framed? And upon which defence, if any, can a State intervening on humanitarian grounds rely?

Framing a charge of aggression

At present there exists no codified crime of aggression. There have, however, been codifications of crimes against peace. These codifications are helpful in framing the charge of aggression.

The Nuremberg Charter\textsuperscript{452} as well as the Charter of the International Military Tribunal for the Far East\textsuperscript{453} define crimes against peace as

\begin{quote}
Planning, preparation, initiation or waging of a (declared or undeclared) war of aggression, or a war in violation of international (law,) treaties, agreements or assurances, or
\end{quote}

\textsuperscript{450} Supra n18.


\textsuperscript{452} Nuremberg Charter 82 UNTS 279 art 6(a) at http://www1.umn.edu/humanrts/instree/1945a.htm last accessed 30/11/02. Although this and the Charter of the International Military Tribunal for the Far East consider only individual responsibility, the definitions are helpful in establishing the nature of aggression, for use against a State.

participation in a common plan or conspiracy for the accomplishment of any of the
aforegoing.”

The words in brackets are included in the Far East Charter, but not in the Nuremberg
Charter. The 1974 Definition of Aggression defines aggression as

“use of armed force by a State or group of States either against the sovereignty, territorial
integrity or political independence of another State or in any other manner inconsistent with
the Charter of the United Nations.”

Taking these definitions into account, how would a charge of aggression look? It is
submitted that it should include the following elements:

1) The Applicant is a State.
2) The Respondent is a State.
3) The Respondent used armed force.
4) The armed force was used against the Applicant’s sovereignty, territorial
   integrity or political independence.
5) The armed force was used in a manner inconsistent with the Charter of the UN.
6) The armed force was in violation of international law.

Having established the first six requirements above, as the Applicant surely must, to have
any grounds for a trial, the Respondent might argue that humanitarian intervention is not in
violation of international law. This could be argued on the basis of necessity, provided that
all the requirements provided in Chapter 4 supra are fulfilled. The International Court of
Justice has, to date, had occasion to consider at least two allegations of aggression in which
this defence was employed.

The leading case in this matter has been the Military and Paramilitary Activities Case.455
Nicaragua alleged that the United States of America breached its general and customary
international law obligations by violating the sovereignty of Nicaragua. These allegations
were based upon a variety of military actions by the US in support of the armed opposition to

455 Supra n18.
the government, the so-called contras, especially the group known as the Fuerza Democrática Nicaragüense [FDN]. The United States justified its actions by relying on collective self-defence. The Court rejected this claim, holding that there had been neither an armed attack by Nicaragua against other members of the Organisation of American States nor did these States request any assistance. In addition, the Court held that the action by the United States failed to meet the requirements of necessity and proportionality.

The Court went on to consider the principle of non-intervention and held that the financial support and training, arms and intelligence supplied by the United States to the contras constituted unlawful intervention. The Court did emphasize, however, that purely humanitarian aid, to which the United States was restricted after 1 October 1984, could not be regarded as unlawful intervention, provided that the assistance is limited to the purposes indicated by the practice of the Red Cross and such aid is given without discrimination.

Another ground relied on by the United States, and the most important for this study, is the alleged violations of human rights by the Nicaraguan authorities against their own people. The Court held that the force employed by the United States could not be an appropriate method to monitor or ensure respect for human rights. This decision does not bode well for the development of the defence of the protection of human rights.

Fortunately, a recent incident of purported humanitarian intervention has resulted in a series of cases concerning Legality of Use of Force coming before the International Court. These cases have been brought by the Federal Republic of Yugoslavia [FRY] against the various

---

456 Military and Paramilitary Activities Case (n18) 59 par 100.
457 Military and Paramilitary Activities Case (n18) 119-123 par 230-238.
458 Military and Paramilitary Activities Case (n18) 124-125 par 242-243.
459 Military and Paramilitary Activities Case (n18) 134-135 par 268.
460 Supra n450. The cases against Spain and the USA were dismissed on the grounds that the Court lacked the requisite jurisdiction to decide the respective matters: Case Concerning the Legality of Use of Force (Yugoslavia v. Spain) Request for the indication of provisional measures (Order) http://www.icj-cij.org/icjwww/idocket/iyssp/orders/iyssp_iorder_19990602.htm & Case Concerning the Legality of Use of Force (Yugoslavia v. United States of America) Request for the indication of provisional measures (Order) http://www.icj-cij.org/icjwww/idocket/iyus/iyus/orders/iyus_iorder_19990602.htm last accessed 15/11/02.
NATO States which participated in the actions relating to the Kosovo crisis during 1998 and 1999. Two of the charges brought against the NATO States are that

- by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, [the States have] acted … in breach of [their] obligation[s] not to use force against another State;
- by taking part in the training, arming, financing, equipping and supplying … of the "Kosovo Liberation Army", [the States have] acted … in breach of [their] obligation[s] not to intervene in the affairs of another State."

Directly after filing the application, Yugoslavia submitted a request for the indication of provisional measures against the Respondents. The measure requested was that "[each Respondent] shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia." In oral arguments against the request the Respondent States argued that their actions were based on humanitarian concerns and that the nature of the Yugoslav actions was such that any provisional measures suspending the NATO action would result in a deterioration of the humanitarian situation, thereby causing irreparable harm. Accordingly, it was submitted that the provisional measure requested should not be granted.

---

461 *Legality of Use of Force (Yugoslavia v Belgium) (Yugoslavia v Canada) (Yugoslavia v France) (Yugoslavia v Germany) (Yugoslavia v Italy) (Yugoslavia v Netherlands) (Yugoslavia v Portugal) (Yugoslavia v Spain) (Yugoslavia v UK) (Yugoslavia v USA) Request for the indication of provisional measures Verbatim Record CR 99/14* [http://www.icj-cij.org/icjwww/idocket/iyall/iyall_cr/iyall_icya_icr9914_19990510.htm](http://www.icj-cij.org/icjwww/idocket/iyall/iyall_cr/iyall_icya_icr9914_19990510.htm) accessed 15/11/02: These are the first two claims formulated by Yugoslavia in its Applications (which are defined in identical terms, *mutatis mutandis*, against each Respondent).

462 *Legality of Use of Force (Request for the indication of provisional measures) Verbatim Record CR 99/14* (n461): This is the measure requested by the Applicant (which is defined in identical terms, *mutatis mutandis*, against each Respondent).


464 *Legality of Use of Force (Yugoslavia v Canada) Verbatim Record CR 99/16* (n463) par 45 & 48; *Legality of Use of Force (Yugoslavia v Germany) Verbatim Record CR 99/18* (n463) par 3.6; *Legality of Use of Force (Yugoslavia v Netherlands) Verbatim Record CR 99/20* (n463) par 43, 45-46; *Legality of Use of Force (Yugoslavia v Portugal) Verbatim Record CR 99/21* (n463) par 4.1.2.2; *Legality of Use of Force (Yugoslavia v United Kingdom) Verbatim Record CR 99/23* (n463) par 23.
The Court rejected the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia based upon the fact that in all cases it lacked the requisite jurisdiction. The Court did, however, acknowledge that this decision on the provisional measures did not affect the substantive dispute, brought before the Court in terms of article 9 of the Genocide Convention, and consequently allowed this aspect of the matter to proceed.

It is unfortunate that the Court’s argument did not move past the question of jurisdiction, as it would have been interesting to have the view of the Court on whether or not it felt that the conduct of NATO constituted an urgent threat to the rights Yugoslavia sought to protect. One will have to wait for the final judgment of the Court in this important case to have any indication of how far the concept of “responsibility to protect” has developed.

Even if conduct passes the test for legitimate use of force or intervention under a charge of aggression, it may still fail as a justification if it is disproportionate or infringes another
principle of international humanitarian law. A possible charge of war crimes may result, and this is therefore the next important consideration.

1.2 WAR CRIMES

In addition to aggression, the ICJ may also hear cases regarding State responsibility for the perpetration of war crimes. Such a charge may be brought before the International Court in an attempt to show that the *prima facie* lawful humanitarian intervention did not fulfil the requirements of proportionality and obedience to international humanitarian law. If proven this would cast serious doubt on the overall legitimacy of the intervention.

The same questions as for a charge of aggression may be posed: How would a charge of war crimes be framed? And upon which defence, if any, could a State charged with war crimes rely?

**Framing a charge of war crimes**

The framing of a charge of war crimes depends on the nature of the specific complaints. War crimes include grave breaches of the Geneva Conventions and violations of the laws and customs of war. Thus the charges may include the targeting of civilians or using nuclear or bio-chemical weapons. An example of the framing of such charges is to be seen in the *Legality of the Use of Force* cases, and is given *infra* at page 91.

Some indication of the International Court’s attitude to State responsibility for war crimes may be found in the *Military and Paramilitary Activities Case*. The Court held that the action taken by the United States, insofar as it involved laying mines in Nicaraguan ports and internal waters, attacks against oil installations and a naval base, as well as the financing and other support given to the FDN, was inconsistent with the aim of protecting human rights. In addition, the Court held that the action also did not fulfil the requirements of necessity and

---

470 Supra n461.

471 Supra n18.

472 Military and Paramilitary Activities Case (n18) 134-5 par 268.
proportionality.\textsuperscript{473} This is a good indication of how the Court will interpret these requirements in future cases of purported ‘humanitarian interventions.’

It can only be hoped that the International Court does not end the cases concerning the \textit{Legality of Use of Force}\textsuperscript{474} at the question of jurisdiction. If it is possible to move beyond this issue, it will be interesting to see how the Court addresses the questions of aggression and intervention as discussed above,\textsuperscript{475} as well as the questions based upon humanitarian law. Yugoslavia has posed many such questions, claiming that the Respondent States have infringed various aspects of international law through:

\begin{itemize}
  \item … taking part in attacks on civilian targets …
  \item … destroying or damaging … historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;
  \item … taking part in the use of cluster bombs …
  \item … bombing of oil refineries and chemical plants, [causing] considerable environmental damage;
  \item … taking part in the use of weapons containing depleted uranium …
  \item … killing civilians, destroying enterprises, communications, health and cultural institutions, [thereby infringing] the right to life, the right to work, the right to information, the right to health care as well as other basic human rights;
  \item … destroying bridges on international rivers, [thereby infringing the] freedom of navigation on international rivers;
  \item [consequently acting] in breach of [their] obligation[s] not [deliberately] to inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part;\textsuperscript{476}
\end{itemize}

A State cannot rely on humanitarian intervention to justify these kinds of abuses. The best defence against these charges is to show that the violations never occurred. If these violations occurred during a humanitarian mission it must be shown by the Respondent that:

\begin{itemize}
  \item It did everything practicable to verify that the objectives to be attacked were military objectives;
\end{itemize}

\textsuperscript{473} \textit{Military and Paramilitary Activities Case} (n18) 122 par 237.

\textsuperscript{474} \textit{Supra} n451.

\textsuperscript{475} 87-90 par 1.1.

\textsuperscript{476} \textit{Legality of Use of Force (Request for the indication of provisional measures)} Verbatim Record CR 99/14 (n461): These are the 3rd through 10th claims made by Yugoslavia in its Applications (which are defined in identical terms, \textit{mutatis mutandis}, against each Respondent) as read into the record by the Registrar.
• It took all practicable precautions in the choice of methods and means of warfare with a view to avoiding or minimizing incidental civilian casualties or civilian property damage; and

• It refrained from launching attacks which were expected to cause disproportionate civilian casualties or civilian property damage.\(^\text{477}\)

Such requirements must be fulfilled by each individual commander in respect of each individual action ordered by him. Further requirements for individual responsibility for war crimes are discussed below at paragraph 2.2.

In addition to the International Court of Justice, which hears only matters of State responsibility, there is a need for tribunals which deal with individual criminal responsibility.

2. **INDIVIDUAL RESPONSIBILITY**

To the extent that individuals are subject to international duties, they may also commit international wrongs.\(^\text{478}\) The international law of war, or humanitarian law, as found in the 1949 Geneva Conventions and the 1977 Additional Protocols, gives rise to most of the duties with which this paragraph deals. The obligations found in these instruments are not confined exclusively to States, but apply directly to individuals.\(^\text{479}\)

Indeed, it is more likely that individuals will be prosecuted for international crimes rather than States. This is because

> “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\(^\text{480}\)

---

\(^\text{477}\) Final Report Reviewing NATO’s action against the FRY (n395) par 28.

\(^\text{478}\) Jennings & Watts (n2) 505 par 148.


\(^\text{480}\) ‘IMT (Nuremberg) Judgment and Sentences’ 41 *AJIL* 172 220-221 in Donovan & McLaughlin (n194).
2.1 AGGRESSION

2.1.1 AD HOC TRIBUNALS

Individuals were prosecuted for crimes against peace at the Nuremberg Tribunal (IMT) held after World War II. Crimes against peace were defined by the Nuremberg Charter as the planning, preparation, initiation and waging of a war of aggression. Individual criminal responsibility was incurred for this crime, but was limited to those leaders, organizers, instigators and accomplices who participated in formulating or executing a common plan or conspiracy to commit crimes against peace.

Although the Nazi leadership tried at the IMT was charged with invading peaceful neighbouring States in violation of various treaties, there is a parallel to be drawn to a purported humanitarian intervention. Such an intervention consists of conduct *prima facie* in violation of the prohibition against the use of force.

Much rests with the definition of aggression that is accepted by the *ad hoc* tribunal set up to adjudicate the circumstances surrounding a humanitarian intervention. If the definition resembles the 1974 Definition of Aggression, including the provision which does not admit any justification ground, even the defence of human rights may not be deemed acceptable. If the definition is more in line with that of the International Military Tribunals of the Second World War the intervention may be deemed lawful if it can be proven to fall within the scope of an existing justification ground such as defence or necessity.

---

481 Nuremberg Charter (n455) art 6(1).

482 Nuremberg Charter (n455) art 6(1).

483 *Supra* p86.

484 Art 5(1).

485 *Supra* pp85-86.
2.1.2 INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is currently in the process of being established. The Rome Statute\textsuperscript{486} provides that the Court shall have jurisdiction over natural persons\textsuperscript{487} accused of the crime of aggression.\textsuperscript{488} This statement is qualified by the next paragraph,\textsuperscript{489} which states that jurisdiction over the crime of aggression shall only be exercised once a provision is adopted\textsuperscript{490} defining the crime and setting out the conditions under which the Court shall exercise that jurisdiction. To date, no such provision has been adopted.

This means that, until the ICC is granted jurisdiction, it is necessary for international tribunals to be established to adjudicate charges of aggression, as was done in the case of the IMT. The most recent tribunals do not, however, have jurisdiction over infringements of \textit{ius ad bellum}, limiting themselves to focus instead on infringements of \textit{ius in bello}.

2.2 WAR CRIMES

There are various means of prosecuting war crimes committed by interventionary forces. The first is the system of \textit{ad hoc} tribunals. The approach of International Criminal Tribunal for the Former Yugoslavia will be considered, as the NATO bombing campaign that occurred during 1999 is included in its jurisdiction. This will be followed by a discussion of the approach of domestic courts and, finally, by a discussion of the International Criminal Court.

2.2.1 AD HOC TRIBUNALS

The \textit{ad hoc} tribunal for the Former Yugoslavia, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [ICTY], has concurrent jurisdiction

\textsuperscript{486} \textit{Supra} n79.

\textsuperscript{487} Rome Statute (n79) art 25(1).

\textsuperscript{488} Rome Statute (n79) art 5(1)(d).

\textsuperscript{489} Rome Statute (n79) art 5(2).

\textsuperscript{490} In accordance with arts 121 & 123 of the Rome Statute (n79).
with the domestic courts of the States comprising the former Yugoslavia.\textsuperscript{491} However, the Tribunal has primacy over those courts in respect of matters within its jurisdiction.\textsuperscript{492}

The ICTY has jurisdiction over natural persons\textsuperscript{493} suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,\textsuperscript{494} including grave breaches of the Geneva Conventions of 12 August 1949\textsuperscript{495} and violations of the laws or customs of war.\textsuperscript{496} Therefore, in terms of the Statute of the International Tribunal, it is possible, in theory at least, to bring the commanders of NATO to trial for war crimes committed during the intervention in the Former Yugoslavia, irrespective of whether the intervention is deemed lawful or not.

During the period of the NATO bombing campaign against the FRY (March 1999 – June 1999) and since, the Prosecutor at the ICTY received requests to investigate alleged violations of international humanitarian law committed by senior figures at NATO during the campaign.\textsuperscript{497} Consequently, the Prosecutor, in accordance with article 18 of the Statute, established a committee to assess the allegations.\textsuperscript{498} The primary questions considered by the committee were as follows:

\begin{quote}
\textit{\textit{a. Are the prohibitions alleged sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of the prohibitions have occurred; and}}

\textit{\textit{b. upon the reasoned evaluation of the information by the committee, is the information credible and does it tend to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign?\textsuperscript{499}}}\\
\end{quote}


\textsuperscript{492} Statute of the ICTY (n491) art 9(2).

\textsuperscript{493} Statute of the ICTY (n491) art 6.

\textsuperscript{494} Statute of the ICTY (n491) art 1.

\textsuperscript{495} Statute of the ICTY (n491) art 2.

\textsuperscript{496} Statute of the ICTY (n491) art 3.

\textsuperscript{497} Final Report Reviewing NATO’s action against the FRY (n395) 1257 par 1.

\textsuperscript{498} Final Report Reviewing NATO’s action against the FRY (n395) 1258 par 3.

\textsuperscript{499} Final Report Reviewing NATO’s action against the FRY (n395) 1258 par 5.
During the investigation the committee reviewed various general issues. These include:

(i) damage to the environment

(ii) use of depleted uranium projectiles

(iii) use of cluster bombs

(iv) legal issues related to target selection [applicable law, the link between *ius ad bellum* and *ius in bello*, the nature of military objectives and the principle of proportionality] and

(v) casualty figures.

After reviewing these factors, the committee provided the following general assessment of the NATO bombing campaign:

“54. During the bombing campaign, NATO aircraft flew 38,400 sorties, including 10,484 strike sorties. During these sorties, 23,614 air munitions were released (figures from NATO). … Approximately 500 civilians were killed during the campaign. These figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.

55. The choice of targets by NATO … includes some loosely defined categories such as military-industrial infrastructure and government ministries and some potential problem categories such as media and refineries. All targets must meet the criteria for military objectives…. If they do not do so, they are unlawful. … As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.

56. The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defences. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilian or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.”

---

500 Final Report Reviewing NATO’s action against the FRY (n395) 1261-1264 par 14-25.
501 Final Report Reviewing NATO’s action against the FRY (n395) 1264 par 26.
502 Final Report Reviewing NATO’s action against the FRY (n395) 1264-1265 par 27.
503 Final Report Reviewing NATO’s action against the FRY (n395) 1265-1272 par 28-52.
504 Final Report Reviewing NATO’s action against the FRY (n395) 1272 par 53.
505 Final Report Reviewing NATO’s action against the FRY (n395) 1272-1273 par 54-56.
The committee reviewed 22 specific incidents\textsuperscript{506} about which it was alleged that NATO infringed international humanitarian law. The committee found that, in the course of its review, it “did not come across any incident which, in its opinion, required investigation by the [Office of the Prosecutor].”\textsuperscript{507}

 Accordingly the committee made the following recommendations:

\begin{quote}
\begin{itemize}
\item \textsuperscript{90} On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.
\item \textsuperscript{91} On the basis of information available, the committee recommends that no investigation be commenced by the [Office of the Prosecutor] in relation to the NATO bombing campaign or incidents occurring during the campaign.\textsuperscript{508}
\end{itemize}
\end{quote}

Thus, as a result of the lack of \textit{prima facie} evidence of alleged violations of the laws of war, it is unlikely that senior figures at NATO will be charged with the alleged offences. In fact, to date, they have not been charged.

It is submitted that two possible conclusions can be drawn from the Final Report Reviewing NATO’s action against the FRY.\textsuperscript{509} The first is that, whatever the legality of the entire campaign under \textit{ius ad bellum}, the interventionary forces acted in accordance with international humanitarian law during the campaign. The second possible conclusion is that there simply is not enough evidence to charge anyone with the commission of international crimes, although such crimes are suspected.

For this reason there are neither examples of indictments as a result of a purported humanitarian intervention nor defence strategies within the \textit{ad hoc} tribunals. What can be deduced of possible future indictments is discussed under paragraph 2.2.4 \textit{infra}.

\textsuperscript{506} Final Report Reviewing NATO’s action against the FRY (n395) 1260-1261 par 9.
\textsuperscript{507} Final Report Reviewing NATO’s action against the FRY (n395) 1273 par 57.
\textsuperscript{508} Final Report Reviewing NATO’s action against the FRY (n395) 1283 par 90-91.
\textsuperscript{509} \textit{Supra} n395.
Acceptable defences to a charge of war crimes are discussed at paragraph 1.2 *supra*, and paragraphs 2.2.4.3 *infra*. These defences comprise private defence and necessity, as well as military necessity. These are considered in both national and international law arenas, and provide some idea of how they would be approached under *ad hoc* tribunals.

International tribunals are not, however, the only recourse open to victims of disproportionate intervention wherein to try suspected war criminals. Under certain circumstances, domestic courts may have the requisite jurisdiction to try individuals suspected of exceeding their mandates to the extent that such excess amounts to war crimes.

### 2.2.3 DOMESTIC COURTS

In the past there was no commonly accepted disciplinary measure for troops who, when involved in international operations, violated international norms. The result was that such discipline was left largely to individual nations. With the introduction of the Rome Statute there now exists the possibility of international adjudication, although the primary responsibility still rests with the individual State.

There exist two possible routes to follow in adjudication of war crimes within the domestic system. The first is the domestic criminal court. The second is the military court or court-martial.

#### 2.2.3.1 CRIMINAL COURTS

In the case of international crimes, the domestic court acts as the agent of the international community in the prosecution of a person in whose punishment all States have an equal interest. Such prosecutions are said, therefore, to rest upon universal jurisdiction. A charge of war crimes would be founded on such jurisdiction.

---

510 91-92.

511 *The Responsibility to Protect* (n183) 62.

512 *Supra* n79.

513 Dugard (n67) 141.
The principle of universal jurisdiction is permissive, in that it does not compel States to prosecute such crimes. It merely allows them the opportunity, should they choose, to do so. 514 It is for this reason that only some States have incorporated war crimes into their respective domestic laws. Israel, Germany and the United Kingdom are examples of such States and, accordingly, either have punished war criminals or are empowered to do so. 515

a) South Africa

While South Africa became a party to the 1949 Geneva Conventions in 1952 and the 1977 Additional Protocols in 1995, 516 until 2002 it had done nothing to incorporate these texts into South African law. The only recourse has been the Military Disciplinary Code, 517 in terms of which a member of the military who exceeds his mandate, or disobeys a lawful command or order, can be charged under section 19.

With the advent of the Rome Statute of the International Criminal Court, South Africa has been presented with an opportunity to incorporate the prohibitions against war crimes, 518 genocide 519 and crimes against humanity 520 into its law. The South African President has recently assented to the Implementation of the Rome Statute of the International Criminal Court Act. 521

In terms of this Act, and in line with the principle of complementarity, 522 a South African court will have jurisdiction over any person who commits a crime listed in article 5 of the Rome Statute, provided that –

514 Dugard (n67) 141.
515 Dugard (n67) 142.
516 Dugard (n67) 435.
517 Defence Act 44 of 1957 as amended, First Schedule.
518 Rome Statute of the ICC (n79) arts 5(1)(c) & 8.
520 Rome Statute of the ICC (n79) arts 5(1)(b) & 7.
522 Rome Statute of the ICC (n79) art 1; Implementation of the Rome Statute Act (n521) s 3(d).
“(a) that person is a South African citizen; or
(b) that person is not a South African citizen but is ordinarily resident in the Republic; or
(c) that person, after the commission of the crime, is present in the territory of the Republic; or
(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.”

This Act will come into operation on a date still to be determined. When it does come into operation, it will afford South Africa the opportunity to try any member of the military, even if he is engaged in a legitimate humanitarian intervention, who exceeded his mandate or the rules of engagement to the extent that the conduct amounts to war crimes.

Such a prosecution will employ indictments similar to those used by the International Criminal Court and will follow lines of argument similar to those in that Court, as both the domestic courts and the International Criminal Court function in terms of the Rome Statute. The structure of indictments and prosecutions under the Rome Statute is discussed *infra* at paragraph 2.2.4.

**i) Defences under South African Law**

Should a prosecution under the Implementation of the Rome Statute Act take place, the accused may rely on the defences as listed in the Rome Statute. Failing these, the accused may rely on general principles of law derived from national laws, provided that these are not inconsistent with the Rome Statute, with international law and with internationally recognized norms and standards.

Two such principles are the justification grounds of private defence and necessity. The defence of human rights fits easily into the requirements for private defence or necessity, and at times the requirements for valid humanitarian intervention are even more strenuous than

---

523 Implementation of the Rome Statute Act (n521) s 4(3).
524 Implementation of the Rome Statute Act (n521).
525 Supra n521.
526 Discussed *infra* at paragraphs 2.2.4.1 and 2.2.4.2.
527 Rome Statute of the ICC (n79) art 31(3) read with art 21(1)(c).
those for either the national law defences. An individual, either the head of State or commander, may rely on these defences if the following requirements are met.

**Private defence**

Private defence under South African law may be defined as

“[using] force to repel an unlawful attack which has commenced, or is imminently threatening, upon [the accused’s] or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack.”

In this definition the requirements for valid private defence have been highlighted: The underlined phrases indicate the requirements of the attack, while the italicized phrases indicated the requirements of the defence.

**Requirements of the attack**

Snyman identifies three (3) requirements which the attack must fulfil in order for private defence to succeed as a justification ground. These are (1) the attack must be directed at an interest which legally deserves to be protected, (2) the attack must be unlawful, and (3) the attack must be imminent but not yet completed.

1. The attack must be directed at an interest which legally deserves to be protected.

   The definition in Snyman states that life, bodily integrity, property and other interests are considered deserving of protection. International law agrees. However, only

---

529 Snyman (n528) 104.
530 Snyman (n528) 103.
531 Snyman (n528) 105.
532 Chapter 3 supra.
the interests of life and bodily integrity are recognized as valuable enough to warrant protection through the use of force.\footnote{Supra Chapter 4 par 4.1.1.}

(2) The attack must be unlawful.

A State has the right to deal with its internal affairs in a way that it sees fit. This is subject only to international customary law and treaties that the States has ratified. Therefore a State may be allowed to impose the death penalty on certain criminals and inflict punishments which may infringe the bodily integrity of such criminals.\footnote{Chapter 3 supra.} However, a State may not arbitrarily deprive anyone of the rights to life or bodily integrity. If a State implements a policy of systematic, widespread, and severe human rights abuses, it crosses the threshold of what is considered legal.\footnote{Supra Chapter 4 par 4.1.2.}

There are two further considerations under this topic:

(a) The attack need not be directed at the defender.\footnote{Snyman (n528) 104.}

In South African law, a person may protect another from attack, even if there is no family or protective relationship between them.\footnote{Snyman (n528) 104.} In international law such protection falls to the UN Security Council.\footnote{Supra Chapter 4 par 2.} However, just as the police are meant to protect civilians under national law, and sometimes fail to do so, so too does the Security Council sometimes fail in its duty to protect populations against attacks from their own State. It is inevitable due to the nature of international relations. It is for this reason that civilians under national law and States under international law sometimes take the task of protection upon themselves. The States which intervene to protect foreign
populations may rely on a moral duty, the responsibility to protect follow human beings, or the necessity of the action. The most compelling argument is that all States have an interest in protecting victimized populations as such protection will ensure regional and global security.

(b) The attack need not necessarily consist in a positive act.

An omission may also qualify as an attack, provided the other requirements of private defence are present. This occurs in international law when the target State is unwilling to impede atrocities that are being committed within its territory by another group.

(3) The attack must be imminent but not yet completed.

As in national law, international law prescribes that human rights abuses must be imminent or ongoing, in order to allow humanitarian intervention.

Requirements of the defence

Snyman identifies a further requirements which the defence must fulfil in order for private defence to succeed as a justification ground. These are (1) the defence must be directed against the attacker, (2) the defensive act must be necessary, (3) there must be
reasonable relationship between the attack and the defensive act,\textsuperscript{549} and (4) the accused must be aware that he is acting in private defence.\textsuperscript{550}

(1) The defence must be directed against the attacker.

If State A is violating human rights either by commission or omission, then the defence must be directed against State A. No other State may be attacked. The situation in which State A is unable to halt the abuses, and so is not the perpetrator of the attack either by commission or omission, will be discussed under the heading of Necessity.\textsuperscript{551}

(2) The defensive act must be necessary.

The defensive act must be necessary to protect the legal interest threatened.\textsuperscript{552} In international law this means that the target state must have failed to halt the human rights violations,\textsuperscript{553} the United Nations must have refrained from action,\textsuperscript{554} and all pacific remedies commensurate with the urgency of the situation have been exhausted.\textsuperscript{555} If these requirements are met, then the use of force by the intervening State will be the only way in which the victims of the abuse can be protected.

(3) There must be reasonable relationship between the attack and the defensive act.

Under national law, there must be a balance between the attack and the defence.\textsuperscript{556} This is equally so under international law. It is for this reason that international law

\textsuperscript{549} Snyman (n528) 107.
\textsuperscript{550} Snyman (n528) 110.
\textsuperscript{551} Infra p107.
\textsuperscript{552} Snyman (n528) 105.
\textsuperscript{553} Supra Chapter 4 par 4.2.
\textsuperscript{554} Supra Chapter 4 par 4.3.
\textsuperscript{555} Supra Chapter 4 par 4.4.
\textsuperscript{556} Snyman (n528) 107.
requires exhaustion of pacific remedies commensurate with the urgency of the situation,\textsuperscript{557} a degree of force proportional to the exigencies of the situation,\textsuperscript{558} and obedience to international humanitarian law.\textsuperscript{559}

It is under this requirement that international law is vastly stricter than national law. Snyman points out that under national law there are three (3) elements between which there need not be a proportional relationship: (a) the nature of the interest threatened and the nature of the interest impaired,\textsuperscript{560} (b) the weapons or means used by the attacker and the weapons or means used by the defender,\textsuperscript{561} and (c) the value or extent of the injury inflicted or threatened to be inflicted by the attacker and the value or extent of the injury inflicted by the defender.\textsuperscript{562}

(a) Proportionality between the nature of the interest threatened and the nature of the interest impaired

The accused may impair an interest of the assailant which differs in nature from that which he is defending. Thus an accused may assault the attacker bodily, when the accused’s property is under threat or attack.\textsuperscript{563} Similarly, in international law, a military commander is allowed to order an assault on opposition troops which are threatening property of the victims of abuse. International law is, however, stricter in this regard. It allows such assaults only if the property is necessary for the survival of those victims.\textsuperscript{564}

\textsuperscript{557} Supra Chapter 4 par 4.4.
\textsuperscript{558} Supra Chapter 4 par 4.9.
\textsuperscript{559} Supra Chapter 4 par 4.10.
\textsuperscript{560} Snyman (n528) 107.
\textsuperscript{561} Snyman (n528) 109.
\textsuperscript{562} Snyman (n528) 109.
\textsuperscript{563} Snyman (n528) 107.
\textsuperscript{564} Supra Chapter 4 par 4.1.1; Rome Statute of the ICC (n79) art 31(1)(c).
International law further limits the targets within the State to military objectives.\textsuperscript{565}

(b) Proportionality between the weapons or means used by the attacker and the weapons or means used by the defender

The weapons used by the attacker and defender need not be identical, neither do they need to be of a similar type.\textsuperscript{566} In international law this requirement is stricter, although still dependent upon the availability of particular weapons, timeliness of the attack and the risk to a commander’s own troops.\textsuperscript{567} There are, however, certain weapons that may not be used, even if the target State employs them. These are weapons that have been banned by international law and include chemical weapons.\textsuperscript{568}

(c) Proportionality between the value or extent of the injury inflicted or threatened to be inflicted by the attacker and the value or extent of the injury inflicted by the defender

Snyman points out that in South African law the proportionality need not be precise, it need be only approximate.\textsuperscript{569} For humanitarian intervention to succeed as a defence, international law requires that only the minimum amount of force necessary to achieve the immediate aim of the action be used.\textsuperscript{570} The motivation for this requirement is that the intervention should save more lives than would be lost if there had been no intervention. For this reason, a commander may only order use of that amount of force necessary to

\textsuperscript{565} Supra Chapter 4 par 4.9.2.

\textsuperscript{566} Snyman (n528) 109.

\textsuperscript{567} Rogers (n407); Final Report Reviewing NATO’s action against the FRY (n395) 1265.


\textsuperscript{569} Snyman (n528) 109.

\textsuperscript{570} Supra Chapter 4 par 4.9.1.
halt human rights violations, even if those violating the rights have used far more than he orders.

(4) The accused must be aware that he is acting in private defence.

This requirement prevents the justification ground from being abused. The head of State or commander that orders an intervention must have the correct intention. He cannot use the defence of human rights as a pretext or excuse to intervene in a State. Further, this requirement prevents a head of State or commander ordering an intervention during which he only becomes aware of human rights abuses from relying on those abuses to justify his order. Neither of these scenarios is acceptable under international law.

Necessity

Necessity under South African law has the same requirements as private defence, with the exception that necessity is force used against the interests of another innocent party as opposed to force used against an attacker. This situation will occur in international law where State is unable to halt gross violations of human rights perpetrated by another group within the borders of that State. The intervention and acts which are committed during it will necessarily infringe certain sovereign rights of the target State. These infringements may, however, be deemed necessary if all the other requirements under both this heading and under Chapter 4, supra, are met.

2.2.3.2 COURTS MARTIAL

As indicated above, the South African Military Disciplinary Code allows for a military court to charge a member of the military with disobeying lawful commands. This will also apply

---

571 Snyman (n528) 110.
572 Supra Chapter 4 par 4.7.
573 Snyman (n528) 113.
574 Which amounts to private defence.
to those members of the military involved in purportedly humanitarian intervention. The same holds true for military forces throughout the world. When the rules of engagement are broken, he who broke it must be held accountable. Is this true even where the rules were broken in the protection of human rights?

**A United States example: United States v Rockwood**

Captain Lawrence Rockwood was deployed to Haiti as part of a multinational force (MNF) to assist in the restoration of the legitimate authorities there. Stationed in Port-au-Prince, he grew concerned over intelligence reports of horrendous treatment of inmates in Haitian prisons. All his attempts to organize an intelligence team to inspect the National Penitentiary in Port-au-Prince were unsuccessful. His commanders ordered him not to go to the prison, as force protection was of greater concern than the protection of human rights.

Certain that the MNF had an obligation to protect the welfare of the internees at the Penitentiary, Capt. Rockwood filed a formal complaint expressing his concern at the indifference of the MNF command towards the human rights violations being committed so close to the MNF compound. Capt. Rockwood, contrary to direct orders, inspected the Penitentiary. After a guided tour revealed nothing untoward, Capt. Rockwood visited another section of the prison, where he found an overcrowded room in which some 30 prisoners were being held, suffering from malnutrition and in need of medical assistance.

Capt. Rockwood called his superiors to report his discovery. However, instead of conducting a more thorough inspection his superiors ordered him back to the MNF compound. Subsequently he was charged with and prosecuted for five violations of the Uniform Code of Military Justice: 1) failure to go to his appointed place of duty; 2) leaving his appointed place of duty; 3) disrespect to a superior commissioned officer; 4) willfully disobeying a superior commissioned officer and (5) conduct unbecoming an officer. He was found guilty on all charges, except on that of conduct unbecoming an officer, and dismissed from the Army.

575 1998 WL 47532, 1 (Army Ct. Crim. App) as cited in Donovan & McLaughlin (n194). The discussion following is a summary of the main points of the case as found in Donovan & McLaughlin (n194).
During his court-martial, Capt. Rockwood argued that he had an obligation not to follow an order where that order would allow grave breaches of international humanitarian law to continue. According to international humanitarian law he had a duty to act affirmatively to prevent the grave breaches that he discovered at the Penitentiary. Further, invoking the Nuremberg-Calley standard\(^{576}\), Rockwood maintained that the order to stay away from the Penitentiary, in light of the inhumane treatment there, was illegal under international humanitarian law, and thus rightfully disobeyed.

The court dismissed this defence holding that a soldier may only refuse to follow a direct order of a superior where it would require him to commit an illegal act. The court held that, despite the consequences for the prisoners at the Penitentiary, the order Capt. Rockwood disobeyed was legal, and should have been followed. It is submitted that after some development it may be possible to rely on such a defence, if it shown that there is a duty upon interventionary forces, whether under UN auspices or not, primarily to protect civilians, not their own force.

In the event that a State does not take responsibility for the prosecution of an individual suspected of committing war crimes during a purported humanitarian intervention, recourse may be had to the International Criminal Court.

### 2.2.4 INTERNATIONAL CRIMINAL COURT

The International Criminal Court has jurisdiction over natural persons,\(^{577}\) without distinction based upon official capacity\(^{578}\) and irrespective of any immunities attaching to that official capacity,\(^{579}\) who are suspected of having committed war crimes\(^{580}\) after the entry into force of

---

\(^{576}\) *US v Calley* 22 USMCA 544 (1973) and Nuremberg Judgement as cited in Donovan & McLaughlin (n194). The Nuremberg-Calley standard is the principle that a subordinate cannot rely on superior orders as a defence if those orders were manifestly unlawful.

\(^{577}\) Rome Statute of the ICC (n79) art 25(1).

\(^{578}\) Rome Statute of the ICC (n79) art 27(1).

\(^{579}\) Rome Statute of the ICC (n79) art 27(2).

\(^{580}\) Rome Statute of the ICC (n79) art 5(1)(c) as elaborated by art 8(1)-8(2)(b).
the Statute.\textsuperscript{581} The jurisdiction extends to acts either committed in the territory of a State Party\textsuperscript{582} or committed by a national of a State Party.\textsuperscript{583} 

In addition to the principle of individual criminal responsibility, the Statute includes the possibility of fairly broad superior, or command, responsibility for actions committed by subordinates.\textsuperscript{584} This provision is a precaution against commanders pleading ignorance of crimes where they had either actual knowledge of them, or the ability and opportunity to discover their existence and thereby prevent them, but failed to do so.\textsuperscript{585}

Unlike the ad hoc tribunals, the International Criminal Court adheres to the principle of complementarity.\textsuperscript{586} This means that the Court will allow a State who is willing and able to try a suspect to do so. A case will only be admissible before the Court if a State, with the requisite jurisdiction, during an investigation or prosecution appears unwilling or unable genuinely to carry out that investigation or prosecution,\textsuperscript{587} or where a State, with the requisite jurisdiction, after investigating decides not to prosecute, but the decision is based upon an unwillingness or inability of the State genuinely to prosecute the suspect.\textsuperscript{588}

Likewise, according to the principle of ne bis in idem,\textsuperscript{589} a case will not be admissible before the Court if the matter has already been decided by, or is pending before, another court, unless the procedure in that other court either has the aim of shielding the suspect from responsibility for crimes under the Rome Statute or is not conducted independently or

\textsuperscript{581} Rome Statute of the ICC (n79) art 11(1).
\textsuperscript{582} Rome Statute of the ICC (n79) art 12(2)(a).
\textsuperscript{583} Rome Statute of the ICC (n79) art 12(2)(b).
\textsuperscript{584} Rome Statute of the ICC (n79) art 28.
\textsuperscript{585} Damaška M “The shadow side of command responsibility” 49 Am J of Comp L 455 471.
\textsuperscript{587} Rome Statute of the ICC (n79) art 17(1)(a).
\textsuperscript{588} Rome Statute of the ICC (n79) art 17(1)(b).
\textsuperscript{589} Rome Statute of the ICC (n79) arts 20(1)-20(3).
impartially according to the norms of due process and was conducted in a manner inconsistent with the intention to bring the person to justice.\textsuperscript{590}

If all preliminary requirements are fulfilled and a prosecution brought before the International Criminal Court, how will it be prosecuted?

\subsection{2.2.4.1 INDICTMENTS IN THE INTERNATIONAL CRIMINAL COURT}

There have not yet been any cases brought before the International Criminal Court in terms of the Rome Statute. In order to determine what such an indictment might look like, it is necessary to consider other indictments brought under international criminal law. Examples of such indictments are to be found at the Hague Tribunal. These examples serve to illustrate not only future prosecutions in the International Criminal Court, or domestic prosecutions under, for example, South Africa’s Implementation of the Rome Statute Act,\textsuperscript{591} but also possible prosecutions at future \textit{ad hoc} tribunals. Because of the similarities in the formulation of indictments, and to avoid duplication, the formulation in all three bodies is illustrated by the example which follows.

The example of an indictment is drawn from the \textit{Lašva River Valley}\textsuperscript{592} case, and includes charges of crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war. These charges are some of those with which an intervening force may be charged. An excerpt from the indictment in this case reads as follows:

\begin{quote}
\begin{quote}
35. Dario KORDIC and Tihofil BLAŠKIC, between 1 May 1992 and 31 May 1993, individually, and in concert with others, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the following [crime]…
(b) bombardments and attacks which caused the death of over 100 Bosnian civilians in the Lašva Valley area and the city of Zenica in the Republic of Bosnia and Herzegovina…
\end{quote}
\end{quote}
\end{quote}

\textsuperscript{590} Rome Statute of the ICC (n79) art 20(3).

\textsuperscript{591} n521.

\textsuperscript{592} \textit{Prosecutor v Dario Kordic, Tihofil also known as Tihomir Blaškic, Mario Cerkez, Ivan also known as Ivica Šantic, Pero Skoplajak and Zlatko Aleksovski} Indictment Case No. IT-95-14-T 2 November 1995 in McDonald GK & Swaak-Goldman O (eds) \textit{Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts} Vol II Part 2 Documents and Cases (2000) 1379.
and, or in the alternative, knew, or had reason to know, that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

By these acts and omissions Dario KORDIC and Tihofil BLAŠKIC committed...

**Count 2:** a CRIME AGAINST HUMANITY as recognized by Articles 5(a) (murder), 593 7(1) and 7(3) of the Statute of the Tribunal [the facts having been provided earlier in paragraphs 24-25 of the indictment]...

38. Dario KORDIC and Tihofil BLAŠKIC and Mario CERKEZ, between 1 January and 31 May 1993 and otherwise as described in paras.23-25 and 32-33 of this indictment, all of which are incorporated in full herein, individually and in concert with others, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful attacking, bombarding and destruction of Bosnian Muslim dwellings, businesses, buildings, personal property and livestock in the Lašva Valley area of the Republic of Bosnia and Herzegovina, and, or in the alternative, knew, or had reason to know, that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

By these acts and omissions Dario KORDIC and Tihofil BLAŠKIC and Mario CERKEZ committed:

**Count 11:** a GRAVE BREACH as recognized by Articles 2(d) (extensive destruction of property), 594 7(1) and 7(3) of the Statute of the Tribunal...

**Count 13:** a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (attacks on dwellings or other installations that are used only by the civilian population, including places of worship) 595 as recognized by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal.

2.2.4.2 ELEMENTS OF THE CRIMES

It is impossible, within the framework of this dissertation, to discuss the elements of each of the possible crimes with which an individual may be charged as a result of his participation within a humanitarian intervention. The discussion will thus, for the sake of brevity, be limited to each of the charges enumerated above. 597

593 Rome Statute of the ICC (n79) art 7(1)(a).


595 If the charge results from an intervention it should be considered an international conflict. Consequently art 8(2)(b)(ii), (iv), (v) and (ix) of the Rome Statute of the ICC (n79) would be the appropriate provisions.

596 Lašva River Valley (n592) 1386-1388.

a) Murder as a Crime against Humanity

In order to prove a crime against humanity under the Rome Statute\(^ {598}\) the prosecutor is obliged to prove (i) that the crime charged was committed as part on an attack, (ii) that the attack was widespread or systematic, and directed against any civilian population, and (iii) that the crime was committed with knowledge of that attack.\(^ {599}\)

Considering previous international criminal tribunal decisions encompassing the definition of murder, Hall suggests the following two sets of requirements to be fulfilled in order to prove murder:

“First, murder would occur where the accused or a subordinate intended (see article 30 para. 2 for a definition of intention) to kill the victim, the victim died, and the death was the result of an unlawful act or omission of the accused or a subordinate (where the requirements of superior responsibility under article 28 have been met). Second, murder would occur where the accused or a subordinate intended to inflict grievous bodily harm on the victim having known (see article 30 para. 3 for a definition of knowledge) that such grievous bodily harm was likely to cause the victim’s death and was reckless whether death would ensue or not, the victim died, and the death was the result of an unlawful act or omission of the accused or a subordinate (where the requirements of superior responsibility under article 28 have been met).”\(^ {601}\)

The underlined and italicized phrases have been highlighted in order to indicate the different requirements within each of the definitions. That the victim died is obviously an evidentiary matter. The discussion therefore turns to ‘intent’ and ‘unlawful conduct.’

i) Intent

The term ‘murder’ means different things to different legal systems. Differing degrees of fault are used to distinguish between murder, manslaughter and culpable homicide in the various jurisdictions. Thus various jurisdictions at domestic level may find the requisite

---

\(^ {598}\) Supra n79.

\(^ {599}\) Rome Statute of the ICC (n79) art 7(1).


\(^ {601}\) Hall (n600) margin no 21 p 130.
intent lacking, while others may find it present. This could prove problematic. However, the Rome Statute\textsuperscript{602} has included provisions in an attempt to alleviate the difficulty.

Article 30(2) of the Rome Statute\textsuperscript{603} states that a person has intent where:

\begin{quote}
(a) in relation to conduct, that person means to engage in the conduct;
(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
\end{quote}

Article 30(3) states that a person has knowledge where he has

\begin{quote}
awareness that a circumstance exists or a consequence will occur in the ordinary course of events.
\end{quote}

Hall, interpreting these provisions, goes on to state that

\begin{quote}
[A] person would have intent if the person meant to kill or inflict grievous bodily harm or was aware that the actions \textit{would lead to death} in the ordinary course of events... [I]f the accused was aware that the actions \textit{would be likely to lead to death} in the ordinary course of events [it is also possible] that the accused would be responsible for murder. Since knowledge includes awareness that a circumstance exists, that circumstance could be the \textit{likelihood} that death would ensue as a result of the actions rather than the certainty that death would occur.\textsuperscript{604}
\end{quote}

A commander who ordered an assault during a humanitarian mission, could be held to have the requisite intention to commit murder (as a crime against humanity) if, when he ordered the assault he was aware that the assault, in the ordinary course of events, would be likely to lead to the death of civilians. He may then be found guilty of perpetrating a crime against humanity if the other requirements are fulfilled.

\section*{ii) Unlawful act or omission}

Unlawful conduct may be defined as that which is in violation of either international law, especially international humanitarian law, or national law. An example of conduct in

\textsuperscript{602} Supra n79.
\textsuperscript{603} Supra n79.
\textsuperscript{604} Hall (n600) margin no 22 pp 130-131.
violation of international humanitarian law is bombardment of towns resulting in the extensive destruction of civilian property. It is to this, that the study now turns.

b) Extensive destruction of property as a grave breach of the Geneva Conventions

The Rome Statute defines this crime as

“any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly…”

The Fourth Geneva Convention is the convention under which protection of civilian property liable to attack during an intervention would fall. This crime consists of two decisive elements: extensive destruction (or appropriation) and military necessity. Fenrick points out that this offence is adequately established if it is established that the extensive destruction of property has occurred and that such destruction was not justified by military necessity. Military necessity is discussed in Chapter 4 at paragraphs 4.9 and 4.10. Both of these are evidentiary questions.

Such extensive destruction would occur if a commander, for example, ordered carpet bombing of an area without properly reconnoitering the targets, or ordered such bombing irrespective of who was present in the area. It is to the ordering of such attacks that the study now turns.

c) Attacks on dwellings or other installations used only by the civilian population, including places of worship as a violation of the laws or customs of war

The relevant provisions in the Rome Statute state that

---

605 Supra n79.
606 Article 2(a)(iv).
608 Fenrick WJ in Triffterer (n597) ‘Article 8’ margin no 14 p 183.
609 Supra n98.
“2. ...?war crimes’ means...

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts...

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives...

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects...

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives...

(ix) Intentionally directing attacks against buildings dedicated to religion...”

The various elements have been highlighted for the convenience of the reader. The first element is ‘intention’ (underlined). This is dealt with supra on page 113. The second element is ‘launching’ (bold). Fenrick suggests that the term ‘launching’ may be used to indicate responsibility of those in higher level headquarters involved in a formal planning process where proportionality is a relevant issue. Attention now turns to the italicized element of civilian targets.

i) Civilian targets

Civilian targets are discussed supra in Chapter 4 at paragraph 4.9.2. There are two additional items which need to be clarified.

The first of these is the term ‘undefended’ (italicized and underlined). Fenrick points out that ‘undefended’ has a technical meaning and does not include objects which are behind enemy lines, whether or not there are combatants or weapons anywhere near those objects.

The second item is the term ‘dedicated to religion’ [Art 8(2)(b)(ix)]. Article 52(3) of the First Additional Protocol to the Geneva Conventions states that

610 A humanitarian intervention involves both the target State and the intervening State(s), and so is deemed an international conflict.

611 Article 8(2)(b)(ii), (iv), (v) and (ix).

612 Fenrick (n608) margin no 50 p 197.

613 Fenrick (n608) margin no 52 p 197.

“[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship … is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

This means that the accused must show that the place of worship which was attacked during the ‘humanitarian’ action was indeed being used by opposition forces.

Having discussed the elements of the crimes, attention must be given to possible defences under the Rome Statute.\textsuperscript{615}

2.2.4.3 DEFENCES

In the event that either a commander or members of his force are charged with war crimes (and in due course, aggression) resulting from an action by States to protect human rights, there are at least two grounds for excluding criminal responsibility upon which he, or they, may rely. The Statute provides that a person shall not be criminally responsible if, at the time of that person’s conduct:

\begin{quote}
“(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this sub-paragraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause greater harm than the one sought to be avoided. Such threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond the person’s control.”\textsuperscript{616}
\end{quote}

Either it must be proved that an intervention meets the requirements of either of these provisions, or it must be proved that it falls within the parameters of article 31(3).\textsuperscript{617} This article provides that the Court may consider a ground for the exclusion of criminal

\textsuperscript{615} Supra n79.

\textsuperscript{616} Rome Statute of the ICC (n79) art 31(1)(c)-(d).

\textsuperscript{617} Rome Statute of the ICC (n79).
responsibility other than those in article 31(1), where such a ground is derived from applicable law as set forth in article 21.618 Before the *Legality of Use of Force*619 cases are decided by International Court of Justice, and unless that Court finds in favour of NATO, it will be difficult to convince the Court that the defence of ‘humanitarian intervention’ exists as an independent defence in international law. There is still too much controversy regarding the issue.

It is, accordingly, submitted that it is necessary to attempt to fit the defence of humanitarian intervention into either the defence provision (article 31(1)(c)) or the duress provision (article 31(1)(d)). The international community has identified at least ten requirements with which an intervention must comply if it is even to be considered as possibly legitimate. These are found in paragraph 4 of Chapter 4, *supra*, and are as follows:

1) There must exist human rights abuses in the target State;
2) The target State must be unwilling or unable to impede the atrocities;
3) The United Nations must refrain from action;
4) The intervening States must have exhausted all pacific remedies commensurate with the urgency of the situation;
5) The action must taken place using a multinational force;
6) The intervening States must have the support or non-opposition of the majority of the members of the United Nations;
7) The intervening States must have the right intention;
8) There must exist a reasonable prospect of success;
9) The force employed must be proportional to the exigencies of the situation; and
10) The action must accord with international humanitarian law.

Where the intervening States comply with all of these requirements as expounded by the international community, could it be possible for the individuals who planned the action or took part in it to escape liability for war crimes or, when defined, aggression? To determine

---

618 Rome Statute of the ICC (n79).
619 *Supra* n451.
whether this is possible, a comparison between the defences in the Statute and the requirements for legitimate humanitarian intervention will be considered.

a) **Article 31(1)(c)**

This article requires a person to act only in defence of himself or another person or, in the case of war crimes, property essential to his or that other’s survival. Herein lies the ‘right intention’ that is required for legitimate humanitarian intervention. The second requirement for the sub-paragraph (c) defence is that the defensive action must be in response to an imminent and unlawful use of force. “Unlawful use of force” is understood to mean the use of force against specific legally protected interests such as life, physical integrity and liberty.\(^{620}\) The danger arising from such use of force must be objectively ascertainable.\(^{621}\) This corresponds to the requirement of legitimate humanitarian intervention, that there exist human rights abuses in the target state, about which the target state does nothing, or in which the target state is involved.

The third requirement under sub-paragraph (c) is that the defensive action meets the requirements of reasonableness and proportionality. This is understood to mean that the action taken must be both necessary and able to prevent or end the danger. This means that the actor must neither cause more harm than necessary, nor must he employ futile and inefficient means which are clearly inappropriate.\(^{622}\) Once again, it is possible to identify the corresponding requirements for legitimate humanitarian intervention. The actors must have exhausted all pacific remedies commensurate with the urgency of the situation, there must be a reasonable prospect of success, the force employed must be proportional to the exigencies of the situation and, finally, the action must accord with international humanitarian law.

If all the requirements for legitimate humanitarian intervention are met there should be little problem in proving the requirements in sub-paragraph (c), as the two sets clearly overlap. It

\(^{620}\) Eser A in Triffterer (n597) ‘Article 31’ margin no 29 pp 548-549.

\(^{621}\) Eser ‘Article 31’ (n620) margin no 31 p 549.

\(^{622}\) Eser ‘Article 31’ (n620) margin no 32 p 549.
is accordingly submitted that, failing the existence of a separate defence, sub-paragraph (c) of article 31(1) may be used in defence of humanitarian intervention.

b) Article 31(1)(d)

This article requires that the action alleged to be unlawful must be caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against the actor or another person. The specification of ‘duress’ indicates that the actor must feel unable to withstand the threat.\footnote{Eser ‘Article 31’ (n620) margin no 38 p 551.} As stated, the duress must originate from threat of imminent death or of serious bodily harm. This duress would increase as the number of victims of human rights abuses increase. This requirement, therefore, overlaps with the first requirement for legitimate humanitarian intervention: human rights abuses, the extent of which shock the conscience of mankind. This article further requires a person to act only to avoid this threat against himself or another person. This is considered the ‘right intention,’ and is also required for legitimate humanitarian intervention.

The third requirement for the sub-paragraph (d) defence is that the threat must either be made by another person, or by circumstances beyond the actor’s control. This scenario is played out in the first three requirements for legitimate humanitarian intervention. Where there are gross human rights abuses occurring in a State that is either unwilling or unable to impede them, it is necessary for the United Nations to intervene. Where the United Nations unjustifiably refrains from action, various States might choose to act on behalf of the victims. One can hardly blame the individuals who are left with these weighty decisions if they feel compelled to err on the side of protecting the victims.

The final requirements in terms of this defence are that the person must act necessarily, reasonably and in a manner indicating the intention not to cause greater harm than the one sought to be avoided. The first of these, necessity, indicates that there must be no other means available.\footnote{Eser ‘Article 31’ (n620) margin no 39 p 551.} This corresponds to the principle of exhaustion of all pacific measures commensurate with the urgency of the situation, which is a requirement for legitimate humanitarian intervention.
The last requirement is reasonableness. This is understood to mean that the measures used must be able to reach the desired effect without causing greater harm than is absolutely necessary. This means that the measures employed must be adequate in terms of being proportionate, although proportionality is not specifically indicated in sub-paragraph (d).  

This last requirement encompasses many of the requirements for legitimate humanitarian intervention: that the actors must have exhausted all pacific remedies commensurate with the urgency of the situation; that there must exist a reasonable prospect of success; that the force employed must be proportional to the exigencies of the situation; and that the action must accord with international humanitarian law.

As is the case with sub-paragraph (c), if all the requirements for legitimate humanitarian intervention are met there should be little problem in proving the requirements in sub-paragraph (d). It is, accordingly, submitted that, failing the existence of a separate defence, sub-paragraph (d) of article 31(1) may also be used in defence of humanitarian intervention.

This is, of course, only theory. After the International Court of Justice has adjudicated the *Legality of Use of Force* cases, and when, if ever, a purported humanitarian intervention comes before the International Criminal Court, whether under the charge of war crimes, or perhaps even a charge of aggression, then it will be possible to determine exactly where international law stands on the issue of the responsibility to protect.

---

625 Eser ‘Article 31’ (n620) margin no 39 p 551.

626 *Supra* n451.
CONCLUSION

There have been two aims to this study. The first was to determine the general legitimacy of ‘humanitarian intervention’ as a concept in international law. The second aim of the study was to determine whether there was a set of factors that could be used to determine the need for, and legitimacy of, individual interventions.

The first question, then, is whether or not humanitarian intervention, as a concept, is currently considered legitimate under international law? Under international law States are sovereign. The primacy of this rule is unquestionable. States may, as and when they wish, taken certain obligations upon themselves by ratifying treaties with specific States or by ratifying the more general conventions. States are not subject to obligations placed upon them by other States without their own consent. Such interference will be construed as a violation of that State’s sovereignty, in line with the principles of non-use of force and non-intervention. Such interference is motivated by many factors, though usually as a result of economics or politics. There are the rare occasions, however, when an intervention is motivated by considerations of human rights.

Human rights developed gradually before World War II. After this catastrophe, the development has been exponential. By the late 20th Century a few rights were universally recognized and considered so important to the very nature of Man that they were made inalienable through numerous conventions. These rights are the right to life, the right to bodily integrity, and the right to human dignity. Their infringement is an international crime. However noble the universal recognition, it has not resulted in universal protection of these rights. Enforcement of the rights is made difficult by the concept of State sovereignty. Enforcement is made nearly impossible if a State is strong enough to resist the pacific means of settlement, which then become futile.

It is at times such as these when the United Nations Security Council is under an obligation to protect the victims of the human rights atrocities being committed. Often, however, the Security Council finds itself deadlocked and unable to decide over appropriate action. This is unfortunate as it is the only body which can legally intervene in such circumstances. Where there is such a deadlock, States may want to take it upon themselves to see that the
abuses are put to an end. There are two possible responses by such States. Either they use the appropriate regional organization to unilaterally intervene and halt the abuses, or, where there is no such organization appropriate or willing, they form a smaller group to take action. Unilateral action by a single State is a last resort.

Thus, it can be concluded that only the United Nations Security Council has the authority legally to intervene. No such right for States exists either in conventional or customary law, although the custom is developing. While unilateral intervention by States cannot yet be legal, it may be justifiable under certain circumstances.

The second question which must be answered is: in which circumstances might a unilateral intervention be justified? There are ten requirements listed, although the list is not a _numerus clausus_. The requirements are as follows.

1) There must exist gross human rights abuses in the target State;
2) The target State must be unwilling or unable to impede the atrocities;
3) The United Nations must refrain from action;
4) The intervening States must have exhausted all pacific remedies commensurate with the urgency of the situation;
5) The action must taken place using a multinational force;
6) The intervening States must have the support or non-opposition of the majority of the members of the United Nations;
7) The intervening States must have the right intention;
8) There must exist a reasonable prospect of success;
9) The force employed must be proportional to the exigencies of the situation; and
10) The action must accord with international humanitarian law.

These requirements, with the exception of number 3, are the same requirements in terms of which the Security Council should be obliged to act.

In the event of a unilateral intervention, there will be a need to determine whether or not the intervention was justifiable. There are several judicial bodies capable of adjudicating this, some of which are newly formed. The matter can be taken before the International Court of
Justice to determine whether the intervening States are responsible for breaching the prohibitions against the use of force and intervention, and even whether the actions taken by those States complied throughout with international humanitarian law, a prerequisite for justification. The matter may also be taken before an ad hoc tribunal, domestic courts, especially courts martial, and, hopefully soon, before the International Criminal Court, to adjudicate on individual responsibility for violations of international humanitarian law during the purportedly protective actions.

There is hope that, in the future, the issue of unilateral intervention by States will become a moot point. There are those States which will continue to fight against the current of human protection that has recently swept the international community into a whirlpool of discussions on intervention and State sovereignty. Yet, as is evidenced by the discussions and the Report of the International Commission on Intervention and State Sovereignty, there is an undeniable shift towards the recognition that there does, indeed, exist a primary responsibility, not to States, but to the people: a responsibility to protect the innocent victims who are ignored or abused by the very people they entrusted with their protection.

There is hope that, after a century of war and torture and genocide, after losing 160 million human lives, that the means to ensure the effective protection of people in the face of State opposition will be developed. These means must be developed. The international community must finally realize that the only way to guarantee State security and international security, is to guarantee human security.
BIBLIOGRAPHY

TREATIES


**DOCUMENTS OF INTERNATIONAL ORGANISATIONS, COMMISSIONS AND COMMITTEES**

**United Nations**


**International Commission on Intervention and State Sovereignty**


International Criminal Tribunal for the Former Yugoslavia

66. ‘International Criminal Tribunal for the Former Yugoslavia: Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’ 39 (2000) ILM 1257

International Law Commission


Independent International Commission on Kosovo


Organization of American States

JUDICIAL AND ARBITRAL DECISIONS


79. **Corfu Channel Case 1949 ICJ Rep 35.**


85. Legality of Use of Force (Yugoslavia v Italy) [http://www.icj-cij.org/icjwww/idocket/iyit/iyitframe.htm accessed 15/11/02]

86. Legality of Use of Force (Yugoslavia v Netherlands) [http://www.icj-cij.org/icjwww/idocket/iyne/iyneframe.htm accessed 15/11/02]


88. Legality of Use of Force (Yugoslavia v Portugal) [http://www.icj-cij.org/icjwww/idocket/iypo/iypoframe.htm accessed 15/11/02]


90. Legality of Use of Force (Yugoslavia v Spain) [http://www.icj-cij.org/icjwww/idocket/iysp/iyspframe.htm accessed 15/11/02]

91. Legality of Use of Force (Yugoslavia v United Kingdom) [http://www.icj-cij.org/icjwww/idocket/iyuk/iyukframe.htm accessed 15/11/02]


93. Legality of Use of Force (Yugoslavia v Germany) [http://www.icj-cij.org/icjwww/idocket/iyge/iygeframe.htm accessed 15/11/02]


95. Legality of Use of Force (Yugoslavia v United States of America) [http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm accessed 15/11/02]


**TREATISES, DIGESTS AND BOOKS**


**LEGAL ARTICLES, YEARBOOKS AND CHAPTERS**

115. Ambos K ‘NATO, the UN and the Use of Force: Legal Aspects’ *European Journal of International Law* http://www.ejil.org/journal/Vol10/No1/coma.html accessed 18/03/01


133. Hogan-Doran J & Van Ginkel BT “Aggression as a crime under international law and the prosecution of individuals by the proposed International Criminal Court” 1996 Netherlands International Law Review 321.


143. Shearer I ‘Rules of Conduct During Humanitarian Interventions’ The Diplomat http://www.unc.edu/depts/diplomat/articles/humintervention/hum06shearer.html last accessed 09/07/01.

144. Simma B ‘NATO, the UN and the Use of Force: Legal Aspects’ European Journal of International Law http://www.ejil.org/journal/Vol10/No1/ab1-1.html accessed 18/03/01


**MISCELLANEOUS**


150. Kemp G *Humanitarian Intervention and the New Paradigm of International Law* Paper delivered at the Research Unit for Legal and Constitutional Interpretation Colloquium, Stellenbosch, August 2000


**LEGISLATION**
