ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE

HUMANITERIAN INTERVENTION UNDER THE REALM OF INTERNATIONAL LAW: The Case of South Sudan

A Master Thesis

By: Hilena Sintayehu

In partial fulfilment of the requirements for the LLM Degree in Public International Law

Advisor – YONAS BIRMETA (PHD)

June 2019

Disclaimer

I certify that this thesis is my original work

Hilena Sintayehu

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the Masters Degree in Public International Law.

Yonas Birmeta (PHD)

Table of Content

Page No.

Acknowledgment-- 1

List of Abbreviations -- 2

Abstract -- 4

Chapter One: Introduction-- 5

1.1.Background--- 5
1.2.Statement of the problem --- 7
1.3.Objective of the Study -- 8
1.3.1. General Objective --- 8
1.3.2. Specific Objective-- 8
1.4.Research Questions -- 9
1.5.Significance of the Study--- 9
1.6.Research Methodology --- 10
1.7.Scope of the Study-- 10

Chapter Two: Development of Humanitarian Intervention ---------------------------- 11

2.1.Historical Evolvement of the Concept -- 11
2.2.Theoretical Approaches to Humanitarian Intervention ----------------------------- 15
2.2.1. Absolute Non-Interventionism --- 16
2.2.2. Limited Interventionism -- 17
2.2.3. Broad Interventionism--- 17
2.3.State Practice in the pre-charter Era--- 18
2.4.Humanitarian Intervention in the Charter Era -- 19

Chapter Three: Humanitarian Intervention Under International Law-------------- 22

3.1.Customary International Law-- 22
3.2.The post UN-Era--- 25
3.2.1. Charter of the UN -- 25
3.2.2. Constitutive Act of the African Union --- 27
A. Article 4(h) Intervention --- 28
B. AU interpretation of Article 4(h)--- 29
3.3.Development of the Responsibility to Protect (R2P) Concept -------------------- 31

3.4.Challenges in Materializing Humanitarian Intervention in
the Context of a Changing World Order -- 36

Chapter Four: The Intervention in South Sudan -- 39

4.1.Background-- 39
4.2.Establishment of the UNMISS-- 41
4.2.1. Resolution Number 1996-- 41
4.3. Subsequent Authorizations by the SC-- 47
A. UNSC Resolution Number 2057--- 47
B. UNSC Resolution Number 2109--- 48
C. UNSC Resolution Number 2132--- 49
D. UNSC Resolution Number 2155--- 50
E. UNSC Resolution Number 2406--- 51
4.4. Does the UN charter Authorize the Security Council to
Undertake Humanitarian Intervention?--- 53
4.5.Is the UNMISS Humanitarian Intervention by the Security Council?--------------------- 54

Chapter Five: Conclusion-- 55

5.1.Conclusion --- 55

Bibliography -- 59

Acknowledgment

I am so thankful of my Almighty God for his limitless blessings throughout all my endeavors and journey.

I would like to express my special thanks to my advisor Yonas Birmeta (PHD) for helping me in giving insights, constructive inputs and a good encouragement.

My families shall take the most gratitude in my whole life, especially to my father; Sintayehu Gebresillassie who always believes in me, my understanding mother Genet Worku, my siblings Anteneh and Betty; I thank you all.

Finally and mainly I would like to express my deepest gratitude to my supportive husband attorney Abeje Mamo for his guidance in numerous ways in my life. Without his understanding and encouragement, I could not finish this thesis.

List of Abbreviations

A.U	African Union
CPA	Compressive Peace Agreement
ECOWAS	Economic Community of West Africa States
ECOMOG	Economic Community of West Africa States Monitoring Group
GA	General Assembly
ICISS	International Commission on Intervention and State Sovereignty
IGAD	Inter-Governmental Authority for Development
ICJ	International Court of Justice
JEM	Justice and Equality Movement
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organizations
OAU	Organization for African Unity
R2P	Responsibility to Protect
SPLM	Sudan People's Liberation Movement
SPLA	Sudan People's Army
UN	United Nations
UNSC	United Nations Security Council
UNMISS	United Nations Mission in South Sudan
UNMIS	United Nations Mission in Sudan
UNAMIR	United Nations Assistant Mission for Rwanda
UNISFA	United Nations Interim Security Force for Abyei

WWI	World War I
WWII	World War II

Abstract

Humanitarian intervention has been one of the fast-evolving concepts in contemporary international law; hence states appear to proceed with practicing it on the grounds of usually humanitarian objectives. As the phrase implies Humanitarian intervention is generally understood as the instance where states unilaterally or collectively intervene in a third state where the population is suffering seriously, due to internal conflicts, repression or state failure, and the state in question is unable or unwilling to halt or avert the suffering. Historically it started with the justification of protecting citizens of a nation residing in a third state. But eventually, it evolved to protecting humans irrespective of their identity.

The practices of such intervention prevailed both in the pre-Charter era as well as during the post-Charter period. The intervention in South Sudan through the authorization of the United Nations Security Council is one of such instances. Due to this; and in particular to the interventions in the Charter period, it is argued that Humanitarian Intervention has a legal basis under international law.

Accordingly, the Thesis tries to assess the concept of Humanitarian Intervention in light of international law; and specifically reviews the intervention in South Sudan with respect to international law.

Chapter One

1.1.Background

Humanitarian intervention has been one of the most controversial issues in international relations. The legitimacy of humanitarian intervention has been debated hotly among the theorists and practitioners of international relations especially since 1990s. Some theorists argue that humanitarian intervention cannot be legal or justifiable and others argue that there is an obligation to intervene for the protection of human rights. Francis Kofi Abiew in his book attempts to establish a legitimate basis for humanitarian intervention. According to him, there are three fundamental questions to ask: Firstly, are there minimum duties states have in terms of protecting the rights of their citizens? Secondly, can violations of these minimum duties constitute the justification for humanitarian intervention? Thirdly, how should such intervention be effectively implemented?[1] It is widely accepted that sovereign states have the responsibility to protect their citizens from humanitarian crisis and if states are unwilling or unable to do so themselves, the international community has the right to exercise that responsibility. "If states are unwilling or unable to protect lives and liberties of their citizens –if they degenerate into anarchy or tyranny- then the duty to safeguard these rights reverts to the international community."[2]

Meanwhile, the legitimacy of humanitarian intervention in international law has still been litigious for a long period of time. The obvious contention is that it clashes with the principle of state sovereignty which is a fundamental principle both under customary international law and the UN Charter[3]. Humanitarian intervention in its classical sense may be defined as 'coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants'.[4] Also, humanitarian intervention was defined more elaborately in a report by the Advisory Committee on Issues of International Public Law on The Use of Force for Humanitarian Purposes, the term was defined as such, 'The threat or the use of force by one or

---

[1] Francis kofiAbiew, *The Evolution of The Doctrine and Practice of Humanitarian intervention*, (Kluwer Law International 1999),p. 17

[2] J. L. Holzgrefe, *"The Humanitarian Intervention Debate",* (Humanitarian Intervention: Ethical, Legal and Political Dilemmas 2003), p. 52

[3]The United Nations Charter (1945, art 2/4)

[4] Adam Roberts, *'The so- called Right of Humanitarian Intervention*'(Yearbook of International Humanitarian Law 2000) p.5.

more states within the territory of another state, with the sole aim of halting or preventing large-scale , serious violations of fundamental human rights, which are taking place or which appear imminent, such rights being in particular the right to life of individual, regardless of nationality, in cases where the threat or use of force is carried out without either the prior authorization of component UN bodies or the permission of the legitimate government of the country in the territory of which the intervention takes place'.[5]

On the other hand, South Sudan has been marred by internal conflicts leading to catastrophic humanitarian situations. It has been years now since the crisis in South Sudan erupted and the horrific humanitarian consequences thereof. The situation has long attracted the attention of the international community in general and regional political organs in particular. However, the practical efforts made to mitigate the situation especially from the ultimate authority with the mandate, the United Nations as well as the able states of the west is not satisfactory.
The crises in the South Sudan and the absence of equivalent action from the international community left the regional organization and other sub-regional organs to deal with the situation. Accordingly, the African Union (AU), the Inter-Governmental Authority for Development (IGAD) and other neighboring countries are making interventions, sometimes coordinated and other times isolated, on the alleged grounds of mitigating the ongoing humanitarian crises.

Hence, the thesis bases as its background on the fact that there is an internal conflict in South Sudan involving the regime and other armed groups; that such conflict has been escalating since indicating the regime's unwillingness and/or inability to contain or stop it; that as a result a horrendous humanitarian crises is occurring; that a peacekeeping mission has long been deployed in South Sudan.[6]

On the other hand, there is this concept of humanitarian intervention under international law that presumably justifies the limits to sovereignty; *i.e.* a given state or group of states may intervene into the internal affairs of another state where the situation in the other state is that which

[5]Ibid p. 4.
[6]UNMISS troops deployed in 2011 for Protecting civilians, monitoring human rights & supporting implementation of cessation of hostilities agreement. Currently its mandate is extended until 2020

demands humanitarian intervention.[7] The peacekeeping mission in South Sudan is not the single instance intervention that the international community undertook. There are several cases where the interventions of various nature have been carried out by the international community in different parts of the world.

Accordingly, the thesis tries to make a review of some of the interventions made by the international community with a view to assessing whether the concept of humanitarian intervention has been developing. Further the thesis dwells on the ongoing situations in South Sudan both from the point of view of the internal conflict and the deployment of peacekeeping mission vis-à-vis the concept of humanitarian intervention.

1.2. Statement of the Problem

Though the UN was established with the principal objective of maintenance of international peace and order , as enshrined under different parts of the Charter. The World does not, however, quite seem to be peaceful as intended in the UN Charter. The instability in various places and at different periods coupled with new types of disorders leads to a new paradigm to approaching the challenges. One such mechanism of ensuring global security is humanitarian intervention. Though this concept emerged out of necessity, there is no still uniform definition or parameter of exercising it. As Adam Robert states, 'in the long history of legal debates about humanitarian intervention, there has been a consistent failure to address directly the question of the criteria and methods used in such interventions.'[8]

International law did not concretely outlaw the use of force by states before 1928[9]. Under the 1919 Covenant of the League of Nations, member states were required to submit any inter-state disputes for arbitration or seek other forms of judicial settlement at the League's Council. However, the Covenant did not in fact revoke the right of states to resort to war, although it subjected this provision to some limitations[10]. With the adoption of the UN Charter, however, resort to the use or threat of use of force is, in principle, prohibited.[11] In effecting its primary

[7]Holzgrefe p.54
[8]Adam Roberts, '*NATO's Humanitarian War over Kosovo'*, (Oxford 1999),110
[9]JhonDugard, '*International Law; A South African Perspective'*, (Cornell 2005),501
[10]The use of force in international law, available at <https://www.open.edu/openlearn/society-politics-law/the-use-force-international-law/content-section-1>(last accessed 21 December 2018)
[11]Ian Brownlie, *International Law and The Use of Force by States*, (Oxford University Press 1963).p.113

responsibility, particularly, in the Post-Cold War era, the Security Council as started to incorporate some issues, such as humanitarian crisis, as part of its endeavor to ensure international peace and security. Trends in the practice of the SC seem to reveal extension of its original scope of intervention such as in the form of, inter alia, peacekeeping operations which have transpired a considerable scholarly debate.[12]

In line with this new development, the thesis tries to identify the legality or otherwise of humanitarian intervention in light of the UN charter. Further the thesis endeavors to assess the legal justification attached to humanitarian intervention with respect to the protection of human rights and global security as one of the problem statements; and it tries to analyze the concept with some of the practices of states and the international legal documents. Through this endeavor, the thesis tries to contend that warranting legitimate humanitarian intervention should be one of the well accepted principles of international law in order to protect human rights and global security.

Based on the above analysis the thesis specifically reviews the intervention in South Sudan as its major statement of the problem; and it assesses whether the situation warrants humanitarian intervention; whether the peacekeeping mission in South Sudan can be characterized as a humanitarian intervention in light of the concept; whether the peace- keeping mission was authorized by competent organs and if it is concurrent with the UN Charter.

1.3. Objectives of the Study

1.3.1. General objectives

The general objective of the study is to examine whether the UN charter regime acknowledges humanitarian intervention and whether the intervention in South Sudan can be characterized so. .

1.3.2. Specific Objectives

The study specifically aims at reviewing the situation in South Sudan whether it warrantshumanitarian interventionin light of the generally established principles of humanitarian intervention. The study also reviews various international law documents in particular the UN Charter, the Resolution of the UNSC, the Constitutive Act of the AU and its Organs together with the intervention taking place in South Sudan with a view to assessing whether the

[12]M. Bothe, '*Peace-Keeping, in Charter of the United Nations*': (Commentary 2002)p. 648

intervention in South Sudan is made on the grounds of humanitarian intervention and if so whether it is consistent with the evolving concept of humanitarian intervention. Consequently, the paper tries to assess the contribution or otherwise of the UNMISS type of intervention towards the development of both international law and global peace.

1.4.Research Questions

This research endeavors to answer some questions on how to address the emerging security concerns such as humanitarian crisis and development of greater values for human rights. It tries to frame issues on the Charter's apparent framework regulating HI and international law in general. Within this broad concept, the thesis endeavors to address the following points:

- Whether humanitarian interventionis a principle embodied in UN Charter or is a principle attaining Customary International Law ?
- Whether or not the situation in South Sudan warrants Humanitarian Intervention?
- Whether or not the UNSC authorized the UNMISS based on grounds of humanitarian interventionprinciples;
- What is the implication of such mission to the development of both International Humanitarian Law and Global Peace; and should the UNMISS types of interventions be appraised the charter system?

1.5.Significance of the Study

Maintaining the world's peace and security has been and continues to be a core issue of international law. Humanitarian crisis in particular is one of the growing challenges to the protection and recognition of human rights. Failure to address humanitarian crises leads to violations of human rights which in turn may lead to a threat to global peace as it has propagating effects emanating from the anger and disappointments following internal displacements and mass migrations. To allegedly mitigating such mishaps states, unified and/or unilaterally are witnessed resorting tohumanitarian intervention as a mechanism to contain as well as minimize humanitarian crises whenever they happen.

There is, on the other hand, an equivalent challenge both by the states intervened in and a debate of scholars against humanitarian interventionon various grounds ranging from its violation of established international law principles such as sovereignty of states to illegal use of force.

This thesis may contribute in analyzing the legal framework enabling humanitarian intervention; tries to identify the significance of humanitarian interventionthrough the achievements made through the humanitarian intervention in South Sudan. Apart from conducting a critical analysis of the views proposed by different scholars, selected resolutions of the SC on South Sudan and factors underscoring the currently controversial issues regarding humanitarian Intervention, including the mandate of the UNSC, it hopefully adds some lead to this problematic and dynamic issue. It will also give highlight on the challenges associated with humanitarian intervention with a view to assessing the need for the adoption of a new framework outside the Charter system or not, and if need be, what further considerations should be put in place in order to make humanitarian interventionachieve the wider goals of the Charter of the UN such as respect for Human Rights and Global Security.

1.6.Research Methodology

This thesis will follow a qualitative research and it will primarily rely on analyzing the Charter of the UN, UNSC Resolutions regarding South Sudan, Constitutive Act of AU, international treaties, international customary norms, and literature review of different books, journals and articles. In addition, the thesis tries to review some data of South Sudan to reflect on the success or otherwise of humanitarian interventionmade.

1.7.Scope of the Study

The study is limited to analyzing the legal aspects of the intervention in South Sudan from the point of view of the growing doctrine of humanitarian intervention. Hence, it doesn't reflect on the political positions of the warring factions, it doesn't comment of the political solutions either. It is rather limited to reviewing the evolving concept of humanitarian intervention vis-à-vis the international legal documents on issue of humanitarian intervention in general and the legal authorization for the intervention in South Sudan in particular; and to synthesize whether making humanitarian intervention should be a norm in international law and what implications the intervention in South Sudan has towards the development of such norm and even should this trend be upgraded to the Charter system.

CHAPTER TWO

DEVELOPMENT OF HUMANITARIAN INTERVENTION

2.1. Historical Evolution of The Concept

As humanitarian intervention has long been a routine feature of the international system, the genesis of the principle dated back to ancient time. According to Abiew, the earliest known instance occurred in 480 BC where the prince of Syracuse, in defeating the Carthaginians, laid down as one of the conditions of peace that they refrain from the barbarous custom of sacrificing their children to Saturn[13]. Intervention was also common in the Greek City-State system and the Roman Empire[14].

In the 17th Century the discussions of Humanitarian Intervention emerged to the then named father of international law, Hugo Grotius, who, in his book *De Jure Belli estPacis,* claimed that the principle of sovereignty could be restricted by principles of humanity; and considered that:

> " *….a war can be just for the subjects of another if it is for the purpose of defending them from injuries by their ruler…if a tyrant…practices atrocities towards his subject, which no just man can approve, the right of human social connexion is not cut off in such case…and that if the subjects may not take up arms for them*[15]."

Here, the classical formulation of the right of humanitarian intervention was inspired by natural law ideas and the doctrine of just war. Grotius regarded maltreatment by a sovereign of his subjects as a just cause to wage war on their behalf. He stated that "if a sovereign, although exercising his rights, acts contrary to the rights of humanity by grievously ill-treating his own subjects, the right of intervention may be lawfully exercised."[16] The Grotian formulation allows the full-scale use of force to end human suffering. Vattel recognized the right to intervene against a government at the request of the oppressed people. He stated that "if the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so

---

[13]Abiew p.22
[14] Ibid
[15]Hugo Grotius, '*De Jure Belli estPacis'*, quoted in Abiew, 35
[16]Abiewp.35

unbearable as to cause the Nation to rise, any foreign power is entitled to help the oppressed people requesting assistance."[17]

European powers also often used force or diplomatic pressure against each other to protect religious minorities in other states from persecution. Knudsen noted that the greater part of the history of humanitarian intervention is the history of intervention to protect persecuted religious minorities.[18] During the 18th and 19th Centuries, Philosophers of political liberalism tended to link the concept of humanitarian intervention to the concept of human rights.[19] Towards the end of 18th Century, some scholars began to treat it as an exception to the general principle of non-intervention, which they place as one of the pillars of international law in their new positivist theory. In the years 1770-80, Johan Jakob referred to the right to intervene when necessary to protect individuals from religious persecution. He emphasized that the motive should be humanitarian and not religious, and that this should be seen as an exception to the principle of non-intervention.[20]The tendency of states to intervene in less civilized states is typical for the first cases of possible humanitarian interventions occurring in the 19th century, such as the invasion of Turkey in 1830 by Great Britain, France and Russia, and the invasion of Syria in 1860 and 1861 by France.[21]

According to Brownlie, by the end of 19th century the majority of scholars agreed that a right of humanitarian intervention existed.[22]The well-cited cases were generally directed against Ottoman Empire for the protection of Christians, like the Greek and Lebanon-Syria. However, legal positivist writers of the 19th Century acknowledged the right or practice of humanitarian intervention on moral and humanitarian grounds alone. Nevertheless, other writers recognised the existence of the legal right of humanitarian intervention.[23]

---

[17]Abiew p.36

[18]TonnyBrems Knudsen, '*The History of Humanitarian Intervention: The Rule or the Exception*'. (New York 2009) p.4

[19]KardasSaban. '*Humanitarian Intervention: The Evolution of the Idea Practice*', (Journal of International Affairs 2002), p.265

[20] Roberts (2000), p.7

[21]Richard B. Lillich, '*International Human Rights Problems of Law, Policy and Practice*'(Virginia school of Law*1991)* p.596-597

[22]Brownlie. p.338

[23] Roberts (2000), p.10

In the first half of 20th Century, the conception of the right of humanitarian intervention continued to attract the support of out-standing scholars of international law. For instance, Lassa Oppenheim maintained that " …should a state venture to treat its own subjects or part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention."[24]Similarly, Lauterpacht stated that "the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins"[25]. According to Knudsen, Lauterpacht was one of the leading international lawyers, who also advocated the right of humanitarian intervention as being part of international law even at a time where it had disappeared from state practice.[26]Indeed, the right of humanitarian intervention had a solid basis in state practice before WWI. The absence of prohibitions of use of force in international relations was a reason to explain the existence of this practice.

After WWII, the UN Charter introduced a new rule imposing limits upon the use of force in international relations. It left the "threat to international peace and security" as the only possible justification for intervention in the domestic affairs of states, and all acts of intervention were subjected to authorisation by UNSC as part of its collective security function. Since 1945, the UNSC has authorised the use of force to end human rights violations. However, practice in the Cold War period shows that SC was hardly able to implement the provisions of the Charter on collective security due to ideological confrontation between the two superpowers and the emergence of third world states with their valuation of sovereignty. As a result, the issue of intervention became perceived as forcible self-help by states to uphold human rights in other states.[27]

During the Cold War, there are three interventions that have been discussed as possible humanitarian interventions; India's intervention in Pakistan, Vietnam's intervention in Cambodia and the Tanzanian intervention in Uganda. However, none of these interventions was justified on the grounds of humanitarian intervention; instead they invoked claims of self-defence.[28] The end of the Cold War led to the end of the conflict between the United States and the Soviet Union, making it easier for the Security Council to act. The Council played a central role after the Cold

[24]Ibid
[25] Ibid
[26] Ibid
[27]Holzegefre
[28]Nicholas .J. Wheeler, '*Saving Strangers Humanitarian Intervention in International Society'*, (Oxford University Press, 2000) p.60-65,

War, authorizing interventions in Iraq, Somalia and Kosovo. The intervention in Iraq in 1991 is significant in the development of humanitarian intervention because it was the first time the Security Council recognized that internal repression could have trans-boundary consequences that threatened- International Peace and Security.[29] While the Security Council played an important part in the intervention in Somalia, it became a bystander in the genocide in Rwanda a few years later. The UN withdrew most of its peacekeeping force; the United Nations Assistance Mission for Rwanda (UNAMIR) leaving the civilians to their own fates.[30] In the Aftermath of the genocide the UN received massive criticism for its failure to act. [31]

The Cold War made non-intervention a universal norm while the right of humanitarian intervention remained an exception.[32] With the end of the Cold War, human rights norms developed significantly and received general support. The end of this war brought about revolutionary change in the concept and practice of humanitarian intervention. The UNSC get the chance to take and authorise measures under provisions of chapter VII of the Charter against aggressor states as well as regimes allegedly violated human rights of their citizens.[33]Kardas pointed out that: "Humanitarian interventions [after the end of the Cold War] are not only responses to the suffering caused by repressive governments, but also they are directed to situations produced by internal conflicts, state disintegration and state collapses, as a result of which human rights are grossly violated."[34]

The discussion about humanitarian intervention took a new turn in March 1999, when NATO went to war against the Federal Republic of Yugoslavia and started its bombing campaign in Kosovo. This was the first time a group of states justified the use of force explicitly on humanitarian grounds and intervened without Security Council authorization. NATO justified its intervention in Kosovo by arguing that the intervention aimed to avert a humanitarian catastrophe, that NATO's credibility was at stake, that the ethnic cleansing in Kosovo posed a

---

[29] Security Council Resolution 688, ,*available at:*<http://unscr.com/en/resolutions/688> (1991)(last visited 18th December 2018)
[30] Security Council Resolution 912, ,*available at:* <http://unscr.com/en/resolutions/912> (1994),(last visited 18th December 2018)
[31] Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda, , S/1999/1257, *available at:* <https://undocs.org/S/1999/1257> (1999), (last visited 18th December 2018)
[32]Saban, p.270
[33]Richard Lilich. '*The Role of the UN Security Council in Protecting Human Rights in Crisis Situation: UN Humanitarian Intervention in the Post-Cold War World'.*(1995)
[34]Holzegfre 55

long-term threat to European security, and that NATO's actions were in conformity with existing Security Council resolutions.[35]

A more recent development in the field of humanitarian intervention is the doctrine of the Responsibility to Protect (R2P). It is an attempt to reconcile the concept of sovereignty with a state's duty to protect its citizens. It had its starting point in the International Commission on Intervention and State Sovereignty (ICISS), which was established in 2000. The Commission was created as a response to UN Secretary-General Kofi Annan's concerns on how to respond to massive human rights violations. In 2001, the Commission issued its report, *The Responsibility to Protect,*[36]where it recommended to the Secretary-General that he initiate steps to develop a doctrine on humanitarian intervention and laid down the principles the doctrine should be based on. The report viewed sovereignty as an obstacle to humanitarian intervention and wanted the term humanitarian intervention to be replaced with a new responsibility to protect. Thus, sovereignty was not conceived of as a right, but rather as a duty to protect.

In 2004 the UN High-Level Panel on Threats, Challenges and Change took up the report and spoke of an emerging norm of collective international responsibility in the face of human right abuses.[37] A modified version of the R2P was acknowledged by the General Assembly in the Outcome Document at the UN World Summit in 2005.[38]The significance of the R2P for the development of humanitarian intervention is limited for two reasons: First and foremost, the Security Council has not yet adopted the R2P, consequently it does not represent legally binding criteria. Secondly, the R2P covers situations in which the intervening states do not resort to force, and thus embraces situations other than just humanitarian interventions.

2.2.Theoretical Approaches to Humanitarian Intervention

The evolving debate among leading scholars of international law coupled with the growing trend of the practices of states relating to Intervention in general led to the framing of theoretical

[35]Ibid

[36]International Commission on Intervention and State Sovereignty, *The Responsibility to Protect,* (2001) *available at* <http://www.iciss.ca/report-en.asp>(accessed on 7 May,2019)

[37] Report of The High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 para 201, (2004) *available at: http://www.un.org/secureworld/*(accessed on 7 May,2019)

[38] General Assembly Resolution 60/1, World Summit Outcome,(2005)*available at: http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement*(7,May 2019)

classifications regarding Humanitarian Intervention. Accordingly, Teson writes that there are three basic positions regarding humanitarian intervention: absolute non-interventionism, limited interventionism and broad interventionism[39].

2.2.1. Absolute Non-Interventionism

Absolute non-interventionists claim that the only justified use of force is the one against aggression, in self-defence. This position is adopted by most legal scholars. Among them is John Rawls, one of the most influential political philosophers of the 20th century, famous as the most prominent theorist of distributive justice. Rawls claims that principles of justice for national societies are those that would be chosen in the "original position" (a hypothetical situation developed by Rawls to replace the state of nature from the classical social contract tradition) by free, rational parties. For him two principles would be chosen: the principle of equal liberty and the "difference principle". As liberty has priority over social and economic claims, Rawls calls this theory "justice as fairness". There is a considerable limitation on the applicability of this theory that Rawls imposed. Rawls claims that civil and political human rights may sometimes be reduced or ignored, but only to limited extent, which is needed to achieve conditions that will make available the full enjoyment of those rights in the future.[40] However, Rawls limited this theory of justice to the societies of democratic industrial West.

According to Teson, this is the "relativist version of justice."Teson considered that this limitation has "grave consequences for international human rights"; and considered this theory unacceptable: "Variations in political, legal and economic organization do not affect the universal validity of human rights derived from appropriate principles of critical morality."[41]

Rawls"s theory of international law relies in the analogy between state and individual. The representatives of states, from the international original position would choose "familiar principles": the first is that of the equality of nations whose consequence is the principle of self-determination, so in a just international society nations are sovereign and hold the right of self-determination, which right is actually a rule of non-intervention.

---

[39] Fernando Teson,*'Humanitarian Intervention: An Inquiry into Law and Morality'*(1988) p.5
[40]JhonRawls, '*A Theory of Justice'*,1971
[41]Wheeler p. 49

2.2.2. Limited Interventionism

Limited interventionists claim that humanitarian intervention is only acceptable in cases of extreme human rights breaches – genocide, mass murder or enslavement. This position is endorsed by most legal scholars who support humanitarian intervention. One of the most prominent contemporary political philosophers amongst them is Michael Walzer who was one of the developers of a pluralist approach to political and moral life. For Waltzer, only genocidal or equivalent action justifies intervention. According to Teson, "…Walzer defines the state as [union of people and government] and argues from there that foreign military intervention against governments is almost always wrong, even if its purpose or effect is to establish liberal or democratic institutions."[42]

Waltzer makes a distinction between domestic legitimacy which is singular in character and reflects democratic values of the citizens who have right to revolt against the dictators, and international legitimacy which is pluralist in character and reflects citizens' ‟recognition of different patterns of cultural and political development".[43] According to Teson, Walzer's principle of pluralism "indicates that there are local moralities (a Nicaraguan morality, a European morality, a Chinese morality) and not a system of moral political principles held valid for all persons regardless of geographical circumstances…….we must let the political process work, we should not speed it up artificially…..the outcome of the process may be a tyranny."[44] To Teson, the pluralism of Walzer "does not differ significantly from outright moral relativism."[45]

2.2.3. Broad Interventionism

Broad interventionism is the thesis that humanitarian intervention is acceptable in cases of serious human rights violations which need not reach genocide proportions. This view is defended by A.D‟Amato and Reisman as legal scholars and Luban and Doppelt as philosophers. In his work,"Just War and Human Rights", David Luban stands on a position that a military intervention will be morally justified only if it maximizes the respect for human rights of

[42]Ibid. at 92
[43]Michael Walzer, '*The Moral Standing of States'*P. 215-216
[44]Wheeler p. 33
[45] Ibid

everybody affected by the intervention.[46] For Luban, all just wars, including wars in self-defence, are human rights-based wars. Teson argued: "Such a position, however, seems to be inconsistent with a theory based on individual rights. In most cases of forcible intervention, a nation going to the war for a *prima facie*just cause cannot avoid inflicting suffering and death."[47]

2.3.State Practice in the Pre-Charter Era

As state practice on humanitarian intervention dated back to ancient times it is difficult to find clear example of humanitarian intervention in the 17th and 18th centuries unlike the general recognition of the concept by some scholars.[48]Thus, it is in the 19th and early 20th centuries that the institution of humanitarian intervention gained ground in state practice. Knudsen noted that "As a consequence of the establishment of the European Concert in 1815, the occasional resort to diplomatic interference and attempted dictate in the 18th Century gave way to a practice of outright humanitarian intervention."[49]

The earliest instance of a genuine humanitarian intervention, frequently cited in the literature, is the 1827 joint intervention of Great Britain, France and Russia to stop the Turkish massacres against Greek population.[50]The majority of scholars have accepted this intervention as based on humanitarian considerations.[51]Another instance of humanitarian intervention is the 1860-61 French intervention in Syria. From 16th Century until the WWI, Syria was an integral part of the Ottoman Empire. The Turkish rule led to the massacre of thousands of Christians by the Muslim population. The French intervention was authorised and supervised by the five European great powers to stop the massacres of the Maronite Christian committed by the Muslim Druses under Turkish supremacy. The French force withdrew in 1861 after accomplished their tasks.[52]According to Chesterman the most important element of this incident as an instance of

---

[46]D. Luban, '*Just War and Human Rights'*, (Phil.&Public Aff.160,1979)

[47]Walzer 28
[48] Roberts, p.14
[49] Ibid
[50]Chesterman Simon. *'Just War or Just Peace? Humanitarian Intervention and International Law'*(Oxford University Press 2001), p.28
[51]Abiew, p.49
[52] Ibid, p.50

humanitarian intervention is the relative disinterestedness of the acting parties, and the humanitarian concerns of the five European powers appear to have been genuine.[53]

Another instance of intervention is that carried on by US in Cuba in 1898.Some writers noted that US intervention in Cuba is an example of unilateral humanitarian intervention in pre-Charter state practice.[54]The intervention was on the basis of reports of atrocities committed by Spanish military authorities attempting to suppress Cuban rebellions. Some writers still argue that an important precedent for humanitarian intervention is the WWII itself as the allied forces acted not just because Hitler and Mussolini engaged in military aggression, but to defend "dignity, reason, human rights and decency against degradation, authoritarianism, irrationality, and obscurantism".[55]

2.4.Humanitarian Intervention in the Charter Era

Following the establishment of the UN Humanitarian Intervention has witnessed significant phenomenon both in the scholarly debate and in practice of states. Though during the early days of this era, the Cold War,with its features of bipolarity and veto power of the Security Council member states, posed a challenge to UN backed Humanitarian Intervention, with the collapse of the Berlin wall things changed for better.[56]

Boutros Boutros-Ghali, in his report as the Secretary-General of the UN, stated that structural changes in the UN and the new prevalence of democracy lessened the importance of sovereignty.[57] Boutros-Ghali wrote of the need to expand peacekeeping to include the delivery of humanitarian aid, among other things. More critically, he expressed an expanded understanding of sovereignty:

> "*While respect for the fundamental sovereignty and integrity of the state remains central, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never as absolute as it was conceived to be in theory.*"[58]

Instead of placing all importance on non-interference, Boutros-Ghali suggested that the rights of the individual deserve the same respect that had been granted to states.[59]Moving beyond the

---

[53]Teson, p.33
[54] Ibid, p.34
[55]Fernando Teson, *'Humanitarian Intervention: An Inquiry in to Law and Morality'*. (2005) 3rd ed., P.227
[56]S. Neil MacFarlane, *"Intervention in Contemporary World Politics,"*(2002) ,p. 35.
[57] Ibid p.52
[58]Ibid, 98-99.

struggle between democracy and communism, the underlying intervention philosophy centred on the alleviation of human pain and the encouragement of more stable governments. The Secretary General's memo, though not immune from critical scholarly opinions, made a radical shift from the conventional understanding of sovereignty during the Charter era.

Walzer writes, in 1995, contradicting the feasibility of Boutros-Ghali's proposed intervention philosophy. Instead, he argued that intervention is at its core a negative action—that it has the goal of mitigating violence, not of spreading industrialization or democracy.[60] Its basic goal is to remove whatever tyrant is oppressing his people and then vacate the territory. For Walzer, the concept of an all-encompassing intervention that brings a regime into the realm of a western democracy misses the point entirely. The aim, he writes, is "not to alter power relations on the ground, but only to ameliorate their consequences—to bring food and medical supplies to populations besieged and bombarded, for example, without interfering with the siege or bombardment."[61]

The framing of intervention as "humanitarian," hence seemed problematic to some academics. Calling an armed intervention "humanitarian" from the onset, for instance, may result in contrary goal as " …..it did not take into account the need for either prior preventive action or subsequent follow-up assistance….". If the humanitarian thing to do is invade a country, then calling for civil society solutions or further diplomacy would seemingly fall into the anti-humanitarian category—a short-sighted conclusion. With these debates surrounding the understanding of humanitarian intervention emerged a relatively new concept of Responsibility to Protect /R2P/. The R2P generally means states have the responsibility to protect people facing dire humanitarian situations in a given state due to either from the acts or omissions of the regime in that given state. Most scholars argue that in such situations Humanitarian Intervention should be justified.

The Charter era has also experienced controversies and debates in practical instances of interventions. One such instance is the NATO intervention in Kosovo. The justifications attached to this NATO intervention were the inhuman treatments of ethnic Kosovar by former Yugoslavia. It appears from the justification that, though it was debatable whether such situation existed or not, the humanitarian ground is accepted as one reason for intervention; and that R2P

---

[59]Ibid., 99.
[60]M. Walzer, *'The Politics of Rescue'*, (Social Research 62 1995), p. 55
[61]Ibid p.53.

can be exercised under such instances. The NATO intervention in the Charter era, however, couldn't escape criticism as it didn't have a UNSC resolution backing the intervention; which act of NATO clearly disregarded the mandate and authority of the UN. Another instance of intervention is the US intervention in Somalia. The alleged rationale for such intervention by the US was the humanitarian needs of the people of Somalia; though some suspect that the real intention of the US was to abolish the then regime in Mogadishu. Here as well, even if one accepts the alleged grounds by the US as real, this intervention didn't adhere to the Charter regime that it didn't have the authorization of the UNSC; nor did it have any justification based on any of the Charter provisions.

The developments of Humanitarian Intervention as discussed in this chapter demonstrate that though the initial motive of state practice on intervention wasn't meant for humanitarian purposes, as it had a specific interest of protecting minority Christians, the step can surely be taken as an ice breaker for evolution of the concept. The articulation of the phrase by some scholars during that early period was, however, a landmark shift in tabling the concept to the field of international law. Of course, scholarly debates have since been varying from outlawing any form of intervention to a wider option of intervention as were the practices of states though the justifications attached to each intervention vary considerably. These coupled trends reinforced the development of humanitarian intervention in the realm of international law as will further be discussed in the next Chapter. Accordingly, contemporary international law seems to recognize humanitarian intervention as one of the means for protecting and maintaining international peace and security in general, despite the frequently forwarded arguments that it contradicts the core principle of sovereignty of states and the prohibition of use of force as stated in the Charter of the UN; and despite the curse that it doesn't have well framed and universally accepted requirements that the international community failed to react to the atrocities in Rwanda.

CHAPTER THREE

HUMANITARIAN INTERVENTION UNDER INTERNATIONAL LAW

3.1 Customary International Law

Customary law being "the oldest and the original source of international law,'[62]is still the source of the law of humanitarian intervention. A general custom and practice of humanitarian intervention existed as early as the 19th century[63];and even those critical of intervention concede that the French intervention in Syria in 1860-61 to stop massacres of the Christian minority was a legitimate humanitarian operation.[64]Proponents of intervention also cite the British, French, and Russian intervention in Greece (1827-1830),[65] the Russian intervention in Turkey (1877-1878), and the Greek, Bulgarian, and Serb intervention in Macedonia (1903) as examples of humanitarian interventions that were regarded as justified.[66] The Syrian operation is probably the best example of humanitarian intervention in the pre-WWII period. Shocked by massacres of Maronite Christian minorities in Syria, France landed troops and patrolled the coast of Syria with naval vessels to prevent recurrence of the massacres. While the Turkish Sultan eventually authorized this intervention by treaty, he did so under strong compulsion from France, Britain, and Russia.[67] France certainly had other reasons for wanting to influence events in the Middle East, but the primary motive for intervention was to stop wanton killings[68].

Despite the apparent contradictions in the Charter and overall purposes of the UN, traditionalists maintain that the UN's voice has been clear regarding the prohibition on the use of force. Nonetheless, the practice of intervention has continued in the post-UN era. There was widespread acceptance of Israel's intervention into Uganda during the Entebbe raid.[69]India intervened in East Pakistan in 1973, and while it eventually relied on its right of self-defence under article 51 of the UN Charter, India initially defended its action on grounds of humanitarian

---

[62]LawrenceOppenhiem, *International Law* (1955), p. 232.
[63]David.J. Scheffer, '*Toward a Modern Doctrine of Humanitarian Intervention'*, (Toledo Law Review1992) p.258-59.
[64]Brownlie p.340 and L.B Sohn & T. Buergenthal, *International Protection of Human Rights*, (1973), P.143-80
[65] Ibid p. 339
[66],Schefer, p.254-55
[67]Oppenhiem, p. 156
[68]R.J. Vincent, '*Nonintervention and International Order'*, (Princeton University Press1974) p.11
[69]S.G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, (California Western. Int'l Law Journal 1993) p.117-124

need.[70] The fact that India even advanced this argument is evidence that it had "a conception that the practice is required by or consistent with international law."[71] India's change of position reflects the inherent problem in humanitarian intervention in the era of the UN Charter.[72]India's true motive was to avert tragedy, but it was forced to resort to "legal gamesmanship" [73] out of fear that its claim would be repudiated.[74]

The Tanzanian intervention into Uganda, in 1978-1979, is another important example of humanitarian intervention in the post-Charter era. After Ugandan forces invaded and annexed Tanzanian territory, Tanzania launched a military offensive to recapture the territory and then carried the war into Uganda. With the help of Ugandan insurgents, Tanzanian forces eventually took the Ugandan capital, Kampala, and toppled the totalitarian regime of Idi Amin.[75] The Tanzanian offensive to remove Idi Amin went far beyond the legitimate bounds of self-defence under article 51 of the UN Charter.[76] Though Uganda had first attacked Tanzanian territory, the right of self-defence does not extend to a punitive[77] offensive designed to topple the government of the aggressor state. The only justification for Tanzania's action was a humanitarian one[78] - the dictatorship of Idi Amin was brutal in the extreme, and in eight years of rule, Amin had caused the death of an estimated 300,000 Ugandans.[79]These practices show, at the very least, that states are cognizant of some remnant of their right to resort to the use of force when the cause is just, despite UN prohibitions. However, critics question whether these scattered instances of humanitarian intervention rise to the level of "general practices accepted as law."
According to some legal theorists, "general practice" may mean only a single instance, provided that there is no significant opposition to it.[80] Michael Reisman argues that customary law is formed each time an international incident occurs, based on the way the international community reacts. Thus," *….a high degree of actual tolerance for ... unilateral action, words and other*

---

[70]Barry M. Benjamin, '*Unilateral Humanitarian Intervention; Legalizing the Use of Force to prevent Human Rights Atrocities'*, (Fordham Int'l Law Journal 1992) p.133.
[71]Henry J. Steiner, '*Transitional Legal Problems'*, (Maryland Journal of International Law 1994), p.240.
[72]Vincent p. 149-50.
[73] Ibid p.134
[74]Simon,p. 149.
[75]Fernando R. Teson, '*Humanitarian Intervention; An Inquiry into Law and Morality'*(2[nd]ed 1997), , p.182-83.
[76]Ibid p.188.
[77]Ibid
[78]Ibid p.195.
[79]Benjamin, p.150
[80]Vincent, p.17

verbal condemnations notwithstanding - may be a signal that the international community is willing to accept such unilateral military assertions of right."[81] Customary law is fundamentally a summation of the accepted standard of behaviour, and the expectations of what is acceptable "are almost entirely derived from the responses of key actors to a critical event.[82] An important step in this paradigm is to identify what constitutes "a response" to an international incident. Reisman implies that words of condemnation alone do not show actual opposition; rather, it is the action of international elites that should be used to determine the level of acceptance. Because they require a greater mobilization of resources, actions often indicate the resolve of participants better than words; they may also better reveal the intensity of elite expectations[83]. As Professor Chodosh notes, "practice may take many forms, both affirmative and negative."[84] The lack of any action in opposition to an intervention may thus constitute a "positive" general practice. If Reisman's theory is correct, then the NATO intervention into Kosovo clearly demonstrates that a legal right to intervene exists based on the lack of any significant international opposition.[85] This theory of the formation of new customary legal norms may well justify the Kosovo operation by way of hindsight; because nobody did anything to stop it or oppose it, then the law may have embraced it.

The record of state action over the past 50 years clearly suggests that a right of humanitarian intervention has survived the formation of the UN. The principles of human rights that form the cornerstone of the United Nations are built on a very weak foundation indeed if no method of enforcing them remains. However, it is equally obvious that not every intervention based on a claim of humanitarian need is a legal intervention. When the United States intervened in Iran in an attempt to free the hostages, it was roundly criticized and the ICJ expressed its opinion (in dicta) that the US had violated international law.[86] The difference between the US intervention in Iran and the Israeli intervention in Uganda are only made clear if they can be examined using

---

[81]W.Michael. Reisman, '*International Incidents in International Incidents: The Law that Counts in World Politics'*, (Princeton Legacy Library 1988) p. 4.
[82]Ibid p.5.
[83]Andrew R. Willard, '*Incidents: An Essay'*, (The Yale Journal of International Law1984),p.36.
[84]Hiram .E.Choodosh,*'Neither Treaty nor Custom: The Emergence of Declarative International Law'*, (Chinese Journal of Int'l Law1991) , p. 100.
[85]Reisman p.4
[86]U.S. v. Iran, (I.C.J. 1980)

established criteria. In order to distinguish between the lawful use of force for humanitarian purposes and the unlawful, pretextual intervention, an analytical framework is required.

3.2. The Post-UN Era

3.2.1 Charter of The United Nations

The primary base for any contemporary debate on the legality of the use of force in international law is article 2(4) of the UN Charter that provides:

> "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the objectives of Purposes of the United Nations.*"

Article 51 and Chapter VII of the UN Charter formally recognize certain particular exceptions to the rule stated above. Article 51 provides: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...*" Chapter VII of the Charter also provides one clear exception to the non-intervention principle by granting powers to the Security Council to use force against any member state if the SC believes other measures, not involving the use of force, are not or would not be adequate in the maintenance or restoration of international peace and security.[87]

Does Article 2(4) of the Charter prohibit humanitarian intervention? Theorists are divided on the subject. The majority are of the view that humanitarian intervention is not legal under the UN Charter arguing that Article 2(4) cannot be interpreted in any way that will allow humanitarian intervention. Some even hold that the principle of non-intervention has been raised to the status of *jus cogens*; a peremptory norm of general application for which no derogation is permitted.[88]Proponents of humanitarian intervention, on the other hand, claim that it is legal under the Charter as one of the primary purposes of the Charter is the promotion of human rights. For the proponents, there are three basic approaches to treaty interpretation. The first one, called

[87]United Nations Charter, Art. 42.
[88]S. Jianming, '*The Non-Intervention Principle and Humanitarian Interventions Under International Law*', (2001) Vol. 7(1) ,Int'l Legal Theory

"objective", focuses on the actual text and analysis of the words used. The second one, "subjective", looks to the intention of the parties adopting the agreement. The third approach regards the objects and purpose of the treaty as the key to the meaning of a treaty provision.

Hence, they argue, the true interpretation of a treaty provision shall employ all three approaches; and it is impossible to exclude any of them. Articles 31 to 33 of the Vienna Convention comprise aspects of all three doctrines. According to Malcolm Shaw, "a joint "textual-intentions-teleological" approach is posited in the Convention on the Law of Treaties as the package solution to problems of resolving difficulties in understanding particular treaty provisions."[89]

Classicalists, however, insist that the Charter prohibits the use of force for humanitarian purposes. According to them, there are only two exceptions to the prohibition of the use of force in the Charter: an assertion of self-defence or collective self-defence and a Security Council authorization. The first exception permits the use of force in self-defence against armed attack and the second permits an action by the Security Council as an enforcement measure in the performance of its duty of maintaining or restoring world peace.[90]Understanding Article 2(4) of the Charter in Historical Context, Gordon argues that if the framers of the Charter wanted to permit the use of force for humanitarian purposes they would have done so explicitly.

Classicalists invoke two General Assembly /GA/ Resolutions for their arguments. The first one is Resolution No. 2625 that provides " …..*no state or group of states have the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another state*". The second one, GA Resolution No. 3314,adopted as a non-binding recommendation to the UNSC on the definition for the crime of aggression; and states that "….*there is a distinction between aggression and war of aggression; only war of aggression constitutes a crime against international peace".* The GA defined "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state…no justification of whatever nature, whether political, economic, military or otherwise, may serve as a justification

[89]Malcom Shaw, '*International Law',* (1977), p.366
[90]Choodosh 105

for aggression." For them, the mentioning of something means the exclusion of all that is not mentioned, thus the drafters could have specifically provided for humanitarian intervention.

Unlike classicalists, realists claim that the Charter emphasizes the right of humanitarian intervention. Teson, for instance, claims that the use of force is prohibited "a) when it impairs the territorial integrity of the target state; b) when it affects its political independence; or c) when it is otherwise against the purposes of the United Nations.[91] First two tests are satisfied, because "a genuine humanitarian intervention does not result in territorial conquest or political subjugation."[92]Regarding the last test; i.e."purpose", Teson concludes that humanitarian intervention is in accordance with one of the fundamental purposes of the UN Charter, the promotion of human rights. According to realists, if a provision can be interpreted reasonably without leaving any words redundant, that interpretation is preferable.

3.2.2 Constitutive Act of the African Union

The A.U. Constitutive Act was adopted by heads of state on July 11, 2000, and the A.U officially launched on July 10, 2002.[93] The A.U. replaced the erstwhile Organization of African Unity (OAU), which was regarded as being an ineffective "club" where leaders did not criticize each other.[94]Indeed, the OAU revolved around a principle of non-interference grown out of African leaders' distrust of colonial interference with African sovereignty.[95] The A.U., in contrast, was founded with a wide variety of goals, including peace and stability, speedy economic development, and promotion of African unity.[96] The main theme of the new organization was "African Solutions for African Problems."[97] Following this theme, the drafters included a right of intervention. The drafters of the A.U. Constitutive Act were frustrated with the international

---

[91]Teson, (1997) p.150
[92] ibid.
[93]KithurKindiki, '*The Normative and Institutional Framework of the African Union relating to the protection of Human Rights and the maintenance of international peace and security: a critical appraisal'*, (African Human Rights law Journal 2003), p.99
[94]Ben Kioko, *'The right of intervention under the African Union's Constitutive Act from noninterference to non-intervention'*, (2003), p.810
[95]Gabriel Amvane,*'Intervention pursuant to article 4(h) of the Constitutive act of the African Union without United Nations Security Councils authorizations'*, (African Human Rights Law Journal 2015), p.294
[96]Kindiki 97
[97]Amyane p.295

community's slow response to the 1994 Rwandan genocide.[98] In future conflicts, leaders did not want to have to wait to get either the consent of the target state or the authorization of the UNSC.[99]The possibility of requiring UNSC authorization was dismissed "out of hand," as African leaders took as given the slow pace of the UNSC and the lack of international focus on African problems.[100] The A.U., born out of the shadow of Rwanda, saw a particular kind of unity, diametrically opposed to OAU principles. Under the new regime, African states would be proactive and seek to solve continent-wide problems.

A. **Article 4(h)- Intervention**

Article 4(h) shows a commitment of African leaders to move past the shadow of the OAU and Rwanda, and the provision is unique among regional organizations.[101] Article 4(h) recognizes the following as a principle of the AU: The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.[102]This provision gives the A.U. the right to intervene forcibly and unilaterally within the territory of a member state in certain "grave" circumstances.[103] In effect, the A.U. has codified a limited right of humanitarian intervention.[104] As noted above, such a forcible intervention likely counts, at least in form, as an enforcement action that requires UNSC authorization under U.N. Charter Article 53. Despite the U.N. Charter's seemingly clear prohibition on unauthorized enforcement actions, unauthorized Article 4(h) intervention could be legal.

---

[98] Kwame Akonor ,'Assessing the African Union's Right of Humanitarian Intervention', (Chicago Journal of Int'l Law 2010),p 157-58
[99] Kioko, p.811-12
[100] Ibid p.821
[101]Kindiki,p.283
[102] Constitutive Act of the African Union, art. 4(h). A not-yet-ratified 2003 amendment would add: "as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council." African Union, Protocol on Amendments to the Constitutive Act of the African Union, July 11, 2003, https://perma.cc/KQX5-HCBR. According the A.U. website, only 28 member states have ratified the amendments, short of the two-thirds majority needed. *List of Countries which Have Signed, Ratified/Acceded to the Protocol on the Amendments to the Constitutive Act of the African Union*¸ Available at, <https://perma.cc/VH7X-ZP5V>(last visited 21 April 2019)
[103]Supra note 86, p.157
[104]Ntombizozuko .Dhyane. Mhango, '*Reflections on the African Union's Right to Intervene*', (Brook. J. Int'l 2012)

The UNSC has approved prior regional enforcement actions *ex post* without a trace of disapproval, indicating evolving regional custom. Second, the definition of enforcement action may still hinge on consent. If A.U. member states validly consented to Article 4(h), then any intervention is not a use of force that would be prohibited but for UNSC authorization. If there is consent, Chapter VII powers (and thus enforcement actions) are not implicated, and Article 53 is not implicated.[105]

B. AU interpretation of Article 4(h)

A.U. interpretations of Article 4(h) have been mixed, and do not provide a clear answer to whether the member states consider unauthorized 4(h) interventions legal. At the drafting of the A.U. Constitutive Act, African leaders thought they did not need UNSC approval for such interventions.[106] The A.U.'s later-enacted internal protocol for its Peace and Security Council, which established mechanisms for intervention, did not clarify how the UNSC is viewed.[107] One provision recognizes the primacy of the UNSC in the maintenance of international peace and security,[108] while another states that the A.U. "has the primary responsibility for promoting peace, security and stability in Africa."[109] The Protocol often refers to cooperation with the U.N.[110]Further, the Protocol explicitly discusses appealing to the U.N. for funds for peacekeeping operations.[111]Despite all this, the Protocol never actually states that UNSC approval should be sought prior to intervention. While the Protocol does not paint a picture of conflict with the UNSC, it does conspicuously omit any mention of prior authorization for interventions.

The 2005 A.U. Ezulwini Consensus also provides an ambiguous interpretation of the UNSC's role.[112]While the Ezulwini Consensus is primarily an argument for UNSC reform, the document touched on Article 4(h) interventions. The document explicitly states that interventions "should

---

[105]Oona.A.Hathaway et al., '*Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to theSovereign'*, (Cornell Int'l Law Journal 2013) p.559
[106]Supra note 82, p. 811-12
[107] African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, (July 9, 2002), *available at,*<https://perma.cc/QW34-BZU9> (last visited 21 April 2019)
[108] Ibid, art 17 (1)
[109] Ibid, art.16 (1)
[110]Ibid, art. 4(k), art. 13(4), 13(15), 17(1), 17(3).
[111] Ibid, art 17 (2)
[112]The Common African Position on the Proposed Reform of the United Nations ("Ezulwini Consensus"), (Mar. 7–8, 2005) available at: <https://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf>(accessed 28 May 2019)

be with the approval of the Security Council," but in the next sentence notes that such approval could be granted "after the fact" if necessary.[113] While this points to a desire on behalf of the A.U. to submit to the normal procedures of the U.N. Charter, it is worth noting that "after the fact" authorization is insufficient by the terms of U.N. Charter Article 53. Further, in the same section, the A.U. declares that the authorization requirement "should not undermine the responsibility of the international community to protect," and that the A.U. should be "empowered to take actions" when the UNSC may not have a "proper appreciation" of "conflict situations."[114] Lastly, the document notes that it is important to "comply scrupulously" with U.N. Charter Article 51 (the right of self-defense) and A.U. Constitutive Act 4(h).[115] There is no mention of U.N. Charter Article 53 or the primacy of the UNSC. What then is to be made of the Ezulwini Consensus? On the one hand, the document is primarily a request for UNSC reform. The statements about intervention therein could be regarded as no more than either political maneuvering or a statement of what would be true if the UNSC were actually effective. On the other hand, the document is fairly clear that while UNSC authorization "should" be required, the A.U. reserves for itself the right to intervene without UNSC approval. In either case, the A.U. is not submitting fully to the U.N. Charter's collective security framework.

On the other hand, the provision of Article 4(h) of the AU Constitutive Act and the deliberate omission of Security Council authorization seem to have been inspired inter alia by the texts and practice of the Economic Community of West African States (ECOWAS). Concerning legal texts, while Article 22 of the ECOWAS Protocol of December 1999 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security charges the Economic Community of West African States Monitoring Group (ECOMOG) with the role of 'humanitarian intervention in support of humanitarian disaster',[116]Article 10 of the same text gives the Mediation and Security Council (MSC) the power "to authorize all forms of intervention and decide particularly on the deployment of political and military missions."[117] On

[113] Ibid art. B(i)
[114] Ibid, art B(i)
[115]Ibid , art B(ii)
[116]The ECOWAS protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, art 22 available at http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en, (last visited 18 May 2019; and A. Abass, '*Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*', (Oxford, Hart Publishing, 2004) p.188.
[117] A. Abass& M.A. Baderin, "Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union" (Netherlands International Law Review 2002),p. 6

a practical level, the ECOWAS intervened in Liberia (1990) and Sierra Leone (1997) respectively, without the prior authorization of the Security Council.[118]

In summary, the Constitutive Act, the criterion for the exercise of intervention by the AU are twofold: first, it may be exercised only in cases of international crimes, such as crimes against humanity, war crimes, and genocide; and second, assuming that the AU has the necessary resources (financial or otherwise) to intervene if international crimes are committed in the territory of a member state. The assumption is that the AU will be willing to exercise the right to intervene.[119] The Constitutive Act does not define crimes against humanity, war crimes, and genocide as its drafters presumed that there was no need to do so, these crimes being already defined in the Rome Statute and the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.[120]

3.3.Development of the Responsibility to Protect (R2P) Concept

The R2P represents a fundamental reframing of the humanitarian intervention debate that started following the international community's failure to adequately predict and respond to a shocking succession of unfolding mass atrocities in the 1990s. Humanitarian intervention was premised on an alleged right to intervene militarily, if necessary against the will of the government of the state in question, when confronted with mass atrocious crimes. This position ultimately turned out to be politically untenable and provided little scope for concrete implementation. It became quickly evident that a solution was needed in order to restore the confidence in the United Nations and the credibility and legitimacy of the Security Council. The challenge was to develop a conceptual and practical framework which avoided the inherent problems associated with humanitarian intervention.[121]

In the 1990s, the international community was faced with several humanitarian crises in several countries, including Iraq (1991), Somalia (1992), Rwanda (1994), Bosnia (1993-1995), Haiti

---

[118]Kindiki 81, p.48

[119] As examples one can mention: Benin, Botswana, Gabon, Malawi, Namibia, Togo and Zambia.

[120]S.M. Makinda and F.W. Okumu, '*The African Union: Challenges of globalization, security and governance', (2008)*, p. 75.

[121]Adele Brown, *"Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?"*, (House of the Commons Library Research Paper 08/552008), p.12

(1994- 1997), and Kosovo (1999). In the face of these crises, particularly the genocide in Rwanda during which over 800,000 Tutsis and a smaller number of Hutus were killed in just a hundred days, and the Srebrenica massacre where 7000 Bosnian Muslims perished, the international community, failed to respond effectively.[122] The attitude of the international community as Kofi Annan put it in his 1998 speech to the Ditchley Foundation, was, "so long as the conflict rages within the borders of a single State, the old orthodoxy would require us to let it rage."[123]The old orthodoxy espoused the inviolability of state sovereignty and non-intervention. The crises in the 1990s and the inability of the Security Council to react triggered debates as to whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or whether the time had come to take a different course.[124]

At the centre of the debates was how the international community should react when the fundamental human rights of people are grossly and systematically violated within the boundaries of sovereign states, and this heightened the need for a reappraisal of armed humanitarian intervention. These debates culminated in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 by the Government of Canada, with the mandate "to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty."[125] The ICISS came up with the concept of the Responsibility to Protect /R2P/, which articulated the basic principles that sovereignty implies responsibility and this responsibility primarily lies on the state to protect its people, but where the state is unwilling or unable to discharge this responsibility, its sovereignty has to yield to the broader international community's residual responsibility to protect the vulnerable population.[126]R2P was unanimously adopted by the 2005 World Summit of more than

[122]J.M., Iyi, *'Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law: Towards a Theory of Regional Responsibility to Protect'*, (Springer International Publishing 2016), Switzerland, p. 1.

[123]Koffi Annan, Secretary-General Reflects on 'Intervention' in Thirty-Fifth Annual Ditchley Foundation Lecture, , Press Release SG//SM/6613. (26 June 1998) Available at: http://www.un.org/press/en/1998/19980626.sgsm6613.html. [Accessed 01 May 2019]

[124] Ibid

[125]ICISS Report, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty,* (2001) p. 2.

[126] Ibid. p. 10

170 world leaders[127] as the roadmap for responding to mass atrocious crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity.[128] This was the largest gathering of world leaders at the UN[129]; and the unanimous adoption of R2P demonstrated the importance that the world community attaches to the protection of victims of atrocities. The significance is that the heads of states and governments who gathered at the summit made it clear that the perpetration of any of the specific four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity constituted a just cause for the application of R2P.

It can, thus, be concluded that customary international law, which basically develops through practices of states, is paving the way for humanitarian intervention to stay up front whenever a crises relating to grave violations of human rights or humanitarian situations occurs. The instances discussed in this part of the Thesis confirm how the world had been reacting to various such situations, though based on varying grounds. Same is the case with the international legal instruments such as Charter of The United Nations and the Constitutive Act of the African Union.

The UN Charter has been a subject of continued debate with regards to humanitarian intervention, as is the case for practices of states. The Charter declares sovereignty of states and non-use of force as its core principles for the protection and maintenance of international peace. This notwithstanding, however, the old assumption of peace appeared to presuppose conflicts between sovereign state; and seemed to undermine internal conflicts which may equally affect international peace and security which the Charter strives to attain. Further, with the end of the Cold War, the removal of the constraints imposed by bipolarity ostensibly presented new opportunities for proactive international engagement for both the UN and Western States, and some heralded the dawn of a more progressive and humanitarian era.[130]

The Security Council approved action in Kuwait in 1991 and the subsequent imposition, through Operation Provide Comfort, of safe havens and no-fly zones in Iraq certainly appeared to

[127] UN Conferences, Meetings and Events, The 2005 World Summit, available at www.un.org/en/events/pastevents/worldsummit_2005.shmtl [Accessed 10 September 2016]
[128] The 2005 World Summit Outcome Document, Resolution A/Res/60/1, para 139.Available at www.un.org/summit2005/documents.html [Accessed 10 September 2016].
[129] A. Shah, United Nations World Summit 2005. Available at www.globalissues.org/article/559/united-nations-world-summit-2005 [Accessed 22 September 2016]
[130] Perez. de Cuellar, 'Report of the Secretary General', (1991), UN Yearbook, paragraph 11.

confirm this new proactive disposition and the realization of President Bush's famous 'New World Order…where the United Nations, freed from cold war stalemate, is poised to fulfil the historic vision of its founders, " … *a world in which freedom and respect for human rights find a home among all nations"*[131]. As few events especially in the Balkans and Rwanda seemed to apparently diminish this optimism they in fact redoubled the underlying conviction; and the pro-intervention lobby articulated subsequently call for humanitarian action with increasing voracity and frequency throughout the 1990s. A notable addition to this was the Speech of Kofi Anan made in 1998 that asserts "….*what is the UN if it isn't to protect gross human rights violations and grave human sufferings ……"*[132]. Accordingly, most scholars adhere to the more positive interpretation of the Charter in that they insist the Charter doesn't prohibit humanitarian intervention where the need dictated so. Opinions of leading international law scholars such as Oppenheim; Lauterpatch and Shaw are but the few good instances to such adherence, not to mention the various speeches of the Secretary Generals of the UN itself.

A very interesting development worth mentioning is the provision of the Constitutive Act of the AU which contained an explicit provision availing the option of intervention on humanitarian grounds. Drafted decades after the Charter of the UN and being understood to have been organized as one of the UN"s continental extensions, it can be said that member states of the AU were well aware of the Chapter VII of the UN Charter in adopting the Constitutive Act which allows intervention on limited grounds. These permissive provisions of intervention in the Act are at times taken as a confirmation to some scholars of their views that the UN Charter doesn't prohibit humanitarian intervention.

It doesn't, however, mean that the contemporary international law confirmed a settled application of humanitarian intervention as one of its accepted principles. It has even been argued by some scholars that these calls for humanitarian intervention challenge the very basis of the international system which guarantees sovereignty and respect for territorial integrity of states. The issue has, at its core, few sources of controversy that have contrived to propel it to contemporary global importance.

---

[131]James Mayall, '*Non-Intervention, Self-Determination and the "New World Order"'*, (*International Affairs* 1991), p. 427.
[132]Ibid 430

One such controversy is the issue of Human Rights itself. Though the prevailing motive in advocating humanitarian intervention in the modern era is the protection of human rights, declaring the individual as an inviolable rights bearer[133], and alleging that legislations outlawing certain human rights violations, such as torture, detention etc. alone have not eradicated these practices[134], there has yet emerged a counter-perspective which rejects the very notion of universal human rights. Critics note that humanitarian advocates are overwhelmingly Western; and that their perspective reflects a conception of human rights that is less universal and more Eurocentric.[135] The rhetoric of the humanitarian movement, critics argue, sounds all too similar to the colonial logic of the 'white man's burden'.[136] Humanitarian intervention is thereby viewed by some as the forced homogenization of societal and cultural values, or worse, a means by which dominance is exercised under the guise of humanitarianism.[137]

The other and more conventional controversy is the principle of Sovereignty**.** According to Jarat Chopra and Thomas Weiss, 'one word explains why the international community has difficulty countering human rights violations: Sovereignty.'[138] The legal rights afforded to states under international law in general and the UN Charter in particular, have increasingly come to be considered the paramount reasons that brought states to a relatively closer and universal world order; i.e. the United Nations. If the very essence that attracted states to join this universal arrangement, sovereignty and territorial integrity, has been compromised through the guise of human rights protection, then the UN as well as the intervening states have both deviated from their initial commitments of observing the core Charter principles; and hence they could have no moral high ground to intervene in the internal affairs of other states on whatsoever grounds.[139]

---

[133]Todd. Landman, Studying Human Rights(2006), p. 8.
[134]Geoffery. Robertson, Crimes against Humanity(2002), p. 220.
[135]Richard Miller, '*Respectable Oppressors, Hypocritical Liberators'*, Deen Chatterjee and Don Scheid (ed), *Ethics and Foreign Intervention* (2003), pp. 215–50.
[136]R. Thakur, '*Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS', Security Dialogue*, 33, 3 (2002), p. 327–28.
[137]E. Herman and D. Peterson, *'Morality's Avenging Angels: The New Humanitarian Crusaders'*, (2002), pp. 196–216.
[138]Jarat Chopra and Thomas Weiss, '*Sovereignty is no Longer Sacrosanct'*, (Ethics and International Affairs1992), p. 95.
[139]Malcom Shaw, *Global Society and International Relations*(1994).

3.4. Challenges in Materializing Humanitarian Intervention in the context of a changing world order

The classical norms of state sovereignty and non-intervention predate the UN Charter. Further, the norms have a long history and are seen to be legally obligatory and not a practice of comity. They have found expression in numerous international instruments of universal, regional and bilateral kind, aptly illustrated in the 1993 Montevideo Convention on the Rights and Duties of States, which declared that 'no state has a right to intervene in the internal and external affairs of another' .[140]

Non-intervention and state sovereignty principles are also enshrined in article 8 of the Pact of the League of Arab States (1945), [141] article 3 of the OAU Charter (1963),[142] article 3 of the International Law Commission Draft Declaration on the Rights and Duties of States (1949)[143]and parts I and II of the Helsinki Final Act (1975).[144] The UN Charter itself states that the organization (UN) is founded on, inter alia, the principle of sovereign equality of its members.[145]The Charter also affirms the principle of equal rights and self-determination of peoples.[146] Both these principles are a corollary of every state's right to sovereignty, territorial integrity and independence that the sovereignty and non-intervention rules seek to advance. Article 2(7) of the Charter specifically provides that nothing in the Charter authorises intervention in matters that are 'essentially within the jurisdiction of any state'. The principles of state sovereignty and non-intervention are reflected firmly in post UN Charter declarations. In 1965, the UN General Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (commonly referred to as the Declaration on Non-intervention).[147] The Declaration specifically

---

[140]Montevideo convention on the rights and duties of states, (1936), art 8.
[141]The Pact of the League of Arab States (1945), art.8
[142] The OAU Charter (1963), art.3
[143] Yearbook of International Law Commission (1949) p.286.
[144] The Helsinki Final Act (1975)
[145]UN charter art 2(1).
[146]The OAU Charter
[147]United Nations General Assembly Resolution 2131 (XX) (1965).

spells out that states should refrain from acts that are, by their very nature, capable of violating the sovereignty and independence of other states.[148]

The final problem is that of inconsistency in the international response to mass atrocity emergencies. There will be circumstances in which civilians are gravely threatened and outside actors cannot, or choose not, to intervene. This may result from any number of causes. For example, there may be conflicting perceptions of the nature, degree or urgency of the threat, which could make it impossible to reach agreement on international action. Events on the ground might also unfold more quickly than anticipated, and consequently the temporal window for making a correct judgement about an imminent atrocity may be narrow and easy to miss. Alternatively, prospective interveners may rule out an operation because they believe it would conflict with their interests. As suggested earlier, a measure of self-interest on the part of the interveners may be a necessary feature of preventive humanitarian intervention – either for reasons of governmental accountability within the intervening state, or to ensure that the interveners are committed to completing the tasks they undertake. However, intervening to prevent mass atrocities in some cases, but not others, creates a problem: it is very likely to produce the appearance of 'double standards', which can only weaken the doctrine's credibility. Again, such inconsistency is inevitable, not simply because other factors may interfere with the application of R2P, but because the doctrine, itself, warns against intervening to prevent or stop mass atrocities in certain circumstances.

However in recent years sovereignty is gradually eroded in favor of human rights and overall human rights development. Notwithstanding the importance attached to sovereignty in the international legal system, developments in the last five decades or so has gradually but inevitably changed the original conception of sovereignty. The changes in the legal interpretation of the norm enshrined in article 2(7) of the UN Charter and the entire concept of state sovereignty are as a result of the fact that the material conditions under which sovereignty is exercised have dramatically changed since 1945.[149] The developments in the field of human rights have had far-reaching impact on the principle of state sovereignty, which was a key element of the UN Charter when it was drawn up in 1945. Furthermore, the broader process of

[148]Ibid Art 3.

[149]E.K.Kwakwa "*The Rule of Law and Global Governance in the Twenty-First Century*," (proceedings of the African Society of International & Comparative Law 1994) p.18.

intern at ion ali sat ion (i.e. the growing importance of international agreements, membership of international organizations and economic interdependence as well as the increasing prominent role of international NGOs and the media) has greatly reduced state sovereignty in practical terms.[150] These factors, coupled with the changing nature of armed conflicts especially after the end of the Cold War and the changing attitudes of states towards intervention have had the cumulative effect of making the need to strike a proper balance between the ban on the use of force between states and human rights more pressing than ever.

CHAPTER FOUR

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

THE INTERVENTION IN SOUTH SUDAN

4.1.Background

With an estimated population of about 13 million now, South Sudan declared its independence from Sudan in 2011 through a referendum undertaken in January, 2011[151]. Subsequent reactions of the world community reflected much optimism that this would bring, among other things, the dawn for the people of South Sudan from. Such optimism was sound when the multi-ethnic and newly independent Republic of South Sudan elected a President, SalvaKiirMayardit, from the largest ethnic group of Dinka and a Vice President, Reik Machar, from the second largest ethnic group of Nuer[152].

This hope, however. An armed conflict broke out in that same year of independence in the northern first region bordering Sudan also the main oil fields exist. The conflict was alleged to have involved an armed ethnic group who believed sidelined from the power sharing at Juba and the Kiir administration. Consequently, a considerable number of civilians were affected that it even led to a further ethnic based attack.

This situation, coupled with the already weak government structures and institutions, seemed to have forced the UNSC to immediately adopt a Resolution in July, 2011 establishing a United Nations Mission In South Sudan (UNMISS)[153]. In its preamble the Resolution stated several reasons necessitating its mission. Following this Resolution, however, situations in South Sudan didn't improve. Armed conflicts even propagated to different parts of the nation in subsequent years that the ensuing situation witnessed dire humanitarian situations.

What went around came around in Juba; and a rift broke out between SalvaKiir and his Vice President Reik Machar that, in June 2013, President Kiir announced that he had successfully putdown a coup attempt in the capital, Juba. The coup attempt was said to have been led by former Vice-President and several ex-cabinet ministers and officials of the ruling Sudan People's Liberation Movement (SPLM), including Madame Rebecca Nyanding de Mabior, the widow of

---

[151]USAID,'South Sudan crisis fact sheet #24'.(2014), Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/02.04.14%20-%20USAID-DCHA%20South%20Sudan%20Crisis%20Fact%20Sheet%20%2324.pdf> (last accessed May 2019)

[152]Ibid

[153]Resolution 1996 /2011/, paragraph 2 of the preamble.

the SPLM's first leader, John Garang[154]. Eleven alleged coup plotters were arrested in their homes, but Riek Machar escaped from Juba; and, amid reports over the next few days of targeted killings of Nuer in Juba by men in uniform loyal to President Kiir, the commanders of the 8th and 4th army divisions of the Sudan People's Liberation Army (SPLA) in Jonglei and Unity states announced their defection to Riek Machar; and seized control of the state capitals of Bor and Bentiu[155].

International pressure on both the government and dissidents resulted in an IGAD-brokered cessation of hostilities agreement in Addis Ababa on 23 January, 2014, but this proved to be an agreement only papers only with no immediate provision for monitoring on the ground. By the beginning of February 2014 nearly 750,000 persons were estimated to have been displaced by the fighting in Juba and the three states; 85,200 were seeking refuge in the compounds of the UN Mission in the Republic of South Sudan (UNMISS); and over 130,000 were estimated to have fled into neighboring countries, including Sudan.[156]

The roots of the crises in South Sudan are not the interests of this Thesis. It is, nonetheless, rational to briefly touch the basic causes of the crises as they not only give a relatively clear picture of the scale of humanitarian situation with a view to making a thematic analysis on the intervention undertaken by UNMISS.

The UN Charter authorizes the Security Council to exercise the power vested in it under Chapter VII. The UN Security Council invoked its authority under the Charter for its various authorizations of interventions at different times in different parts of the world. One such instance of the UN Security Council’s actions is the authorization for intervention in Iraq for the protection of Kurds adopted through Resolution No. 688/1991.

It is with this same authorization of the Charter that the Security Council adopted Resolution No. 1996 in 2001 establishing the United Nations Mission in South Sudan (UNMISS). This Chapter of the Thesis accordingly tries to assess some selected Resolutions of the UNSC with regard

---

[154] Peter AdowkNyaba, ‘*South Sudan: The state we aspire to’*,Centre for Advanced Study of African Society, Cape Town, 2011). P. 177

[155]Ibid, page 181
[156]Ibid, page 182

toUNMISS vis-à-vis Humanitarian Intervention. The UNSC Resolutions discussed in this chapter are thus selected on the basis of their relevance to the thesis.

4.2.Establishment of the UNMISS

4.2.1. UNSC Resolution No. 1996

The independence of South Sudan owes its inception to the preceding more than two decades of civil war between the Government of the Sudan and Sudan People's Liberation Movement/Army (SPLM/A); and this led to the eventual signing of the 2005 Comprehensive Peace Agreement /CPA/ between the two warring parties.[157] This CPA paved the way for an interim period, referendum and independence for South Sudan on July 9, 2011.

By this time, the military presence of the United Nations was already in the area. The United Nations Mission in Sudan (UNMIS) had already been present for six years throughout southern Sudan and in the "three areas", covering the contested Abyei Area and the northern Sudanese states of South Kordofan and Blue Nile.[158]In addition, in early July 2011, the United Nations Interim Security Force for Abyei (UNISFA) had also been deployed to oversee a ceasefire in the Abyei Area.[159]However, while UNMIS rapidly drew down on expiration of its mandate during this time, the border region between Sudan and South Sudan remained tense. Inter-communal conflict and raiding continued to motivate violent confrontations, and increased militarization of armed groups from the war, which threatened civilians and overall security.[160]

Consequently, the United Nations Mission in South Sudan (UNMISS) was deployed in UNMIS's place in South Sudan,in the new Republic's independence in July, 2011. The Mission's challenges were apparent from the very start nonetheless. UNMISS had a robust multi-dimensional mandate under Chapter VII of United Nations Charter, covering state building, reconciliation and protection of civilians.[161] Initially, it remained restricted to the South Sudanese

---

[157]Matthew .LeRiche and Matthew Arnold, *South Sudan from Revolution to Independence* (2012), p. 159–62.

[158]Ibid

[159]Ibid

[160]Ibid

[161]Supra note 115

side of the North-South border, reliant on UNISFA to manage border security issues, and with limited capacity to fully dispense its mandate.[162]

The UNSC Resolution 1996 /2011/ establishing UNMISS was adopted in July, 2011 at 6576th Meeting of the Council, and it is at this Meeting that the Council first decided to establish the UNMISS. In its preamble the Resolution interestingly states that:

"*Reaffirming its strong commitment to the sovereignty, independence and territorial integrity …… of South Sudan*".[163]

This strong commitment to the sovereignty, independence and territorial integrity stated in the first paragraph of the Resolution is undoubtedly the affirmation of the SC to the adherence of one of the basic principles enshrined in the Charter of the United Nations.[164] This affirmation by the SC is also an apparent confidence to member states of the UN that the SC wouldn't disregard the principal Charter Principles. In other words, the SC is reaffirming that such kinds of Missions are exception to sovereignty and not the rules Consistent with this Charter principle, the UNMISS's mandate as repeated in the Resolution reflected the SC's position that Government of the Republic of South Sudan/GRSS/ was primarily responsible as a sovereign state for ensuring security, protecting civilians, and conducting other state-building activities.[165]

The SC further stated in the Resolution that it adopted this Resolution pursuant to Chapter VII of the Charter.[166] Chapter VII of the UN Charter generally authorizes the SC to use all necessary means for the protection of international peace and security. Chapter VII of the Charter doesn't, however, make any explicit mention of what constitutes a threat to the peace and security in general. More specifically, Chapter VII of the Charter doesn't make any mention of state Humanitarian Intervention as one of the grounds for the SC to invoke Chapter VII of the Charter; i.e. use all necessary means available for the protection of international peace and security. For that matter Article 2/4/ of the Charter even precludes that a threat or use of force by a state directed against the territorial integrity or political independence of another state. Article 2/7/ further prohibits the UN from interfering in the domestic jurisdiction of any state except when the Security Council undertakes Chapter

[162]Supra note 122
[163]Supra note 115
[164]Ibid
[165]Ibid
[166]Ibid

VII of the Charter. Hence, the Resolution's invoking of Chapter VII of the Charter, being an exception to the provisions of Article 2, apparently endows the SC with the authority to adopt the Resolution.

Of course The Charter, under Chapter VII, grants the SC with the primary responsibility of maintaining international peace and security. To this end the Charter establishes that the SC has the authority to determine whether a threat to the peace, breach of peace, or acts of aggression exists.[167] It is after this determination that the SC resorts to any of the actions available to it under the Charter.[168] Hence, the findings by the SC that a threat to the peace, breach of peace, or acts of aggression are the preconditions for the exercise of the enforcement powers by the SC under Article 41 and 42 of the Charter.

What is striking, however, is that whether the SC was undertaking Humanitarian Intervention in its adoption of Resolution 1996. It is also equally interesting to note whether the SC can invoke Humanitarian Intervention under Chapter VII of the Charter. What Chapter VII of the Charter authorizes the SC is the determination of the existence of threat to the peace or breach of the peace. Once determining this, the Charter further authorizes the SC to take measures it deems appropriate for the restoration and maintenance of international peace and security.

In fact, the Resolution establishing UNMISS doesn't as well specifically mention in its preamble part or elsewhere the existence of any fact on the ground that indicates or leads to the conclusion that there is a threat to the peace, breach of peace or act of aggression in deciding the need to establish the Mission; let alone acknowledging the Mission as Humanitarian Intervention The Resolution, however, states in its last preamble part that:

"*Determining that the situation faced by South Sudan continues to constitute a threat to international peace and security in the region*[169],

[167]Jeremy I. Lavett; Humanitarian Intervention by Regional Actors; The Case of ECOWAS in Liberia and Sierra Leon, 12 Temporary International and Comparative Law Journal. 333 /1998/
[168]Ibid
[169]Supra Note 115

So the questions follows does the SC have the authority to invoke Chapter VII of the Charter to undertake Humanitarian Intervention? And if so, was the establishment of UNMISS a Humanitarian Intervention?

One prevailing argument in this regard is that the SC has the authority to determine what actually constitutes a threat to or breach of the international peace and security in general and if a human rights violation by a state or a serious humanitarian situation within a state constitutes a threat to the peace or a breach of peace in particular in which case the SC can invoke Chapter VII of the Charter.[170]

The Resolution enumerates the mandates vested on the Mission. It emphatically states that the Mission has the mandate to consolidate *peace and security*.[171] Further the Resolution envisages that the Mission's mandate includes:

> *"Monitoring, investigating, verifying, and reporting regularly on human rights and potential threats against the civilian population as well as actual and potential violations of international humanitarian and human rights law,*[172]

Humanitarian Intervention as discussed in this Thesis is an intervention that presupposes actual suffering of serious harms by considerable number of people, inter alia. Resolution 1996 doesn't make any confirmation that such situation did in fact exist in South Sudan. Humanitarian Intervention as concurred by scholars as well as institutions like ICISS avails all means necessary including the use of force wherever and whenever the situation in executing the intervention requires so. Resolution 1996 /2011/ doesn't, however, mention in any of its parts the use of all the necessary means to execute its operation including the use of force. All the preamble parts of the Resolution assert in similar terms that what is expected of the Mission is assistance to the newly emerged state in its building of government as well as democratic structures within the Republic of South Sudan. The Resolution doesn't specifically acknowledge that there is a dire humanitarian situation or grave human rights violation; and that such situation amounts to a threat to the peace.

[170]Supra Note 132
[171]Supra Note 115
[172]Ibid

The Mission's mandates, as stated in the Resolution, on state and institution building appear to have diverged from the former UNMIS mandate in Sudan. The UN Security Council established UNMIS to monitor and promote implementation of the 2005 Comprehensive Peace Agreement and undertake specific tasks to ensure the achievement of the peace agreement's core provisions, including the referendum on self-determination in January 2011.[173] By contrast, UNMISS was more expansive. It aimed to support the newly established government in accomplishing large goals in the areas of development, security, institution building, and rule of law. At the outset, the UN and the Government of Republic of South Sudan /GRSS/ had a more amicable relationship than the UN had enjoyed with the Government of Sudan during the UNMIS era.[174] This shaped expectation that UNMISS could achieve a more ambitious and multidimensional mandate.

Even though the Resolution does not specifically acknowledge the existence of a dire humanitarian situation or a grave violation of human rights, it is worth mentioning, nonetheless, that the Resolution authorizes the Mission to:

> *"Deterring violence including through proactive deployment and patrols in areas at high risk of conflict, within its capabilities and in its areas of deployment, protecting civilians under imminent threat of physical violence, in particular when the Government of the Republic of South Sudan is not providing such security;"*[175]

It also authorizes the Mission to "use all necessary means" to implement or carryout its protection mandates. It seems from the reading of this phrase that the Mission was mandated through this Resolution even to use force where the protection required so. But the actual authorization given to the Mission implies otherwise as it reads that the UNSC:

> *"Authorizes UNMISS to use all necessary means, within the limits of its capacity and in the areas where its units are deployed, to carry out its protection mandate as set out in paragraphs 3 (b) (iv), 3 (b) (v), and 3 (b) (vi);"*[176]

And the mandates set out in Paragraph 3/b/vi,v,vi/[177] of the Resolution are:

---

[173]Ibid
[174]Supra Note 122
[175]Supra Note 115
[176]Ibid

(iv) Supporting the Government of the Republic of South Sudan in developing a military justice system that is complementary to the civil justice system;

(v) Facilitating a protective environment for children affected by armed conflict, through implementation of a monitoring and reporting mechanism;

(vi) Supporting the Government of the Republic of South Sudan in conducting de-Mining activities within available resources and strengthening the capacity of the Republic of South Sudan Demining Authority to conduct mine action in accordance with International Mine Action Standards;

The wordings of paragraph 3 above do not seem to authorize the Mission with the mandate of using force where such is necessary. Hence, the mandate of the Mission appears to be short of the use of force as it dwelt on the political and governance aspects of the Mission's mandates. This Resolution didn't acknowledge the existence of grave humanitarian crises; neither did it make any mention of the sources thereof. It can generally be said, therefore, that in light of the conventional understanding of Humanitarian Intervention which presupposes a gross violation of human rights and/or dire humanitarian situation which the host nation is the cause of it or is unwilling or unable to stop it; and that other options than humanitarian intervention are unlikely to resolve the crises, Resolution No. 1996 /2011/, the very first Resolution of the UNSC to establish UNMISS, is far from the generally accepted elements of humanitarian intervention.

4.3. Subsequent Authorizations of the Mission by the SC

UNSC Resolution No. 2057

Despite its limited role of state building and coordinating, as mandated in Resolution No. 1996 /2011/, UNMISS faced significant challenges to its mandate from the very beginning. These challenges included the December 2011-January 2012 Jonglei crisis, and violations of the Status of Forces Agreement /SFA/, eventually forcing UNMISS to prioritize on logistical activities over

[177] Ibid

the political portions of its mandate.[178] This stretch of crises to attend even worsened the already poor rated successes of the Mission to meet the mandates in the Resolution. So the UNSC adopted Resolution 2057 in July, 2012 to not only extend the mandate of the Mission for additional period, but also to streamline emphasis areas of the mandate.

Like the Mission establishing Resolution of 1996 /2011/ this Resolution 2057 affirmed the Charter principles of sovereignty. But unlike the previous Resolution it made recognition to the persistence of conflicts and violence gravely affecting civilian.[179] It also noted the occurrence of humanitarian situations. These included killing and displacement on a large scale. Putting these situations as constituting a threat to international peace and security, the UNSC decided to extend the mandates of the Mission to an extra one year until December 2013.[180] Through this Resolution the SC authorized the Mission to use all means necessary to carry out its mandates in the previous Resolution.

Not much is added in this Resolution from the previous one as far as the authorization of the Mission as use of force is concerned. This Resolution emphasized that the Mission should prioritize the protection of civilian in undertaking its mandates.[181] It didn't expressly authorize the Mission to use force in stating "..to use all means necessary..". Rather it referred to the previous Resolution which implies that the Mission's role is still short of use of force.
Humanitarian intervention being a post facto action requiring the existence of large scale grave human sufferings, this Resolution like its predecessor, doesn't make a confirmation to the occurrence of such situation in South Sudan.

UNSC Resolution No. 2109

In adopting this Resolution 2109, the UNSC didn't wait the Mission's extended period under Resolution 2057; i.e. until December, 2013. Instead the SC decided to convene a meeting on

---

[178]Press statement by Riek Machar, (8 December 2013), available at <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/14076/categoryId/120/Press-Statement-by-Riek-Machar.aspx> (last visited 17 December 2018).

[179]. UNSC Resolution 2057 /2012/, preamble.
[180]Ibid
[181]Ibid

July,2013 and adopted Resolution 2109.[182] The reasons that necessitated early meeting of the SC were the ongoing conflicts and the consequences thereof.

The Resolution affirmed this situation that there was a continuing conflict resulting in continuing *violations of human rights, including arbitrary detention, extrajudicial killings, torture, and ethnic based attacks* and so on.[183] It also mentioned the persistence of worsening humanitarian situations *including large scale internal displacement*.[184]

These led the SC to the conclusion that the situation in South Sudan constituted a threat to international peace and security in the region. Consequently, the SC decided to extend the Mission until July, 2014; and authorized the Mission to prioritize the protection of civilian as one of its mandates unlike the previous engagements.[185] Important development in this Resolution was the SC's authorization of the Mission to "use all means necessary" to protect civilian. These "all necessary means" appear to have included the use of force if the Mission's capacity permits as the Resolution states "…..means necessary to carry out its mandate of protection of civilian".[186]

Humanitarian Intervention, as illustrated in different parts of the Thesis, requires, among others, violation of human rights, extra-judicial killings, torture and ethnic based attacks necessitating its undertaking. This Resolution accordingly recognized these situations to have existed in South Sudan; and that such situations dictate intervention. More important, this Resolution illustrated what constitutes intervention. The Resolution also confirmed that large scale internal displacement constitutes a humanitarian situation.

It can be said, hence, that, this Resolution further made few progresses on the Mission towards the concurrence with humanitarian intervention in that it addressed the ongoing situations, it categorized the situations as constituting threat to the peace, it decided to extend the Mission and its authorized the Mission to use all means to carry out the mandate especially in areas of priority.

---

[182]UNSC Resolution 2109
[183]Ibid
[184]Ibid
[185]Ibid
[186]UNSC Resolution 2057

UNSC Resolution 2132

This Resolution, ought to have been adopted as extension to Resolution 2057, it, however, followed Resolution 2109 due to the reasons stated above. Hence the purpose of adopting this Resolution was not extension of the mandate of the Mission. It rather was principally of increasing the troop level and capacity of the Mission to effectively carry out the mandates already mentioned.

When the December 2013 crisis erupted, hence, the UN Security Council moved quickly, to pass Resolution No. 2132 within days. In the deteriorating security context, it was clear that a mandate to foster institution building and contribute to economic development was unviable. The new mandate also increased the Mission's troop level to 12,500 military personnel, and a police component of up to 1,323 in Formed Police Units.[187] The civilian police were deployed in order to "maintain the civilian nature" of conflict-affected areas, especially where civilians sought protection on UN bases.[188]

As highlighted in this Chapter above, the December 2013 civil war which broke out as a consequence of a political dispute within the ruling SPLM, and which triggered disintegration, inter alia, of the army into factions, was a game changer. This came to a head on December 14, 2013 at a meeting of the long-postponed SPLM National Liberation Council when Kiir's critics within the party had planned to confront him with a series of reforms that would have challenged his leadership.[189]Machar did not attend the following session on December 15. And finallyKiir announced that a coup was plotted against him and that he declared it failed.

Since then, the violence has assumed a dynamic of its own, independent from clearly-defined command and control characteristics of conventional bilateral warfare. Armed groups –

---

[187]UNSC Resolution 2132 /2013/

[188]Ibid

[189]Human Security Baseline Assessment (HSBA) for Sudan and South Sudan, (11 January 2014). '*The conflict in Unity state'*, available at; <http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/south-sudan/HSBA-The-Conflict-in-Unity-State.pdf> (last visited 17 December 2018)

including factions of the army, opposition militias, ad hoc mobilization of armed youths (in configurations such as the White Army), and community protection groups – have targeted civilians along ethnic lines, attacked peacekeepers and humanitarian workers, perpetrated rape and sexual violence, destroyed property and looted villages, and recruited children into their ranks, among other serious crimes.[190]While estimates are inaccurate due to access issues, some assert (as of October 2015) that 1.6 million people were displaced inside South Sudan, and more than 620,000 were refugees in neighboring countries. Death toll estimates vary and difficult to verify.

It is worth mentioning, nonetheless, that this Resolution as well as its predecessors acknowledged developments since the previous Resolution. It expressed the SC's grave alarm and deep concern on the rapidly deteriorating humanitarian crises resulting from political disputes and subsequent violence caused by the political leaders. This concern of the SC implies the inability and/or unwillingness of the government to protect its civilians which justifies intervention on humanitarian grounds.

UNSC Resolution 2155

Adopted in May 2014, this Resolution witnesses even further developments on the positions of the UNSC in acknowledging situations on the ground in determining the need for intervention. In this Resolution the SC expressed its concern on the deteriorating humanitarian situation and strongly condemned the human rights violations, abuses, violations of International Humanitarian Law and Human Rights Law in strongest terms. [191] Stating the large scale displacement and deepening humanitarian crises, the SC stressed the need to end the impunity and to bring those responsible to justice.[192]

It therefore decided to extend the mandate of the Mission until November, 2014 and authorized the Mission to use all means necessary for the protection of civilian as the Mission's priority.[193]

---

[190] Ibid
[191]UNSC Resolution 2155 /2014/
[192]Ibid
[193]Ibid

UNSC Resolution No. 2406

The UN Security Council adopted this Resolution in March, 2018 as an extension to the previous Resolutions regarding the situation in South Sudan. The first paragraph of the Resolution recalls these previous Resolutions on the matter implying that it is an extension to the Security Council's previous engagements in South Sudan.[194]The Resolution further affirms, as it did in all preceding Resolutions, the United Nations' traditional and Charter based principles of its commitment to the sovereignty, independence and territorial integrity of the Republic of South Sudan.[195]

Unlike Resolution No. 1996 /2011/ establishing UNMISS, however, the Security Council seems to be determined in this Resolution that not only did it unequivocally recognize and acknowledge the existence of, among other crises, dire humanitarian crises, human rights violations and ethnically targeted attacks on civilians; but it also boldly expressed that these situations are partly created by the actions of the government of South Sudan, among others.[196] The Security Council has also been alarmed by the worsening situations in South Sudan since the December, 2013 incident that triggered an all-out civil war in that it took the Security Council not much paragraph to immediately acknowledge that the subsequent violence caused by the country's political and military leaders had exacerbated the humanitarian situation.[197]

The preamble part of the Resolution states that:

> *"Strongly condemning all human right violations and abuses, violations of International Humanitarian Law, including those involving extrajudicial killings, ethnically targeted violence ....."*[198]

It further asserts that, based on the reports it obtained from other actors[199], the SC concludes there is good reason to believe that there is a war crime and crime against humanity committed in South Sudan.[200] The 4 million people internally displace due to the crises and the deepening

[194] UNSC Resolution 2406 /2018/
[195]Ibid
[196]Ibid
[197]Ibid
[198]UNSC Resolution 2057
[199]Ibid
[200]Ibid

consequent humanitarian situations in the country was also another serious and urgent concern of the SC in adopting the Resolution.[201]

In this Resolution, the UNSC has conspicuously forwarded its various justifications that led it to the conclusion that the situation in South Sudan continues to constitute a threat to peace and security in the region.[202] And once the UNSC determines the existence of a threat to the peace in a particular place Chapter VII of the UN Charter authorizes the Council to employ all appropriate measure for the protection of peace. Accordingly, the SC's adoption of this Resolution with the aim of undertaking, among other things, humanitarian intervention in South Sudan through the already established Mission; and determining the mandates of the Mission meant to address the crises is within the provisions of Chapter VII of the UN Charter.

Interestingly, the Resolution didn't limit itself by just mentioning the existence of various aspects of sever humanitarian situations justifying intervention; it went further in stressing the urgent need to end impunity in South Sudan.[203] In addition, the Resolution stresses the intention to hold those accountable to the crises and bring them to justice.[204]

With the above backgrounds, the UNSC decided to extend the mandate of UNMISS and expressed its intention to consider all appropriate measures to be employed by the Mission to carry out its mandates as provided in the Resolution.[205] To this end, the SC decided to increase the troop level of the Mission thereby authorizing it to use all necessary means for the protection, in particular, of civilians, creation of conditions for humanitarian assistance and monitoring and investigating of human rights violations.[206]

It isn't uncommon for the SC to make subsequent acknowledgment of interventions for humanitarian purposes. Such were the cases in the intervention by ECOWAS in west Africa and the NATO intervention in the Balkans. It appears similar here that the SC, in its subsequent Resolutions relating to UNMISS, tended to subsequently recognize the need of Humanitarian Intervention in South Sudan unlike the first resolutions establishing the Mission which limited the mandate just to capacity building activities. The later Resolutions of the SC, thus, made

---

[201]Ibid
[202]Ibid
[203]Ibid
[204]Ibid
[205]Ibid
[206]UNSC Resolution 2406

considerable developments from ethnic cleansing to extra-judicial killings, from torture to large scale displacements as warranting intervention thereby authorizing the Mission all necessary action to avert such atrocities, which characteristics of the Resolutions demonstrate convergence with Humanitarian Intervention.

4.4. Does the UN Charter authorize the SC to Undertake Humanitarian Intervention?

A review of Chapter VII of the Charter reveals that it doesn't specifically recognize Humanitarian Intervention as one of the instances under which the SC may resort to measures including use of force. So does it mean that the Charter actually prohibits Humanitarian Intervention?

Opinions differ in this regard. Overwhelming views, however, show that Charter of the UN would face the challenges of being obsolete and the Organization itself purposeless if it sticks to the plain readings of the Charter and the initial understanding of international peace. It is a matter of the contemporary world fact that states are not directly engaged at war with other states. The tendency rather is that they choose to employ proxies to execute their political or national interests on another state. As a result, insurgencies and other forms of internal instabilities are the means through which motives are achieved.

Hence, if the Charter of the UN is understood in such a way that only conflicts between states are the businesses then human sufferings would escalate in every corner of the world. And as the Secretary Generals of the UN from Boutros Ghali to Ban Ki Moon consistently championed for the evolving role of the UN, what purposes would it serve if not human kind as a whole. Besides, the international community, through the auspices of the UN, has adopted various instruments for the protection of human rights in general. These instruments can't be interpreted in contradiction to the very Charter that facilitated their adoption.

On top of these, the specific provisions of the Charter that propagate the protection and maintenance of international peace and security can't be executed effectively by disregarding human sufferings and gross human rights violations. That means, grave human rights violations and sever humanitarian situations are a breach of the peace or a threat to the peace as the SC repeatedly recognized in its various resolutions. In view of this, Humanitarian Intervention should be understood to have an evolving recognition under the Charter system.

4.5. Is the UNMISS a Humanitarian Intervention by the SC?

The establishment of the UNMISS through the initial Resolutions of the SC didn't seem to fit with what is considered as humanitarian intervention. The initial purpose of the Mission was political than humanitarian.

Later developments in South Sudan, however, forced the SC to acknowledge the prevailing situation and hence adopt subsequent Resolutions to this effect. In these subsequent Resolutions, the SC unequivocally stated the facts on the ground and the equivalents actions needed to meet them. Some of these contents of the subsequent Resolutions are even landmark developments to the uniformity and institutionalization of humanitarian intervention.

Some of these Resolutions like Resolution 2406 specifically addressed violations of International Human Rights Law and International Humanitarian Law that clearly constitute a breach of or threat to the peace and warranting intervention for humanitarian reasons. In light of the preceding understandings of the concept and the converging developments interventions in the Charter system, the UN Mission in South Sudan is generally aliened to Humanitarian Intervention.

CHAPTER FIVE

CONCLUSION

Conclusion

Humanitarian Intervention has been substantial a recent phenomenon in the eyes of international law. Though the idea seems to have emerged in the 17th and 18th Centuries, state practice apparently similar was witnessed in the 19th century. Even during this time though the practice of states was not consistent; nor was it executed in relatively objectively articulated grounds. Scholarly opinions were, however, soundly articulated in generally defining what is meant by humanitarian intervention and what constitutes the justifications for such interventions.

Greater developments were, however, made during the 20th century both in the pre and post Charter era. Such developments were achieved not only in customary international law, but also through the Charter of the United Nations. Customary international law during this period witnessed that states collectively or unilaterally had been intervening in other states on the alleged grounds of humanitarian situations.

Following the end of WWII and through the establishment of the United Nations with its Charter, intervention in the internal affairs of other states apparently seemed outlawed. The Charter, as one of its driving principles, condemned that the use or threat of force against the sovereignty and territorial integrity of other states. The obvious rationale to this is that while the Charter's main objective is the protection and maintenance of international peace and security, this can be achieve mainly through the respect for sovereignty and territorial integrity of other states. This understanding of international peace and security, though, couldn't always be tenable having due regard to the emergence of the post Charter propagation of respect for Human Rights.

Human Rights in general hence held much ground as universal and every nation is obliged to observe them. This implies the derivation that non-observance of human rights entails consequences of various natures. And one of these is comprise of a state's sovereignty and territorial integrity through humanitarian intervention. Hence, customary international law has it

that states unilaterally or collectively had at different times carried out humanitarian interventions in other states on grounds of humanitarian crises through every intervention has its own criticism. This has been true even during the Charter era where respect for sovereignty and territorial integrity of member states was one of the Charter principles.

The adoption of the UN Charter, on the other hand, though apparently prohibited the use or threat of force against the sovereignty of other states it didn't leave the prohibition without any exception. Rather, the Charter restricted the use of force to the Security Council which organ is bestowed with the authority to maintain international peace and security. Accordingly, the Security Council has been making various decisions of intervening in other countries with alleged grounds of maintaining international peace and security. Such was the case when the UN Security Council decided to intervene in the situations in South Sudan.

The Security Council first made this decision through a Resolution adopted in 2011 and numbered 1996 in which it established the United Nations Mission In South Sudan /UNMISS/. The Mission was actually a shift of responsibility from the previous United Nations Mission In Sudan /UNMIS/. And as repeatedly indicated in the Resolution the Mission was primarily established to coordinate and assist the newly emerged Republic of South Sudan. Hence, the preambles as well as the authorizations made to this Mission do not squarely represent the characteristics of humanitarian intervention. Subsequent Resolutions of the SC, however, envisaged good contents that reveal the SC's recognition of humanitarian intervention as one of the justifying grounds for the protection of peace and security.

Therefore, the growing and converging trends of customary international law coupled with the UN Security Council's inclinations towards humanitarian situations as demanding intervention it can be said that humanitarian intervention is gaining momentum for attaining the status of accepted principles of international law.

Bibliography

Books and Journals

- A. Abass& M.A. Baderin, "*Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union"*(2002) Vol.49 Netherlands International Law Review
- A. Abass, '*Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter'*, (2004)
- A. Brown, *"Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?"*, (2008)
- A. Roberts, '*NATO's Humanitarian War over Kosovo'*, (1999), Vol.41, No.3
- A. Roberts, *'The so- called Right of Humanitarian Intervention*'(2000) Yearbook of International Humanitarian Law Vol. 3
- Andrew R. Willard, *'Incidents: An Essay in Method'* (The Yale Journal of International Law 1984)
- *B.M.* Benjamin, '*Unilateral Humanitarian Intervention; Legalizing the Use of Force*
- B. Kioko, *'The right of intervention under the African Union's Constitutive Act from noninterference to non-intervention'*, (2003),
- C.Simon. *'Just War or Just Peace? Humanitarian Intervention and International Law'*(2001) Oxford University Press
- D.J. Scheffer, '*Toward a Modern Doctrine of Humanitarian Intervention'*, (1992) Vol.23
- D. Luban, '*Just War and Human Rights'*, (Phil.&Public Aff.160,1979)
- E. Herman and D. Peterson, *'Morality's Avenging Angels: The New Humanitarian Crusaders'*, (2002).
- E.K.Kwakwa "*The Rule of Law and Global Governance in the Twenty-First Century*," proceedings of the African Society of International & Comparative Law (1994)
- F.K Abiew, *The Evolution of The Doctrine and Practice of Humanitarian intervention*, Vol.47 (1999).
- F.R. Teson, '*Humanitarian Intervention',* (2nd ed.1997)

- F.R. Teson, *‘Humanitarian Intervention: An Inquiry into Law and Morality’* (1988)
- F.R. Teson, ‘*Humanitarian Intervention; An Inquiry into Law and Morality’*(1997)
- F.R. Teson, *‘Humanitarian Intervention: An Inquiry in to Law and Morality’*. (2005)
- G.Amvane,*’Intervention pursuant to article 4(h) of the Constitutive act of the African Union without United Nations Security Councils authorizations’*, (2015), Vol.15,African Human Rights Law Journal
- G. Robertson, *Crimes against Humanity*(2002)
- H.E. Choodosh, *‘Neither Treaty nor Custom: The Emergence of Declarative International Law’*, (1991) , Vol.26
- H.J. Steiner, ‘*Transitional Legal Problems’*, (1994)
- I.Brownlie. ‘*International Law and the Use of Force by States’*. (1963) Oxford University Press
- J. Chopra and T. Weiss, ‘*Sovereignty is no Longer Sacrosanct’*, (1992), *Ethics and International Affairs*, 6
- J. Dugard, ‘*International Law; A South African Perspective’*, (2005) 3rd ed
- Jeremy I. Lavett; Humanitarian Intervention by Regional Actors; The Case of ECOWAS in Liberia and Sierra Leon, 12 Temporary International and Comparative Law Journal. (1998)
- J. L. Holzgrefe, *“The Humanitarian Intervention Debate”,* (2003), Humanitarian Intervention: Ethical, Legal and Political Dilemmas
- J. Mayall, ‘*Non-Intervention, Self-Determination and the “New World Order”’,* (1991), *International Affairs*, 67
- J.M., Iyi, *‘Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law: Towards a Theory of Regional Responsibility to Protect’*, (2016) Springer International Publishing, Switzerland
- J.Rawls, ‘*A Theory of Justice’*,(1971)
- K.Akonor ,*’Assessing the African Union’s Right of Humanitarian Intervention’*, (2010), Vol 29
- K.Kindiki, ‘*The Normative and Institutional Framework of the African Union relating to the protection of Human Rights and the maintenance of international peace and*

security: a critical appraisal', (2003), Vol 97 no. 106 African Human Rights law Journal,

- K. Saban, *'Humanitarian Intervention: The Evolution of the Idea Practice'*(2001), Journal of International Affairs, Vol. VI-Number
- K. Saban. '*Humanitarian Intervention: The Evolution of the Idea Practice'*, (2002) Journal of International Affairs, Vol. VI-Number 2
- L.B Sohn & T. Buergenthal, *International Protection of Human Rights*, (1973),
- L.Richard. '*The Role of the UN Security Council in Protecting Human Rights in Crisis Situation: UN Humanitarian Intervention in the Post-Cold War World'.(*1995)
- L Oppenhiem, *International Law* **8th** ed. (1955),
- M. Bothe, '*Peace-Keeping, in Charter of the United Nations'*: a Commentary (2002) Vol. I, 2nd 2d,
- M.LeRiche and M.Arnold, *South Sudan from Revolution to Independence* (2012)
- M. Shaw, *Global Society and International Relations*(1994).
- M. Shaw, International Law(1977)
- M. Walzer, '*The Moral Standing of States'*
- M. Walzer, *'The Politics of Rescue'*, Social Research 62, no. 1 (1995)
- N.D. Mhango, '*Reflections on the African Union's Right to Intervene'*, (2012),Vol. 38 Brook. J. Int'l
- N.J. Wheeler, '*Saving Strangers Humanitarian Intervention in International Society'*, (2000) Oxford University Press
- O.A. Hathaway et al., '*Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign'*, (2013) Vol. 46 Cornell Int'l Law Journal
- P.A Nyaba, '*South Sudan: The state we aspire to'* (2011), Centre for Advanced Study of African Society, Cape Town, 2011
- R.B. Lillich, *'International Human Rights Problems of Law, Policy and Practice'(1991)*
- R.J. Vincent, '*Nonintervention and International Order'*, (1974)
- R. Miller, '*Respectable Oppressors, Hypocritical Liberators'*, Deen Chatterjee and Don Scheid (ed), *Ethics and Foreign Intervention* (2003),

- R. Thakur, '*Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS', Security Dialogue*, 33, 3 (2002),
- S.G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, (1993) 24 Cal.W. Int'l L.J
- S. Jianming, '*The Non-Intervention Principle and Humanitarian Interventions Under International Law'*, (2001) Vol. 7(1) ,Int'l Legal Theory
- S.M. Makinda and F.W. Okumu, '*The African Union: Challenges of globalization, security and governance', (2008)*
- S. N. MacFarlane*, "Intervention in Contemporary World Politics,"* (2002)
- T.B Knudsen, '*The History of Humanitarian Intervention: The Rule or the Exception'*. (2009)
- T. Landman, *Studying Human Rights*(2006)
- W.R. Reisman, '*International Incidents in International Incidents: The Law that Counts in World Politics'*,

Charter, Protocols and Treaties

- African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, (2002)
- Constitutive Act of the African Union (2002)
- Montevideo convention on the rights and duties of states, (1936)
- The ECOWAS protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security
- The Helsinki Final Act (1963)
- The Pact of the League of Arab States
- The OAU Charter
- The United Nations Charter (1945)

UNSC Resolutions

- UNSC Resolution no. 688 (1991)
- UNSC Resolution no. 912 (1994)
- UNSC Resolution no. 1996 (2011)
- UNSC Resolution no. 2057 (2012)

- UNSC Resolution no. 2109 (2013)
- UNSC Resolution no.2132 (2013)
- UNSC Resolution no. 2155 (2014)
- UNSC Resolution no.2406 (2018)

UNGA Resolutions and Other UN Documents

- United Nations General Assembly Resolution 2131 (XX) (1965).
- United Nations General Assembly Resolution 60/1 (2005)
- Report of The High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 para 201, *available at:* *http://www.un.org/secureworld/*(2004)
- The 2005 World Summit Outcome Document, Resolution A/Res/60/1, para 139.Available at www.un.org/summit2005/ documents.html
- UN Conferences, Meetings and Events, The 2005 World Summit, available at www.un.org/en/events/pastevents/worldsummit_2005.shmtl

Reports

- Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000).
- Human Security Baseline Assessment (HSBA) for Sudan and South Sudan, (11 January 2014). '*The conflict in Unity state'*, available at; <http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/south-sudan/HSBA-The-Conflict-in-Unity-State.pdf>
- International Commission on Intervention and State Sovereignty, *The Responsibility to Protect, available at* <http://www.iciss.ca/report-en.asp>(2001)
- *Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda, ,* S/1999/1257, *available at:* <https://undocs.org/S/1999/1257> (1999),
- P. de Cuellar, '*Report of the Secretary General'*, (1991), UN Yearbook,
- Report of the International Commission on Intervention and State Sovereignty *'The Responsibility to Protec':*, (2001)
- Yearbook of International Law Commission (1949)

Websites and Blogs

- A. Shah, United Nations World Summit 2005. Available at www.globalissues.org/article/559/
- The Common African Position on the Proposed Reform of the United Nations ("Ezulwini Consensus"), (Mar. 7–8, 2005) available at: <https://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf>
- The use of force in international law, available at: <https://www.open.edu/openlearn/society-politics-law/the-use-force-international-law/content-section-1>
- K. Annan, Secretary-General Reflects on 'Intervention' in Thirty-Fifth Annual Ditchley Foundation Lecture, Press Release SG//SM/6613. Available at: http://www.un.org/press/en/1998/19980626.sgsm6613.html. (1998)
- USAID, '*South Sudan crisis fact sheet*'.(2014), Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/02.04.14%20-%20USAID-DCHA%20South%20Sudan%20Crisis%20Fact%20Sheet%20%2324.pdf>

Cases

- U.S. Vs Iran, *Case Concerning United States Diplomatic and Consular Staff In Tehran,* (I.C.J) (1980)