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Legality and legitimacy of military intervention in intra state conflicts: A case study of Ecowas intervention in Sierra Leone

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Chapter III

3.1 Threat to International Peace and Security

The responsibility for the maintenance of international peace and security rests with the UN Security Council.[301] However, the question of what constitutes a threat to international peace and security is not easily determined. Sometimes the decision is clouded by legalistic and political concerns. This raises the issues of sovereignty, non-intervention, and use of force. While the Security Council has the "primary" responsibility for the maintenance of international peace and security, it does not have exclusive responsibility. Article 10 of the UN Charter empowers the UN General Assembly (UNGA) to deal generally with all matters. More specifically, Article 11 gives it the power to deal with issues of international peace and security, though its power is limited to recommendations, and not binding decisions.[302] However, the proviso is that the matter must not be under consideration by the Security Council.[303] The purposes and principles of the UN are stated in Article 1(1).[304] The principle of non-intervention in the Charter is one of the ways of achieving the overall purposes of the UN. The question, which analysts and scholars of international relations and international law have struggled with, is what constitutes international peace and security? Under what situations can it be said that conflicts which are obviously domestic could affect international peace and security? Are there parameters for measuring the effect of domestic conflict affecting international peace and security? Are there circumstances where intervention can be carried out legally? Whose responsibility is it to determine what constitutes breach of peace and security?

The provision of Article 39 of the Charter answers the last question. It states that:

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[301] United Nations Charter, Article 39.
[302] Op cit not 51para. 6.7
[303] UN Charter, Article 12.
[304] It reads, "[T]he purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment of settlement of international disputes or situations which might lead to a breach of the peace;".

> [T]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.[305]

Having established whose responsibility it is to determine what constitutes a breach of peace and security, an attempt would be made here to answer the other questions. Question one dovetails into question two and will be treated simultaneously. Preamble 1 of the UN Charter sets out the background to the formation of the United Nations in the following words: "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind…"[306]A restrictive interpretation of the above would mean that the types of threats envisaged by the charter are inter-state threats. This could have been correct, given the dynamics of conflicts in the world then. However, in view of the change in the dynamics of known conflicts after World War II (WW II), the UN Security Council has taken an expanded view of what constitutes international peace and security. A few examples would suffice here; the internal repression of the civilian population in northern Iraq, including the upsurge of refugees was declared a threat to international peace and security in 1991.[307] Furthermore the enormity of human suffering experienced by people in Somalia during the conflict of 1992,[308] and the UN Security Council's description of the apartheid regime in Southern Rhodesia and South Africa as constituting threats to international peace and security are good examples.[309] I therefore posit that in any situation of conflict whether, inter-state, intra-state or even terrorist acts, which bring about untold hardship to the civilian population and which in turn, might generate internally displaced persons or refugees, would constitute a threat to international peace and security. The inflow of refugees into another state could lead to destabilization of that state and could therefore constitute a

[305] UN Charter, Article 39.
[306] UN Charter, Preamble 1.
[307] UNSC Resolution 688 of April 1991.
[308] UNSC Resolution 794 of December 1992. While the UNSC recognized the event in Somalia as requiring humanitarian assistance, it maintained that the situation constituted a threat to international peace and security.
[309] Op cit note 302.

threat to the security of the state. For instance, the inflow of refugees from Sierra Leone into Liberia and Ghana during the conflict in Sierra Leone constitutes a threat to international peace and security. The UN Security Council has even gone a step further to declare that the absence of war does not necessarily mean the absence of a threat to peace and security. It therefore welcomes under the ambit of threat to international peace and security, matters under the economic, social, humanitarian and ecological field.[310]

While the statement of Article 24(1) is unambiguous in conferring the "maintenance of international peace and security" to the Security Council, it can be argued that the provision of Article 33(1) articulates the idea of domestic conflict. It states that "[T]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security…"[311] One could therefore safely assume that the Security Council can also determine a threat to peace and security in the case of domestic conflict. The key phrase here is "any dispute".

The proviso in Article 2(7) of the UN Charter is that the principle of non-intervention "shall not prejudice the application of enforcement measures under Chapter VII". Chapter VII of the UN Charter provides the UN Security Council with a variety of options while addressing actions, which it has determined that constitute a breach of peace and security. These actions range from economic, to severance of diplomatic relations.[312] The UN Security Council also has the power to endorse the use of force in order to maintain or restore international peace and security.[313] This function of the UN Security Council has been severely criticized by many as being lopsided. The interdependency of the international community today more than ever before, makes the case for treating some "localized" threats as threat to international peace and security.

3.2 Sovereignty

[310] Olara A. Otunnu, "The Peace-and-Security Agenda of the United Nations", in Olara A. Otunnu and Michael W. Doyle (eds.) Peacemaking *and Peacekeeping for the New Century*, (Rowan & Littlefield Publishers) Maryland, 1998, p. 312- 3, citing Security Council Document (S/23500, 31 January 1992.
[311] UN Charter, Article 33.1.
[312] UN Charter, Article 41.
[313] UN Charter, Article 42.

The cornerstone of international relations is the principle of sovereign equality of member states of the United Nations.[314] Sovereignty denotes that a state is supreme within its territorial boundaries and cannot be dictated to by other states on what to do. The origin of this concept is easily traced to the Treaty of Westphalia.[315] The Treaty brought a fundamental and noticeable change to international relations because it was then that the authority of the Pope and the Emperor was first challenged.[316] Sovereignty was expressed then to mean that, each state became a master to itself and a slave to none. The corollary to that status was the principle of non-intervention in a state's affairs.[317] Although the doctrine of sovereignty is still the cornerstone of international and political legal order, the traditional view of sovereignty is being challenged by the growing norm that the legitimacy of the rights associated with sovereignty is dependent on the respect for human rights and of the principle of representation.[318] The following changes that have occurred in the post-Westphalia and, particularly in the post-1945 have the effect of affecting the dynamics of sovereignty namely; expansion of states, technological advances that have reduced the world into a global village and has created borderless markets, communication development, economic globalization, and an increase in number of actors in the world system.[319] Events in the last two decades have shown that sovereignty, if it was considered absolute before, is no longer absolute.[320]

Sovereignty, while still an important principle in international relations, does not suggest or presume the unlimited power of a state to do what it wants with its citizens.[321] While a sovereign state is empowered under international law to exercise exclusive jurisdiction within its territorial borders, other states are duty bound not to intervene in the internal

[314] UN Charter, Article 2 (1).
[315] Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, October 24, 1648, available at http://fletcher.tufts.edu/multi/texts/historical/westphalia.tx last visited on 18 August 2005.
[316] Anthony Sammons "The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy in Trials of War Criminals by National Courts", *21 Berkeley Journal of International Law, 2003* p.115.
[317] Caroline Thomas, *New States, Sovereignty and Intervention*, (St Martin's Press, New York, 1985). P.3.
[318] Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, (Gullanders, Denmark, 1999) p. 17.
[319] Ibid.
[320] Op cit note 302.
[321] Ibid. Para 1.35.

affairs of a sovereign state.[322] This norm of sovereign equality and the corresponding obligation of non-intervention received its most emphatic affirmation from the newly independent states in the era of decolonization.[323] However, after the realities of World War I and World War II, the international community realized that the absoluteness of sovereignty was not advancing the realisation of global peace. The prohibition on the use of force set out in Article 2 (4) of the UN Charter (the Charter) by member states in international relations is aimed at both enhancing the concept of sovereignty and curbing its excesses.[324]

Sovereignty as envisaged by the UN Charter plays a significant role in international relations. It implies a monopoly of power by the sovereign state, and implies the concept of equality of nations.[325] The other implication of sovereignty, which is of particular import to the current discussion, is the right against interference or intervention by any foreign (or international) power.[326] The question then becomes under what umbrella can the United Nations prescribe rules of behaviour for sovereign states? Can it be said that having consented to being in the 'family' of the United Nations, the member states have ceded a part of their sovereignty to the UN? This question is against the backdrop that a sovereign state does not recognize any power above it. It can be argued that since the UN Charter came into force on October 24 1945, all member states agreed to cede a little bit of their sovereignty to the world body. This is more so when we consider the import of Article 24 (1) of the Charter.[327] An analogy can be drawn with the election of members of the parliament in a democratic setting. The electorate (the people) with whom the power resides (social contract theory) has ceded a little of their individuality in order for peace and good governance to be enthroned. Each person therefore expects the elected government to regulate his/her behaviour within the body polity formed. Transposing this

[322] UN Charter, Article 2(7).
[323] Op cit note 51 para. 2.8.
[324] UN Charter, Article. 2 (4)
[325] John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept", *97 American Journal of International Law* (2003) p. 782.
[326] Ibid.
[327] It states, "[I]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

analogy to the international community, it therefore means that a member state of the UN has, by virtue of its membership, agreed to abide by the (superior) authority of the UN. The weakness of sovereignty has also affected the way international law views matters of sovereign immunity. Sovereign immunity, which is a by-product of state sovereignty, presupposes that, a person who carries out certain acts in the name of the sovereign state, cannot be held directly accountable for those acts, even if they were determined to be criminal. However, the international community has taken a fresh view to the fiction of sovereign immunity. The case involving General Augusto Pinochet Duarte, the former President of Chile is an indication that, erstwhile Heads of State can be indicted and tried for international crimes committed while in or out of office.[328]

Sovereignty as the absolute power of a state has always been constrained; initially by divine law, respect for religious practices and natural law, and later limitations have developed from state practice.[329] The UN Secretary-General, Kofi Annan in his contribution to the discussion on the issue of sovereignty has advocated the idea that two concepts of sovereignty exist viz; individual sovereignty and state sovereignty. [330] The individual sovereignty, which entails the human rights and fundamental freedoms of each individual as enshrined in the UN Charter, "has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny."[331] Reliance on the traditional concept of sovereignty is not therefore enough to guarantee fundamental freedom to all.[332]

The change in dynamics of international relations indicates that sovereignty also attracts responsibility. This means that firstly, state authorities are responsible for the functions of

[328] *Regina v Evans and Another and the Commissioner of Police for the Metropolis and others* (Appellants) Ex Parte Pinochet (Respondent) (No 3) 1999 2 All E.R. 97. The current trial of Slobodan Milosevic at The Hague and the indictment against Charles Taylor are all indications that the international community no longer considers violations of human rights as acts of State that could afford the Head of State immunity from prosecution.
[329] Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau,* (New York: Columbia University Press) 1958 p. 11.
[330] Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General*, (United Nations, New York 1999) p. 37.
[331] Ibid. p. 38.
[332] Ibid.

protecting the safety and lives of citizens, and promotion of their welfare. Secondly, the national political authorities are responsible to the citizens internally and to the international community through the UN, and finally, the agents of the state are responsible for their actions, that is, they are accountable for their acts of commission or omission.[333] In a situation where the UN Security Council has determined that a threat to international peace and security exists, sovereignty cannot be used as an excuse to block the actions deemed expedient by the Security Council.[334] Some have argued that sovereignty reverts to the people notwithstanding the existence of an effective government.[335] It therefore means that the loss of a claim to international representation of a people can permit international action in line with the implied or expressed desires of a population.[336] One can argue that when the civilian population in Sierra Leone rose against the AFRC government, the government lost its legitimate claim to representing them. However, not all cases of revolt against a government can lead to the loss of legitimacy. If a section of the state revolts, it might not be enough to lead to a loss of legitimacy. It must be widespread and systematic. The obligations inherent in sovereignty have been given current pronouncement in the concept of the responsibility to protect. It is reasoned that the primary responsibility of protecting the citizens of any state lies with the state itself. It is only when the state in question is unable or unwilling to protect that the burden of responsibility shifts to the international community.[337]

The absolutism of sovereignty is therefore gradually becoming a dim feature of international relations, as there has been the emergence of a parallel transition from a culture of sovereign impunity to a culture of national and international accountability.[338] Events in the last two decade have shown that sovereignty, if it was considered absolute before, is no longer absolute. Ramesh Thakur notes that, "[T]he doctrine of national

[333] Op cit note 51 para. 2.15.
[334] Op cit note 57 p. 5.
[335] Martin Griffiths, Iain Levine and Mark Weller, "Sovereignty and Suffering" in John Harriss (ed), The Politics of Humanitarian Intervention, (Pinter: London) 1995 p. 59. See also Preamble of the UN Security Council Resolution 794 of 1992 which confirmed that the ultimate responsibility for reconstruction of authority lay with the Somali people, rather than with any one or all factions.
[336] Ibid.
[337] Op cit note 51 para. 1
[338] Op cit note 51 para 2.18.

sovereignty in its absolute and unqualified form, which gave rulers protection against attack from without while engaged in the most brutal assault on their own citizens has gone with the wind".[339]

3.3 Non-Intervention and Use of Force in International Law

The principle of non-intervention into the domestic affairs of a state is one of the bedrocks of international law. The principle encourages states to solve their own internal problems and prevent these from spilling over into a threat to international peace and security.[340] This principle is enshrined in the provision of Article 2 (7) of the UN Charter. Article 2 (4) of the Charter expressly prohibits the use of force or the threat to use force by states in their international relations with others. However, the Charter allows two exceptions; under the self-defence rule,[341] and in carrying out its function, the Security Council can authorize the use of force under its Chapter VII powers.[342] The International Court of Justice (ICJ) decision in Barcelona Traction Case (*Belgium v Spain*) established that while violations of basic human rights endanger obligations *erga omnes*, such violations did not confer the right to use force by a state to enforce its observance.[343] In the Corfu Channel Case (*United Kingdom v Albania*), the ICJ in its decision stated that, "it is immaterial that force is used for benign purpose and that the violation of territorial sovereignty is only temporary."[344] However, the question remains if the provisions of the Charter on the use of force are dynamic and hence subject to change or if they have fixed meaning.[345] The ICJ in *Nicaragua v the USA* regarded the provisions on the use of force as dynamic when it stated that the UN Charter does not cover the whole area of regulation of the use on force in international relations.[346]

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[339] Ramesh Thakur, "Global Norms and International Humanitarian Law: An Asian Perspective", *International Review of the Red Cross, 83 no. 841 (March 2001)* p. 35.
[340] Op cit note 51 para 4.12.
[341] UN Charter, Article 51.
[342] See Chapter VII of the UN Charter.
[343] Barcelona Traction, Light and Power Company Ltd (Second Phase) (*Belgium v Spain*) 1970 ICJ 3 Feb 3.
[344] Corfu Channel Case *(United Kingdom v Albania)* 1945 ICJ 4 p. 35.
[345] Christine Gray, *International Law and the Use of Force* (Oxford University Press, Oxford 2000). P. 3
[346] Ibid. See also 1987 Declaration on the Non Use of Force, GA RES/42/11 1988.

The three cardinal rules of international relations, which are sovereignty, state integrity and sovereign equality of states implies the principle of non-intervention.[347] This principle is an established norm of both treaty and customary international law.[348] However, the principle has generated so much controversy in international law as the dynamism of international relations keeps unfolding. Intervention is defined as "an intentional act of one state or group of states or an international agency aimed at exercising overriding authority on what are normally the 'internal' policies and practices of another state or group of states".[349] However, there can be no universally accepted definition of intervention.[350] The meaning of intervention has been stretched to include the mere application of political pressure to the threat of sanctions and actual military force.[351] The idea of sovereignty provides a benchmark against which to measure intervention, for any incursion made on state sovereignty indicate to a greater or lesser extent that the norm of non-intervention has been violated.[352]

A critical question is whether international intervention is necessary to prevent the spread of internal conflict and if so; what kind of intervention is necessary? However, the determination of what can be regarded as "matters which are essentially within the domestic jurisdiction of any state" is not easily determined. There is no doubt that intervention into a state's domestic affairs is often harmful as it leads to a destabilization of order of states, while fanning ethnic or civil strife.[353] Domestic jurisdiction is not an absolute but rather a relative concept, as it depends on the development of international law. This is because, what may be within the exclusive jurisdiction of a state today, might become a matter of international concern the next day, as states by way of treaty do undertake international obligations.[354] However, traditionally, the decisive condition of placing an area outside the exclusive jurisdiction of a state has been the existence of

[347] Op cit note 57 p. 2.
[348] John R. Vincent, *Non-intervention and International Order* (Princeton University Press, New Jersey, 1974)
[349] C.A.J Coady, *The Ethics of Armed Humanitarian Intervention*, (US Institute of Peace, Washington, 2002). P. 10.
[350] Op cit note 57 p. 9.
[351] Op cit note 51 para 1.37.
[352] Ibid.
[353] Ibid para 4.12.
[354] Op cit note 64 p. 49.

international legal obligation and hence, any area not subject to any rules of international law lies exclusively within the domestic jurisdiction of the state. Customary International law can also circumscribe matters of domestic concern.[355] The UN Security Council in Resolution 794 on the situation in Somalia and Resolution 864 on the situation in Angola are two examples where the Security Council adjudged internal domestic matters to constitute international peace and security.[356]

The end of the cold war brought changes in international relations and most especially, the growing emphasis on human rights.[357] The implication of sovereignty dictates that a state can enter into binding conventions and treaties. However, if a state enters into such binding conventions and treaties, the matter regulated by that obligation can no longer be considered as a matter within its exclusive jurisdiction.[358] The prosecution of Nazi war criminals was a watershed in the development of the law that what happens in a state's backyard, cannot all be tolerated if it is termed or seen as a heinous crime under international law.[359] The normative consolidation of human rights is traced from the UN Charter to a plethora of other human rights instruments.[360] While the Charter reaffirms its faith in the fundamental human rights, it however does not do much for its protection. It prohibits member states intervening in matters seen as being within the domestic jurisdiction of any state.[361] The notion that the UN should become the international

[355] Ibid.
[356] George J. Andreopoulos, "Violations of Human Rights and Humanitarian Law and Threats to International Peace and Security", in Ramesh Thakur and Peter Malcontent (ed), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, (United Nations University Press, New York) 2004 p. 85.
[357] Op cit note 62 p. 34.
[358] Ibid p. 36.
[359] Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, (2nd ed), (Transnational Publishers, Inc. Irvington –on-Hudson, New York, 1997). P. viii.
[360] Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 1, 102 Stat. 3045, 78 U.N.T.S. 277(Genocide Convention);See also, International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, arts I-II, 1015 U.N.T.S 243, (Apartheid Convention). International Covenant on Civil and Political Rights. Adopted 16 December 1966. (Entered into force on 23 March 1976) Art. 2. (hereinafter referred to as 'ICCPR'). International Covenant on Economic, Social and Cultural Rights, Adopted 16 December 1966. (Entered into force on 23 March 1976) Art. 2. (Hereinafter referred to as 'ICESCR'). African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, entered into force October 21 1986.
[361] Report of the High-Level Panel on Threats, Challenges and Change, *A More Secured World: Our Shared Responsibility.* A/59/565 available at http://www.un.org/secureworld last visited on July 22 2005.

protector of the rights of the individual grew out of the terrible experience of World war II and the atrocious violations of human rights committed during the holocaust.[362] The entry into force of each new treaty in the field of human rights has further internationalized the subject of human rights as one between the parties themselves.[363] It will therefore be difficult to mention any matter that is within the area of human rights over which a state can claim exclusive jurisdiction. However, not every violation of human rights warrants intervention. To warrant intervention, the violations must be of such an egregious nature that it shocks the conscience of the world. The danger however, is that a lot of damage could have been done before the international community thinks of intervening.

Despite the attraction that intervention holds for many, the dangers lie in the belief that allowing intervention will pose a threat to the concept of sovereign inviolability. However, to argue against intervention is to give sovereignty a value higher than any other, and to argue in favour of intervention would pose a direct challenge to the value of sovereignty.[364] Intervention in another state is generally seen as a violation of sovereignty and a threat to international world order.[365] The rule of non-intervention provides the basis for both a universal and an individual injunction and as such, any act of intervention constitutes a threat to the independence of the state and hence a threat to the independence of other states.[366]

Various resolutions of the UN have reaffirmed the principle of non-intervention. For instance, the Declaration on the Inadmissibility of Intervention into Domestic Affairs of States and the Protection of their Independence and Sovereignty,[367] the Declaration on

[362] Thomas Burgenthal, "The Normative and Institutional Evolution of International Human Rights", *19 Human Rights Quarterly 1997*, p. 706.
[363] Ibid p. 708.
[364] Ian Forbes and Mark Hoffman, "Intervention and State Sovereignty in the International System", in Ian Forbes and Mark Hoffman (ed), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd) 1993 p. 9.
[365] Op cit note 6 p. 13.
[366] Cornelia Navari, "Intervention, Non-Intervention and the Construction of the State", in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd 1993) p. 50.
[367] See GA Res. 2131, UN GAOR, 20th Sess., Supp. No. 14 at 11, UN Doc. A/6014 (1965).

Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,[368] and the Definition of Aggression.[369] The declaration on the Inadmissibility of Intervention provides that "[N]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state"[370] However, it fails to define or give direction on how to determine what constitutes internal affairs. As mentioned above, it is arguable if matters that relate to international human rights can be strictly regarded as internal. The fact that the RUF and the AFRC were complicit in violations of the Geneva Conventions and international humanitarian law makes events in Sierra Leone an international matter as opposed to an internal one.[371] Secondly, the international assistance from Charles Taylor's NPFL and the Burkinabe soldiers transformed the conflict from internal to international. It needs to be stated however that there is no force of law attached to declarations of the General Assembly. It may however, be seen as a restatement of existing international law or as a common standard of behaviour in the international arena.

The principle of non-intervention in the territorial sovereignty or political independence of a state is not violated if the intervention is at the request of one of the parties to a conflict.[372] That means that if a state invites another to assist it quell civil disorder, the intervention cannot be said to be in violation of the non-intervention principle. At different stages of the conflict in Sierra Leone, it is reported that the government of that country did request help from Nigeria and ECOWAS to stave off the RUF insurgency.[373] However, in a situation of total collapse of state structure, consent to intervene need not be an issue, since no authority exists to give such consent.[374] One can argue that when the

[368] See GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28 at 121, UN Doc. A/8028 (1970).
[369] See GA Res. 3314, UN GAOR, 29th Sess., Supp. No. 31 at 142, UN Doc. A/9631 (1974).
[370] Op cit note 367.
[371] See Generally, The Fourth Geneva Convention: Convention (IV) Relative to the Protection of Civilian Persons in time of War, 12 August 1949. U.N.T.S No. 973, Vol. 75, p. 286.
[372] Anthony Chukwuka Ofodile, "The Legality of ECOWAS Intervention in Liberia", *32 Columbia Journal of Transnational Law*, 1994 p. 407.
[373] "ECOWAS Intervenes to Restore Democracy", *Africa Today*, July/August 1997, p.24.
[374] Michael J. Glennon, "Sovereignty and Community after Haiti: Rethinking the Collective Use of Force", *89 American Journal of International Law*, 1995 p. 70. See Also David Wippman "Enforcing the Peace:

AFRC overthrew the legitimate government of Kabbah, the public outrage and the international condemnation de-legitimized the AFRC and hence, since there was no proper government, ECOWAS did not need to obtain consent before intervening in the conflict. In a situation that the government refuses to give its consent, for instance, for humanitarian operations to be conducted within its territory, the international community could set aside the principle of sovereign inviolability and intervene to save lives. This is because such refusal might even amount to a threat to international peace and security.[375] Once the UN Security Council declares that such a situation exists, then the matter can no longer be within the exclusive jurisdiction of the state.[376]

The requirement of consent might pose another problem. In a situation where the non-state actors has control over a substantial part of the country, and is seen by the citizens as the *de facto* government, the question still remains if the *de jure* government can consent to another to assist it. While the basic principle is that a government has the right to invite a third party to use force and help suppress a civil strife in its territory, there is no right for the opposition to do it. This is however in theory, in practice, it is different.[377] In traditional peacekeeping however, the consent of all parties to a conflict is required before a peacekeeping force can be deployed.[378] The question then is, what is the effect of withdrawal of consent by one of the parties to a conflict? In Sierra Leone, following the emphatic withdrawal of consent by RUF to parts of the Lomé Agreement, and the subsequent discovery of a number of murdered peacekeepers, the latter could no longer act impartially.[379] Ironically, the conflagration of the conflict could have been avoided if Sandline International and the South African based Executive Outcomes had been permitted to act on behalf of Sierra Leone government.[380] While this might have ended the war, the risk is that it would have been setting a wrong precedent in conflict

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ECOWAS and the Liberian Civil War" in Lori Fisler Damrosch (eds), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, (Council on Foreign Relations Press, New York, 1993) pp. 154-182.
[375] Op cit note 68 p. 44.
[376] Ibid. p. 46.
[377] Ibid. p. 57
[378] Richard Connaughton, *Military Intervention and Peace Keeping: The Reality*, (Ashgate Publishing Coy: Aldershot, England, 2001) p. 244.
[379] Ibid. p. 252.
[380] Ibid.

resolution in Africa. It might have led to a proliferation of mercenary wars in Africa especially since the termination of the cold war had left many ex-military personnel out of the job market. The implication of the use of mercenaries in African wars was seen with the arrest of seventy mercenaries in Zimbabwe on the allegations of conspiring to overthrow the government of Equatorial Guinea in 2004. It is instructive to note that the leader of the group, Simon Mann was linked to Executive Outcomes, which operated in Sierra Leone in the 1990s.

Incidentally, military intervention in Africa is not novel, neither is it purely a product of the post-cold war era. During the cold war period, foreign military intervention was rife in the continent, and even African governments were involved in different interventions. For instance, Nigeria and Libya intervened in Chad in 1979-80.[381] However, with the end of the cold war and the apparent loss of interest in African conflicts by the Western powers, African states realized that they had to be more proactive in addressing the continent's instability.

Intervention however, should not be the first option in conflict resolution. It should only be considered when the preventive and diplomatic aspects of resolution fail.[382] In supporting intervention in exceptional circumstances such as a deadlock in war, which could lead to untold hardship for the population, J.S. Mill once stated that "intervention to enforce non-intervention is always rightful, always moral, if not always prudent".[383] The situation in Sierra Leone could be likened to a deadlock between the RUF and the Government of Sierra Leone. The involvement of ECOMOG helped end that deadlock. The conflict was six years old before ECOMOG officially got involved and it lasted for five more years even with the combined efforts of ECOMOG and UNAMSIL. It is arguable whether without ECOMOG's intervention either side might have won or the war would have extended.

[381] Op cit note 26. p. 169.
[382] Op cit note 51 para 3.34.
[383] J.S.Mill Vol. 3 1875 Cited by Caroline Thomas, *New States, Sovereignty and Intervention*, (St Martin's Press, New York, 1985). P. 14.

The fear many analysts and scholars have raised about adopting the norm of intervention in international relations is that it might be abused. However, UN Secretary- General, Kofi Annan in allaying such fears stated that, "just as the world cannot stand aside when gross and systematic violations of human rights are taking place, so intervention must be based on legitimate and universal principles if it is to enjoy the substantial support of the world's people".[384]

The most challenging situation is when the state itself is the guilty one; that is, when the state uses the forces of order, including the military to become the source of threat to the human security of people and oppress the citizens.[385] In such a situation, the view of the International Commission on Intervention and State Sovereignty is that the international community has an obligation to act.[386] This obligation to act was also adopted at the 60th Summit of the UN in September 2005.

In the cold war era, state practice reflected the unwillingness of many countries to give up the use of intervention for political or other purposes as an instrument of policy,[387] and while state practice dictated otherwise, the norm of non-intervention was not abandoned in the 20th Century.[388] Though there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organization practice as well as UN Security Council precedent suggests an emerging guiding principle.[389] This emergence of thought is best illustrated by the fact that President Obasanjo of Nigeria as a military president had chastised President Julius Nyerere of Tanzania for intervening in Uganda. Now, President Obasanjo is a champion of the African Union (AU) and New Partnership for Africa's Development (NEPAD),

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[384] Kofi Annan, "Balance State Sovereignty with Individual Sovereignty", cited by Alhaji M.S. Bah, "The Intervention Dilemma: The Dynamics of the Post-Cold Era", in Festus Aboagye and Alhaji M. S. Bah (ed), *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*, (Institute for Security Studies, South Africa) 2005 p.12.
[385] Konrad Raiser, "Humanitarian Intervention or Human Protection?", *Ploughshares Monitor*, Spring, 2004, available at http://www.ploughshares.ca/content/monitor/monm04.b.html last visited on July 17 2005.
[386] Op cit note 51 para 2.25.
[387] Op cit note 50 p. 8.
[388] Ibid.
[389] Op cit note 51 para. 2.24.

both of which support intervention.[390] The United Nations Development Programme (UNDP) Human Development Report of 1994 argues that there are situations where intervention may be warranted. The situations include mass slaughter of the population by the state, decimation through starvation or the withholding of health or other services, forced exodus, and occupation and denial of the right to self determination.[391] A strict or liberal interpretation of the above brings the Sierra Leone situation under its ambit. While some may argue that the RUF did not represent a state, when the AFRC took power in 1997, it along with the RUF used the instrument of the state to repress the population. One would also expect that the interpretation given to state in this circumstance would extend to non-state actors that control a territory within the state. Secondly, the forced migration of the civilian population due to the RUF and AFRC activities are enough to warrant the intervention. Most importantly, the phrasing of the conditions does not suggest that all conditions must be present to warrant intervention. The existence of one of the conditions is enough to qualify. Notwithstanding the above argument, the UNDP Report is merely recommendatory.

Often, scholars and analysts when discussing the finer points of the law regarding sovereignty and non-intervention seem not to consider the interests of the civilian population or the beneficiaries of such interventions. It will add more value to the discussion if evaluations of the issues are made from the point of view of those who need the support, rather than from those who intervened. Each case of intervention should be looked at on its own merit. However, the recognition of certain crimes as *jus cogens* or peremptory norms of international law demands action from the international community. Peremptory norm is defined as "a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[392] The international community has an obligation to act to prevent or stop them from continuing.

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[390] Op cit note 77 p. 31-32.
[391] UNDP Human Development Report: *New Dimensions of Human Security*, (New York, UN) 1994.
[392] Art. 53, Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331, entered into force January 27 (1980).

The absoluteness of the non-intervention principle has been challenged both through state practice and through academic discourses. Michael Walzer argues that the same legalist paradigm that conceives the concept of non-intervention based on the conceptions of life and liberty; also seem to require that the principle of non-intervention be disregarded sometimes. Though the process of intervention sometimes threatens the territorial integrity of another state, it can oftentimes be justified.[393] The burden of proving the justification for such intervention lies on the state that intervened.[394] The principle of non-intervention is gradually becoming obsolete. After World War II, the concern with war was legitimate, but with the danger of inter state war having faded in today's world, another danger, that of human rights violations on a massive scale, and intra state wars have replaced it.[395] Despite the fact that states do perceive the norm of non-intervention as a pillar of order in contemporary international political system, they still do not regard the rule as being absolute.[396] Fernando Tesón argues that since the ultimate existence of states is the protection and enforcement of the natural rights of the citizens, any state that engages in massive violations of human rights betrays the very essence of its being and can no longer claim domestic or international legitimacy.[397] The loss of such legitimacy can then translate to the loss of a claim of sovereign inviolability.[398] The International Commission on Intervention and State Sovereignty (ICISS) is also of the view that the UN Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds based on the emerging state practice, customary international law, and norms.[399] The principle of non-intervention in domestic matters cannot be used as a shield for genocidal acts or other atrocities of large-scale violations of international humanitarian law, which can clearly be seen to present a threat to international peace and security, and hence, require the UN Security Council reaction.[400]

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[393] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (Basic Books Publishers New York, 1977) p.8.
[394] Ibid.
[395] Op cit note
[396] Op cit note 316 p. 86.
[397] Op cit note 42 p. 16.
[398] Ibid.
[399] Op cit note 51 para 2.27.
[400] Op cit note 50.

For intervention to be fair and justifiable, it would require the collective action of the international community. The appropriate authority for the authorization of intervention is the UN Security Council. However, as was evident during the cold war, there was reluctance on the part of the UN Security Council to act collectively in situations that required intervention. One of the few times when the UN Security Council took a collective view on the use of force in the cold war era was in 1950, when, due to the fortuitous absence of the USSR, the UN Security Council authorized member states to use force in assisting South Korea counter the aggression of North Korea.[401] The dilemma exist where the UN Security Council is unwilling or delays in acting, as experienced in Rwanda and to a lesser extent in Sierra Leone. The UN Charter does not support the notion of unilateralism, but rather a collective security paradigm. The more an intervention is detached from the partial interests of specific states, particularly powerful ones, the more likely it is to be perceived as legitimate by the parties to conflict and by the international community.[402]

We might never know if the decision to intervene in Sierra Leone was factually right or wrong since it is not possible to predict what the situation would have been if the RUF and AFRC were not challenged. However, the lesson of non-intervention in Rwanda leaves one with the impression that it was better to intervene militarily in Sierra Leone. The question this debate raises therefore is whether it is better to fight force with force, or with diplomacy. The RUF exhibited the characteristics of an untrustworthy insurgency. Many a time, peace agreements were reneged, either due to the nature of the RUF itself or due to the manipulation by its foreign sponsors. In resolving conflicts, the dynamics of the particular conflict must be taken into consideration, as there is no one size fits all approach.

Notwithstanding the very strong arguments in favour of intervention, the position of sovereignty in international relations is still a subject of much controversy.[403] The

[401] Antonio Cassese, *International Law*, (Oxford University Press) 2002 p. 296.
[402] Op cit note 50 p. 26.
[403] Gene Lyons and Michael Mastanduno, "Beyond Westphalia? International Intervention, State Sovereignty and the Future of International Society" (Summary Report of Conference at Dartmouth

declaration at the 60th UN Summit recognizing the obligation to protect citizens, while it does not bear the force of law, reinforces the side of the scale the balance is tilting towards, in the sovereignty and non-intervention debate. There is no doubt that there is an emergence of a change in the thinking of states and individuals on the issue of non-intervention.

The UN Security Council's steps in establishing ad-hoc criminal tribunals in the aftermath of Yugoslavia, Rwanda, and Sierra Leone, shows the extent to which the UN is ready to make amends and bring to justice those who commit heinous crimes during armed conflict. A more robust approach needs to be articulated by the UN and other regional organizations, in order to react effectively and timeously whenever there is a threat to international peace and security. If such mechanisms are in place and supported by a vibrant political will, more human and material resources will be saved. If such mechanisms are well articulated, less time will probably be spent in determining the legality and legitimacy of intervening in a particular violent conflict situation. The ad-hoc mechanisms for Yugoslavia, Rwanda, and Sierra Leone have been criticized as compensatory in nature for failure of the international community to protect innocent civilians during the crisis period.[404] While this might be true, one should also give credit to the UN Security Council for taking such a bold step. However, a holistic approach to the issue of civilian protection is advocated. This approach should focus more on prevention than on reaction. Reactive measures should follow prevention almost immediately in order to minimize civilian casualty and restore normalcy as soon as possible. The international community does not have to wait for the humanitarian catastrophe to be of a massive nature before intervening. The fear and concern over the possibility of abuse of intervention can actually be an argument in favour of intervention as a recognized principle under international law. Just as sovereignty and non-intervention is also subject to abuse, that factor alone did not stop states from adopting and adhering to the principles. The principles of strict sovereignty and non-intervention

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College) cited by Alhaji M.S. Bah, "The Intervention Dilemma: The Dynamics of the Post-Cold Era", in Festus Aboagye and Alhaji M. S. Bah (ed), *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*, (Institute for Security Studies, South Africa) 2005 p. 4.

[404] Op cit note 77 p. 44.

have served its purposes and it is time that a new principle that is more people oriented is put in place.

3.4 Humanitarian Intervention

In the aftermath of the 1994 Genocide in Rwanda, many Africans concluded that the universality of human rights is mere rhetoric and that some human lives matter more than others in the international community.[405] One of the most controversial issues in international law is the concept of humanitarian intervention, especially, since the international community has attached a greater premium on human rights and international humanitarian law.[406] The end of the cold war resulted in a new emphasis on democratization, human rights, and good governance in some states.[407]

Humanitarian Intervention has been defined to include the impartial use of force by governments in another state to assist individuals who are being denied of their basic human rights and who ordinarily are willing to revolt against the repressive government.[408] The idea of states intervening in another state for the purposes of human protection is not novel in international law. The concept and practice was part of the international legal discourses up till the 19th Century when the principle lost its appeal to the principle of non-intervention.[409] The world kept quiet in the 1930s when Josef Stalin, the Soviet Union leader massacred about ten million Russian farmers who did not fit into his overall agrarian reform.[410] However, since the 1990s, there has been a noticeable shift of opinion especially, in the political and moral aspect of humanitarian intervention. Javier Perez de Cuellar, as the Secretary-General of the UN in his 1991 Annual Report stated that:

[405] Op cit note 51 para 1.1.
[406] Op cit note 372 p. 392.
[407] Ibid.
[408] Op cit note 146 p. 5.
[409] Op cit note 64 p. 12.
[410] Op cit note 42 p. viii.

> It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that in diverse situations the UN has not been able to prevent atrocities cannot be accepted as an argument, legal or moral, against the necessary corrective action, especially when peace is threatened.[411]

The UN Charter empowers the Security Council to determine situations of threat to international peace and security.[412] In making such determinations, the Security Council is also empowered to endorse requests for calls for intervention.[413] The request for intervention can either be made by those calling for intervention, by the Security Council itself or by the Secretary-General of the UN acting under Article 99 of the UN Charter.[414] If, however, the Security Council fails to act or delays in acting as witnessed in the case of Rwanda and Sierra Leone, the UN General Assembly (UNGA) may consider the matter under the Emergency Special Session "Uniting for Peace Procedure",[415] and a regional or sub regional organization within the jurisdiction can act under Chapter VIII of the Charter subject to seeking subsequent authorization from the Security Council.[416] The "Uniting for Peace Procedures" were developed in 1950 specifically to address situations where the Security Council, due to lack of unanimity, of the permanent members, fails to exercise its primary responsibility of maintaining international peace and security. This Emergency Session should be convened within twenty-four hours of the request being made.[417]

The question of the legality of humanitarian intervention is usually determined by the norms of international law – treaty as well as customary international law.[418] It has been argued that humanitarian intervention is not contrary to Article 2 (4) of the UN Charter, which prohibits the use of force. This is chiefly because force exhibited in any

[411] UN Secretary-General Annual Report 1991.
[412] Op cit note 225.
[413] UN Charter, Article 42.
[414] Op cit note 42 p. xiv.
[415] See General Assembly Resolution, Uniting for Peace, A/RES/377 (V) A November 3 1950.
[416] Ibid.
[417] Ibid para 6.29.
[418] Op cit note 64 p. 23.

humanitarian intervention is not directed against the "territorial integrity" or "political independence" of the state. More so, it is not inconsistent with the "purposes and principles" of the Charter, but rather in conformity with one of the fundamental purposes of the UN, which is the promotion and respect for human rights enshrined in Article 1(3).[419] It can also be argued that humanitarian intervention is not incompatible with Article 2(4) of the Charter as far as it is based on the subsidiary member's responsibility to maintain international peace and security, which applies when the Security Council is unable to fulfil its responsibilities under Article 24 and Chapter VII of the Charter.[420] However, since the primary responsibility for the maintenance of international peace and security rests with the Security Council and not the members of the UN, member states acting in the Security Council's place would amount to usurpation of the Council's power. This might also constitute a threat to international peace and security as the case of United States' unilateral invasion of Iraq with a few other states in what it referred to as "coalition of the willing".

The concept of collective security and the protection of civilians especially during war times has been the focus of modern day international security system. The Geneva Conventions of 1949 and the two Additional Protocols of 1977,[421] together with the Universal Declaration of Human Rights (1948) form the cornerstone of modern day international humanitarian law and human rights law.[422]

Humanitarian intervention is controversial both when it happens and when it has failed to happen. This is primarily because it is difficult to ascertain a real case of humanitarian intervention. Different motives usually manifest themselves in intervention. However, it is important that in any intervention based on humanitarian needs, the humanitarian reasons should be prominent on the hierarchy of stated reasons and other nuanced

[419] Ibid p. 82.
[420] Ibid.
[421] Fourth Geneva Convention, August 12, 1949 UNTS No. 973 Vol. 75 p. 287. (Convention Relative to the Protection of Civilian Persons in Time of War).
[422] Op cit note 77 p. 22. See also International Humanitarian Law and Human Rights Fact Sheet No. 13, pp 201-204, Raul Wallenberg Institute, Lund, Sweden, 1994.

reasons.[423] Humanitarian intervention poses a moral dilemma in the form of a clash between the moral significance of the state and the claims of humanity, and between autonomy and justice.[424] The question then would be, in a conflict between sovereign inviolability and the preservation of humanity, which of the two issues have a higher value? One argues that the preservation of humanity should take precedence over the preservation of such abstract concept as sovereign inviolability. Any reasonable person would intervene when a child's life is in danger even if the cause of the danger is the child's parents. The fact that the child's parents might be exercising a "legitimate" "domestic" right of discipline over the child does not matter. As much as some might want to deny it, morality plays a part in our daily lives as well as the lives of states – states after all are made up of individuals and not abstract entities.

The role of the media in influencing the decision of government launching of humanitarian intervention cannot be underestimated. Since President Lyndon Johnson of the United States told his advisers while watching pictures of Biafran war to "get those nigger babies off my TV screen," the response to a humanitarian crisis has too often been in proportion to the media coverage rather than the degree of need.[425] Little wonder then that, the UN Security Council failed to act in Rwanda and delayed to act in Sierra Leone, but was quick to act in Kosovo. Ethiopia's famine in the 1980s captured the world's attention through Michael Buerk's exposé of the situation in a British Broadcasting Corporation (BBC) film. Media coverage can also give rise to inadequate balancing of the news.

Humanitarian intervention has been criticized on various fronts. Notably is the criticism that states often times mask military action against another state as humanitarian action.[426] The concept of humanitarian intervention has led to a very problematic blurring of the fundamental distinction between two ways of exercising the

[423] Op cit note 50 p. 11.
[424] Peter Johnson, "Intervention and Moral Dilemma", in Ian Forbes and Mark Hoffman (ed), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd) 1993 p. 65.
[425] John Harriss, "A Time of Troubles – Problems of International Humanitarian Assistance" in John Harriss (ed), *The Politics of Humanitarian Intervention*, (Pinter: London) 1995 p. 64.
[426] Commission on Human Security, *Human Security Now*, (New York 2003) p. 27

"responsibility to protect". Konrad Raiser is of the opinion that a military intervention which causes disproportionate number of civilian casualties and vast damage to civilian infrastructure in violation of the Geneva Conventions cannot truly be humanitarian.[427] It is arguable that since the UN Charter does not expressly provide for the humanitarian exception to the prohibition on intervention, it is therefore impliedly prohibited. However, applying the golden rule of interpretation of statutes and legal documents to the provisions of the Charter, one is convinced that the Charter did not prohibit intervention on humanitarian grounds either explicitly or impliedly.[428] The conviction is based on the affirmation made in the second and sixth preamble to the Charter, and Article 1(3) of the Charter.

The moral and benign necessity of intervention notwithstanding, it has been argued that it is still illegal to intervene in a state's domestic affairs.[429] The fear is that if humanitarian intervention is sanctioned, powerful states can always use that excuse to interfere in the affairs of the weaker states.[430] However, despite the explicit prohibition on the use of force, and the explicit prohibition on intervention into a state's domestic affairs, it has not cured the practice of intervention. It is therefore indicative that the international system is rejecting the idea of non-intervention especially when there is a humanitarian need for it. This view conforms with Robert Keohane's analysis of international regime creation that "rules of international regimes are frequently changed, bent, or broken to meet the exigencies of the moment".[431] It is therefore important for the international community to agree on the concept of intervention and craft a mechanism to monitor and enforce the agreed threshold for humanitarian intervention.

[427] Op cit note 385.
[428] Golden Rule of interpretation means that in interpretation of laws, where there is ambiguity; one should look at the overall purpose the particular law is aimed to achieve. That is the intention of the legal drafters as at then. In this case, the overall purposes of the UN Charter must be looked at.
[429] Michael Reisman, "Coercion and Self Determination: Construing Charter Article 2(4)", *American Journal of International Law, Vol.78 1984* p.624.
[430] Op cit note 372 p. 393.
[431] Robert Keohane, "The Demand for International Regimes", in Stephen D. Krasner (ed). *International Regimes* (Cornell University Press, London) 1983 p. 147.

In making a case against humanitarian intervention, scholars have reasoned that no intervener would be guided by humanitarian concerns alone. The elements of political, economic and social issues sometimes are also present in the decision to intervene.[432] To abandon a deserving case of humanitarian intervention on the flimsy excuse that the intervener might be pushing a political, socio-economic agenda would be placing a higher value on political, socio-economic considerations than on humanity itself. The essence of international relations is to preserve order in the international system for the benefit of humanity. Anthony Ofodile argues that since no state can successfully claim the absence of human rights violations, then it means that no country is safe from being visited with the "force of intervention", and that this will indeed render the principle of the use of force useless.[433] It must be noted that, not all human rights abuses are of such magnitude that could warrant intervention. What the "spirit" of the concept is about are such gross violations of human rights that shock the conscience of the world. Human rights deprivations like freedom of expression would certainly not attract the same moral or legal opprobrium that violations like torture and mass murder will attract.

The dynamism of the international system is reflected in the groundswell of opinion by both state practice and publicists writing favouring humanitarian intervention. The shift in paradigm of strict adherence to the principles of sovereignty and non-intervention was occasioned by the incessant violence directed mainly at civilian population in the early 1990s.[434] However, this challenge of sovereignty negates one of the fundamental pillars of the UN – Article 2 of the Charter, that guarantee the sovereign equality of all member states.[435] The concept of humanitarian intervention is given support in the statement by a Tanzanian foreign ministry official concerning the situation in Burundi that:

> We [can't] stay as spectators. We will act strongly if the army continues to kill the people. Tanzania urges the Burundi government to ensure such murders are stopped immediately. The killings of innocent people in

[432] Op cit note 302 citing Farooq Hassan, "Realpolitik in International Law: After Tanzania – Ugandan Conflict – "Humanitarian Intervention" Re-examined", *17 Willamette Law Review 1981* p. 859.
[433] Op cit note 372 p. 393.
[434] Op cit note 77 p. 36-37.
[435] David L Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention", *University of Toledo Law Review* 23 Winter, 1992 p. 7.

> Burundi could not be seen as the internal affairs of Burundi. This is genocide and against human rights. As a neighbour, we will not stay and see such murders continue. We [can't] just stand and see people being killed.[436]

The primary assumption seems to be that because it is moral, it is therefore legally right to intervene on humanitarian grounds to stop large-scale violations of human rights.[437] Moreover, the use of force prohibition has so often been breached that it has lost its relevance and since human rights have gained so much prominence, any intervention to protect them should not be prohibited.[438]

The dynamics of conflict especially in post cold war era has contributed immensely to the re-emergence of the concept of humanitarian intervention. The UNDP Report of 1994 recorded three interstate wars in the period between 1989 and 1992, while within the same time it recorded seventy-nine instances of intra-state conflicts.[439] These conflicts gave rise to immense human sufferings and to a corresponding sense of need for humanitarian intervention. The continued debate on intervention for human protection is a reflection of how far the world has moved since the formation of the UN in 1945.[440] Julius Stone, a proponent/critic of humanitarian intervention admits that circumstances have changed so much since the adoption of the Charter; therefore, the right of humanitarian intervention should now be recognized.[441]

As acknowledged before, intervention in another state is not as novel as it seems. Before the Charter, the right of a state to intervene in the affairs of another on humanitarian grounds was recognized under customary international law.[442] This right existed in the 19th Century as exemplified by the 1829 Russian, English, and French intervention in

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[436] Paul Chintowa, "Burundi – Politics: Tanzania Threatens to Intervene", Inter Press Service, June 5 1995 cited by Gilbert M. Khadiagala, "Burundi" in Jane Boulden (ed.) *Dealing with Conflict in Africa: The United Nations and Regional Organizations,* (Palgrave Macmillan, New York, 2003) p.241.
[437] Op cit note 372 p. 392.
[438] Ibid.
[439] Op cit note 385.
[440] Op cit note 51 para 1.12.
[441] Julius Stone, *Visions of World Order* 1984 pp. 54-55, cited by Anthony Chukwuka Ofodile, "The Legality of ECOWAS Intervention in Liberia", *32 Columbia Journal of Transnational Law*, 1994 p. 393.
[442] Op cit note 302 p. 391. See also, Ian Brownlie, *International Law and the Use of Force by States* 1963 pp. 338-348.

Greece against Turkey; the 1860 French intervention in Syria, and the 1866 Concert of Europe intervention in the Island of Crete.[443] While customary international law allowed for humanitarian intervention in pre-1945, it is not clear if this law survived the Charter, as the Charter does not expressly forbid it nor does it recognize the right.[444] What is however clear is that proponents for humanitarian intervention are increasing by the day, and it has started reappearing in state practice after its obvious disappearance in the early 20th Century.[445]

Most proponents of humanitarian intervention base their arguments on the universality of humanitarian values, and the undeniable need to subordinate conventional ideas of sovereignty to those of humanitarian imperatives.[446] Others also justify the threat of military action, arguing that the impact will be minimal on the civilian population because humanitarian emergency relief follows immediately behind military action.[447] If the use of military action will help forestall the continuous senseless killings of a large population of the state, it might amount to a dereliction of the responsibility to protect the people if, the international community were to sit back without intervening militarily. The application of a human security approach in its broader sense will assist and inform on the best approach. If the international community does not intervene when the need arises, it risks becoming complicit bystanders in massacre, ethnic cleansing, and even genocide.[448] The ICISS suggests that in order to carry the debate on humanitarian intervention forward, the choice of the phrase should not be "humanitarian intervention" or "right to intervene", but "intervention on human protection grounds and responsibility to protect".[449] The emerging principle is that intervention for human protection purposes is supportable when, major harm to civilians is occurring or is imminent and the state in question is unable or unwilling to end the harm or is itself the perpetrator.[450] While this

[443] Ibid.
[444] Op cit note 54 p. 55.
[445] Op cit note 64 p. 12.
[446] Op cit note 77 p. 37 See also Francis M Deng et al, *Sovereignty as Responsibility – Conflict Management in Africa*, (The Brookings Institution, Washington DC) 1991 pp. 1-31.
[447] Op cit note 426 p. 27.
[448] Op cit note 51 para 1.22.
[449] Ibid. para 2.4.
[450] Ibid. para 2.15

emerging principle seems to negate the principle of non-intervention in the domestic affairs of sovereign states, it also acts as a check to the abuse of sovereignty.

The collective security paradigm, instituted in the post-Westphalia era and reaffirmed by the Charter, is aimed at maintaining order within the international system. When therefore, all order within a given state has broken down, or when civil conflict and repression are so violently pronounced that civilians are threatened with massacre, genocide, and ethnic cleansing on a large scale, the interest of all states in maintaining a stable international order requires them to react.[451] Tesón is of the view that the Charter did not nullify humanitarian intervention. The idea is that Article 2 (4) did not expressly prohibit the use of force as such, but only when intervention in the political independence or territorial integrity of a state is for reasons contrary to the purposes of the United Nations.[452] Since the protection of human rights is among the purposes of the UN, any action taken to achieve this purpose cannot be among actions prohibited by the Charter.[453] The secret agenda of those that condemn the intervention, especially some ECOWAS leaders needs to be looked at. Charles Taylor and Blaise Campoare were in the forefront of condemning the interventions in both Sierra Leone and Liberia. It was later revealed that both had ties to the RUF. If ECOMOG had achieved immediate success in putting an end to the conflict, those who benefited from the illegal mining and sale of diamonds for the duration of the war could have lost out.

The ICISS has proposed two scenarios that might approve of military intervention, namely; where there is large-scale loss of life or large-scale ethnic cleansing.[454] However, the Commission proposes benchmarks for determining the appropriateness of such interventions. These are just cause, right intention, right authority, last resort, proportional means, and reasonable prospects.[455] The determination of a deserving humanitarian intervention might be tainted most times with political and moral

[451] Op cit note 51 para 4.13.
[452] Op cit note 372 p. 392.
[453] Ibid. See also Michael Risman, "Humanitarian Intervention to Protect the Ibos", in Richard Lillich (ed) *Humanitarian Intervention and the United Nations*, 1973 pp 167-177
[454] Op cit note 51 p. xiii.
[455] For a full discussion of the above criteria, see the report of the ICISS at note 226 para 4.18 – 4.42.

interpretations, more than legal ones. In the imposition of an appropriate enforcement action, what should be considered are the level of breaches of human rights and international humanitarian law. Policy makers should also consider the number of people affected and the nature of the violations. In retrospect, the AFRC and the RUF were in breach of serious human rights and international humanitarian laws. The number of refugees, internally displaced persons, and a generation of children who lost their childhood and are maimed for life are constant reminder that the situation in Sierra Leone required the intervention by ECOMOG to save lives.