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THE LEGAL STATUS OF HUMANITARIAN INTERVENTION UNDER CURRENT INTERNATIONAL LAW

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Abstract

Humanitarian intervention carried out with the authorisation of the Security Council is considered legal, but the status of such intervention carried out without the authorisation of the Security Council is not yet legally settled. Humanitarian intervention raises tension between the principles of state sovereignty and protection of human rights. Moral justifications *de lege ferenda* for humanitarian intervention even without the authorisation of the Security Council are persuasive. But in view of the settled principle of non-use of force, the legal basis for such intervention *de lege lata* is difficult to establish. To many scholars there is no customary rule of humanitarian intervention independent of the provisions of the UN Charter, even though they agree that there is an emerging felt need for the formulation of such rules. This article takes cognizance of the reality that if unanimous intervention is allowed under the current decentralised international legal system, even on humanitarian ground, it might be carried out to fulfil ulterior motives by powerful state or group of states. It, therefore, makes a case for the explicit development of an international legal framework for humanitarian intervention based on the principles of rule of law, sovereign equality and justice.

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Introduction

Recent examples of humanitarian intervention have raised serious debate as to the legitimacy and necessity of such intervention as a tool of protecting human rights and humanitarian law. Intervention by a powerful state into the internal affairs of another state in order to protect the human rights of the citizens of the latter state is often criticised as an initiative taken to fulfil an ulterior motive of the former state. External policies of a state are regulated by so many factors that it is often difficult to justify intervention as purely humanitarian. Indeed, unilateral armed intervention under the current decentralized international legal system tend to undermine the notion of rule of law on the international plane, and may well lead to a situation of lawlessness, a condition inimical to the protection of human rights in the present world. Yet there are situations of mass killing or genocide within states where international community cannot just sit idle.

This article examines the relevance of humanitarian intervention in protecting human rights in the present world. As much of the debate revolves around the principles of state sovereignty and human rights, this article investigates into the conditions on which humanitarian intervention can be treated as legitimate under the current international legal system. State sovereignty provides legitimacy to a domestic authority to ensure human rights to its citizens under internal law. It protects citizens of a state from external despots such as Hitler and Mussolini. State sovereignty is, however, often used as legal protection by despots to continue their internal atrocities. In addition to examining the tension between the humanitarian intervention and state sovereignty, this article explores whether there is a customary rule of humanitarian intervention.

Under the current UN system, intervention carried out on humanitarian ground with the authorisation of the Security Council is deemed legal. But the question whether a humanitarian intervention carried out without the authorisation of the Security Council is legal remains disputed. The moral justification *de lege ferenda* for such

intervention is not hard to find. But the legal basis, the rules *de lege lata*, is harder to ascertain. This article is an attempt to ascertain the legal status of the humanitarian intervention carried out without the authorisation of the Security Council. While the necessity of humanitarian intervention in extreme cases is acknowledged, the present paper puts forward the justifications for and conditions under which such intervention should be carried out by states. Since severe violations of human rights are not sporadic, it remains to be explored if reforms of the present UN system could be initiated in order to develop an international legal order for humanitarian intervention based on the principles of rule of law, sovereign equality, and justice.

Nature and Extent of Humanitarian Intervention

Although there is no commonly accepted definition of humanitarian intervention, in short, it refers to intervention by one state or group of states in the affairs of another state on humanitarian grounds. As the terms 'humanitarian' and 'intervention' are subject to various interpretations, humanitarian intervention may refer to wide range of measures. There are two views regarding the meaning of humanitarian intervention, one is restricted and the other is wider. The restricted view limits intervention to military operation and justifies it only in cases of grave and large-scale violations of fundamental human rights. The wider view includes wide range of activities as intervention, such as relief operation, peace keeping, military operation and even rehabilitation works. The wider meaning of the term tends to include not only the cases of actual violation of human rights but also the potential situations that might lead to grave violations of human rights and hence, emphasizes more on preventive measures than curative ones. This line of thinking raises issues that go to the heart of the problem. For example, where deep-rooted ethnic conflict is the cause of the grave violation of human rights, a mere military operation cannot resolve the matter for good, rehabilitation and reconciliation measures might be necessary. It advocates military operation as a last resort arguing that in the domestic jurisdiction

police forces are used to maintain law and order in normal situation while preserving military forces for emergency situations[2].

A number of authors have adopted a restricted view of humanitarian intervention. According to Robert Kolb, "It may be defined as the use of force in order to stop or oppose massive violations of the most fundamental rights in a third state".[3] A Report published by the Danish Institute of International Affairs, defines humanitarian intervention as "coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law."[4] A NATO seminar held in November 1999 defined humanitarian intervention as "an armed intervention in another state, without the agreement of that state, to address (the threat of) a human disaster, in particular caused by grave and large-scale violation of fundamental human rights."[5] The key aspects of these definitions are related to sovereignty and human rights. According to these views, for an action to be humanitarian intervention, the following conditions must be met: Firstly, the sovereignty of a state being intervened must be breached; Secondly, the desire to address gross violations of human rights such as genocide, crime against humanity should be the driving force of intervention. Lauterpacht, a renowned authority on international law, states that "when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally

[2] See, International Commission on Intervention and State Sovereignty (ICISS), Report on *The Responsibility to Protect*, published by the International Development Research Centre, Ottawa, Canada, December 2001,pp. 8-9, 22-23.

[3] Robert Kolb, "Note on Humanitarian Intervention, in Current Issues and Comments", *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp.119-120.

[4] Danish Institute of International Affairs, *Report on Humanitarian Intervention: Legal and Political Aspects*, Copenhagen, 1999, p.11.

[5] Centre for Strategic Studies, "Humanitarian Intervention: Definitions and Criteria", *CSS Strategic Briefing Papers*, Vol. 3, Part 1, June 2000.

permissible".[6] Thirdly, there must be a use of armed force. Therefore, according to this restrictive view, interventions of other types such as economic sanctions or political pressures are outside the scope of humanitarian intervention.[7] Lastly, the intervention must be carried out without the consent of the target state. Interventions carried out with the consent of the target state and to rescue the nationals of intervening state fall squarely within the right to self-defence.[8] However, General Assembly Resolution concerning the 'Declaration on the Inadmissibility of Intervention' takes a wider view. It defines "intervention' as 'armed intervention and all other forms of interference".[9]

Sovereignty, Human Rights and Humanitarian Intervention

Indeed, at the heart of the humanitarian intervention, there is a tension between sovereignty and human rights. Sovereignty, a well-established principle of international law, protects states from external aggression. Sovereignty, territorial integrity and political independence are the general principles of international law, recognized in the United Nations Charter, an important corollary of which is the principle of non-use of force. These principles are the founding stones of the present international legal order in which states, mighty or weak, coexist with one another in equal dignity. In the absence of these principles, we can only visualize a world of anarchy in which atrocities, genocides and large-scale violation of human rights will become order due to aggression on the weaker states by the mightiest ones. Sovereign equality is, therefore, a precondition for a

[6] H. Lauterpacht (ed), *International Law- A Treatise*, Vol. I, Longman, London, Eighth Edition, 1955, p. 312.

[7] See, V.D. Verwey, "Humanitarian Intervention Under International Law", *Netherlands International Law Review*, Vol. 32, 1985. p. 358; P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, pp. 3-5; B. Parekh, "Rethinking Humanitarian Intervention", *International Political Science Review*, 1997, pp. 53-55.

[8] J. G. Starke, *Introduction to International Law*, New Delhi, Tenth Edition, 1994, p.105; Robert Kolb, *op. cit.*, p.120.

[9] See, General Assembly Resolution 2131 (XX), paragraph I.

state to protect its people's human rights. These principles indeed help domestic authorities to put in place necessary legal order supportive for the observance of human rights of their citizens. Sovereignty is, therefore, often referred to as an authority to make laws for the domestic jurisdiction. By making and implementing national laws and policies on human rights and providing for the punishment for their violations, states can play key role in preserving universal rules of human rights and humanitarian laws. The principle of sovereign equality can, therefore, be seen as a kind of human rights. The Charter of the UN emphasises respect for the principle of equal rights and self-determination of peoples[10]; the principle of the sovereign equality of all its Members[11] and the principle of non-interference in the domestic matters.[12]

The other important aspect of sovereignty is that states are free from external compulsion. In the legal sense, it means they are not subject to external laws. They can only be bound to what they have consented to. This consent theory, propagated by the positivist school of international law, has been reflected in the classical decision of the Permanent Court of International Justice in the famous Lotus Case. The Court observed:

> International law governs relations between independent states. The rules of law binding upon States therefore emanates from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.'[13]

States are bound by the rules of international regimes because they have agreed to delegate some portion of their law-making power to an external authority, which is of their own creation, to make laws on

[10] See, Article 1 (2) of the UN Charter.

[11] See, Article 2 (1) of the UN Charter.

[12] See, Article 2(7) of the UN Charter.

[13] S.S. Lotus (France V. Turkey), 1927 The Permanent Court of International Justice, (Ser. A) No. 10, (Sept. 7), p. 18.

behalf of them, following certain commonly agreed procedural rules. As sovereign states are bound to follow what they have consented to, it is now widely held that states have a responsibility to observe human rights laws in their domestic jurisdiction due to their consent to a large number of human rights treaties.[14] Sovereignty, according to this view, is not only a right to be free from external compulsion but also an obligation or responsibility to ensure human rights in the domestic jurisdiction[15]. The Charter of the UN reminds us about this obligation as well. It says, "We the peoples of the United Nations determined …to reaffirm faith in fundamental human rights, in the dignity and worth of the human person..".[16] One of the important purposes of the Charter is "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[17]

States who do not consent expressly to human rights treaties are still bound to many fundamental principles of international human rights as these have been turned to customary rules of international law. Usages through repeated practice as legally binding (*opinio juris*) by vast majority of states over a long period of time become customary rules of international law.[18] Although the proponents of positivist school rule out such obligation in the absence of express consent, majority of states have internalised much of the contents of international human rights laws into their domestic laws. It means that states responsibility to observe human rights in domestic jurisdiction can hardly be denied.

[14] The major treaties on human rights and humanitarian law include: 1966 International Covenant on Civil and Political Rights; 1966 International Covenant on Economic, Social and Cultural Rights; 1966 International Covenant on the Elimination of all Forms of Racial Discrimination;

[15] See, International Commission on Intervention and State Sovereignty (ICISS), *ibid.*, pp. 11-12.

[16] See, Preamble to the UN Charter.

[17] See, Article 1(3) of the UN Charter.

[18] See, J.G. Starke, *op. cit.,* pp.35-39.

It can be argued that the principles of sovereignty, territorial integrity, political independence and equality enshrined in the UN Charter might play an important role in protecting states from external aggressions and thus from grave violation of human rights by foreign despots. But, what can be done if domestic tyrants carry out large-scale violation of human rights or commit genocide in violation of their international responsibility to observe human rights in the domestic jurisdiction? In the context of recent grave violation of human rights and genocide carried out by domestic despots in places like Rwanda, Kosovo, and Bosnia, the UN Secretary General Kofi Annan has raised this dilemma in the following words:

> If humanitarian intervention is, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?[19]

It should be pointed out here that international politics is replete with instances in which interventions have been carried out in the pretext of humanitarian emergencies mostly to fulfil imperialist agenda. Many of these interventions resulted in the mass killings of innocent civilians especially children and women and also in the disruption of basic facilities. Thus the grave challenge is how to reconcile the two principles of sovereignty and human rights in a decentralised international legal system so that world citizens are protected from the atrocities of local and foreign tyrants.

The Principle of Non-Intervention

One of the important corollaries to Sovereignty, as pointed out earlier, is the principle of non-use of force or non-intervention. In the middle ages, use of force in the form of just war was allowed in certain specified cases such as punishing wrongdoers. Since the Peace of Westphalia 1648 the international legal order has begun to be characterised by the principles of sovereignty, equality, and peaceful settlement of inter-state conflicts. Although the two World Wars

[19] See, United Nations, "We the Peoples: The Role of the United Nations in the 21st Century", *Millennium Report of the Secretary-General,* 2000, p. 48.

shattered the Westphalian model to a great extent, both the League and United Nations institutionalised the principles of non-use of force and the peaceful resolution of inter-state conflicts as the building blocks of the post war international legal order.[20] The League system did not prohibit war or use of force altogether, but it did set up a procedure designed to restrict it to tolerable levels. The Covenant of the League declared that members should submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the Council of the League. In no circumstances were members to resort to war until three months after the arbitral award or judicial decision or report by the Council.[21] Article 2(4) of the UN Charter, however, more emphatically prohibits the use of force in the following words:

> ..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 in consistent with the purposes of the United Nations.[22]

While the Covenant of the League emphasises the 'resort to war', the UN Charter emphasises the 'use of force', the latter covers situations in which violence is employed but do not fulfil the technical requirements of the state of war. However, the prohibition on the use of force in the Charter is not absolute. There are two exceptions recognised in the Charter, one is self-defence under Article 51 and the other one is 'collective security' under Chapter VII of the Charter. Article 51 states as follows:

> 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 UN, until the Security Council has taken measures necessary to maintain international peace and security.[23]

[20] Malcolm N. Shaw, *International Law*, Cambridge, Fourth Edition, 1997, pp. 779-780.
[21] See, Articles 10-16, The Covenant of the League of Nations, 1919 in Malcolm D. Evans, Blackstone's International Law Documents, 3rd Edition, 1991, pp.3-5.
[22] See, Article 2(4) in the Charter of the United Nations, 1945 in Malcolm D. Evans, Blackstone's International Law Documents, 3rd Edition, 1991, p.9.
[23] See, Article 51, UN Charter, *ibid*, p. 16.

Article 24 (1) gives the Security Council the primary responsibility for the maintenance of international peace and security.[24] Once the Security Council determines that a threat to peace, breach of the peace or act of aggression has occurred and that measures not involving the use of force would be or have proved to be inadequate to maintain or restore international peace and security, it can under article 42 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.[25] The relevance of these two exceptions to the principle of non-use of force or non-intervention will be examined in the course of later discussion.

The Legal Status of the Principle of Non-Intervention

The principle of non-use of force as enunciated in Article 2(4) of the Charter has been reiterated in various international legal documents including the judgments of International Court of Justice (ICJ) showing that it is a customary rule of international law and as such binding on all states irrespective of their membership in the UN. The 1965 General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty states that:

> no state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.[26]

The 1970 General Assembly Declaration on Principles of International Laws Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,[27]

[24] See, Article 24(1), UN Charter, *ibid*, p.12.
[25] See, Article 24, UN Charter, *ibid*, p.15.
[26] G.A. Resolution. 2131 (XX), December 21, 1965, General Assembly Official records, 20th Session, Supp. 14, p. 11.
[27] General .Assembly Resolution 2625 (XXV), October 24, 1970. G.A. Official Records, 25th Session, Supp., No. 28, 971, pp.121-124.

was adopted unanimously, and thus considered as an authoritative interpretation of Article 2 (4) of the UN Charter. It states that 'every state has a duty to refrain …from the threat or use of force'. It also declares that 'such a threat or use of force constitutes a violation of international law and the Charter of the United Nations'. A war of aggression, according to the Declaration, "constitutes a crime against the peace for which there is responsibility under international law".[28]

The Declaration recognises that "every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state". The Declaration has a wider implication as it declares that "No state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[29]

The 1987 General Assembly Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations declares that "the Principle of refraining from the threat or use of force in international relations is universal in character and is binding regardless of each state's political, economic, social or cultural system or relation of alliance". It also declares, "No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter of the U.N."[30]

A number of the Decisions of the ICJ upheld the principle of non-intervention as enumerated in Article 2(4) of the Charter. In the Corfu Channel Case the UK intervened into the strait with warships to sweep the mines, after two British ships were sunk by mines laid out by Albania in its Corfu Channel, alleging a right to intervention to secure evidence for a claim for damages.[31] The Court rejected the alleged

[28] See, *ibid*.
[29] See, *ibid*.
[30] See, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22, 73rd plenary meeting, 18 November 1987
[31] See, Albania V. U.K., ICJ Reports, 1949, p. 4.

right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuse and such as cannot, whatever be the present defect in international organisation, find a place in international law. The Court also rejected the right of forcible self-help stating that "Between independent states respect for territorial integrity is an essential foundation of international relations".[32]

In the Nicaragua Case, the Court stated that the principle of non-use of force might be regarded as a principle of customary international law.[33] The two important implications of this decision of the Court are: firstly, that the principle of non-use of force has been declared as a customary international law and as such independent of the functioning of the collective security system under Chapter VII of the UN Charter. Secondly, while Article 2(4) of the Charter binds only member states, as a customary international law the principle of non-use of force is applicable to even non-member states of the Charter. Another significant aspect of the Decision is that the Court seems to have implicitly rejected the doctrine that intervention is justified on human grounds. Considering the claim by the US that its intervention in Nicaragua was justified to protect human rights, the Court stated that "in any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect".[34]

In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,[35] the ICJ acknowledged the prohibition on the use of force in Article 2(4) but held that this prohibition should be considered in the light of other relevant provisions of the Charter such as provisions on the right of individual or collective self-defence under Article 51, and the collective security system under Article 42.[36] In the Court's view current rule of treaty law or customary international law does not ban the use of nuclear weapons as such. Thus, in the light of

[32] *Ibid*, p.35.
[33] Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, para. 188.
[34] *Ibid*, paras, 267-268.
[35] Advisory Opinion, 1997, 35 *International Law Monthly*, 809, and 1343.
[36] *Ibid*, paras 39-48.

Article 2(4) the threat or use of nuclear weapons is prohibited against the territorial integrity or political independence or any state except for self-defence or collective security.

Humanitarian Intervention as an Exception to the Principle of Non-use of Force

Of the two exceptions to the principle of non-use of force under Article 2(4), the exception of 'collective security' enshrined in Chapter VII of the UN Charter authorises the Security Council to use force if necessary to maintain international peace and security. This is the legal basis for the Security Council to intervene on humanitarian grounds if the situations amount to 'threat to the peace', a 'breach of the peace' or 'act of aggression' under Article 39 of the Charter.

The UN Charter is based on a collective security system and confers upon the Security Council primary responsibility for the maintenance of international peace and security. In carrying out this responsibility it acts on behalf of the Member States.[37] Decisions taken by the Security Council are binding upon the Member States.[38] Decision by the Security Council requires an affirmative vote of nine of its fifteen Members including the 'concurring votes' of the permanent Members-- Untied States, the United Kingdom, France, China and Russia[39].

Under Article 39 of the Charter the Security Council shall determine the existence of a 'threat to the peace', a 'breach of the peace', or 'act of aggression' and make recommendations or decide upon the measures necessary to maintain or restore international peace and security. In order to prevent aggravation of the situations, before making such recommendations or taking such decisions, the Security Council may call upon the parties concerned to comply with necessary provisional measures without prejudice to the rights, claims, or position of the parties.[40] It may decide upon non-military measures such as economic sanctions or the severance of diplomatic relations

[37] Article 24(1) of the UN Charter, 1945.
[38] Article 25, *ibid*.
[39] Article 27(3), *ibid*.
[40] Article 40, *ibid*.

and call upon the Members of the United Nations to apply such measures.[41] If such measures are inadequate or have proved to be inadequate may the Security Council take action involving the use of military force.[42] For this purpose, all Members of the United Nations are to make available to the Security Council, on its call and in accordance with special agreement, armed forces, assistance, and facilities, including rights of passage.[43] In the absence of such agreement states are not obliged to make troops available to the Security Council on request. To assist and advise the Security Council on such enforcement action a Military Staff Committee is established consisting of the Chiefs of Staff of the Permanent Members.[44] However, conclusion of such agreements is not a precondition for undertaking military action by the Security Council. The ICJ observed, "It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded"[45]. The calls of the Security Council may be addressed to the Members generally, or to particular member or to regional organisations and in the absence of agreements to that effect may be carried out by Members or regional organisations on voluntary basis. Article 53 provides, "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council".[46] Once the Member states or regional organisations voluntarily decide to carry out the Security Council's authorisation in the absence of agreements, they have an obligation to follow the objectives and limits of actions outlined in the authorisation.

[41] Article 41, *ibid*.
[42] Article 42, *ibid*.
[43] Article 43, *ibid*.
[44] Article 47, *ibid*.
[45] Certain Expenses of the UN, ICJ Reports, Advisory Opinion, 1962, p.167.
[46] Article 53, UN Charter.

Humanitarian Intervention Under the Authorisation of the Security Council

As observed earlier, under Article 39 of the Charter, the Security Council has the authority to decide on the existence of threat to the peace and measures to be taken under Articles 41 and 42, to maintain or restore international peace and security. While Article 41 provides for 'measures not involving the use of armed force', Article 42 provides for measures involving the use of armed forces.

The Security Council in exercising its power under Article 39 has gradually widened the meaning and scope of the notion of threat to the peace. Although the notion of 'threat to the peace' is inherently vague, the framers of the Charter left it to the discretion of the Security Council to determine the existence of a threat to the peace. The traditional view of the 'threat to the peace' presupposes the objective existence of a threat of aggression by one state against another or the existence of real threat of armed conflict in some other form.[47] Over the last several decades, however, the Security Council has consistently regarded humanitarian emergencies within a state as a threat to international peace. The practice of the Security Council since 1945 shows that humanitarian intervention is legally justified if carried out under its authorisation and without the violation of human rights and humanitarian laws.

In this section a number of leading cases will be examined to demonstrate how the Security Council has increasingly been occupied with internal conflicts, treated as threats to international peace.

In 1965, while the white regime in Southern Rhodesia proclaimed independence in violation of the majority black people's right to self-determination, the Security Council, for the first time, in Resolution 217 (1965) determined the continuance of such situation as a threat to international peace and called upon states to break off economic relations with the regime. In Resolution 221 (1966), the Security Council made the similar determination with a specific call upon the UK to prevent, by use of force if necessary, the arrival of vessels at the

[47] Danish Institute of International Affairs, *ibid.*, p.62.

port of Beira carrying oil destined for Southern Rhodesia. In 1977 the Security Council in Resolution 418 determined South Africa's policy of apartheid and aggressions against neighbouring states as 'fraught with danger to international peace and security and decided upon an arms embargo against the country.

During the Cold War period, the Security Council in Resolution 688 (1991) determined the Iraqi repression against the Kurds as threat to international peace and security. The Council insisted that Iraq allow immediate access by international humanitarian organisations, following which a number of states undertook humanitarian relief operations in Northern Iraq backed by force. In Resolution 757 (1992) the Security Council determined the civil war and serious violation of international humanitarian law in Bosnia as a threat to international peace and security and under Chapter VII imposed economic sanctions against Serbia and Montenegro. In a subsequent Resolution 770 (1992), the Council called upon states to take nationally or through regional agencies all measures necessary to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina. By Resolution 827 (1993) the Council under Chapter VII established an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia.

In Resolution 733 (1992), the Council determined the internal civil war and anarchy in Somalia as threat to international peace and security and imposed under Chapter VII, an arms embargo against Somalia. In a subsequent Resolution 794 (1992), the Council determined that the humanitarian disaster in Somalia, brought about by civil war and widespread violations of international humanitarian law, in itself constituted a threat to international peace. The Council, under Chapter VII authorised the member states and the Secretary-General to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia in accordance with the US offer to carry out the operation. In Resolution 940 (1994) the Council determined the systematic violations of human rights due to refusal of the military regime to step down from the power in Haiti. The regime came to power by a military coup in September 1991 that forced the democratically elected President

Aristide into exile. The Council under Chapter VII authorised member states to form a multinational force under unified command and control in order to replace the military leadership with the legitimately elected President. The US was to carry out the operation. However, the regime yielded to the threats and Aristide was reinstated.

Following a civil war between ethnic groups in Rwanda in the Spring of 1994, the Council, in Resolution 918 (1994), condemned the violence and massacre against civilians and expressed its alarm at the systematic, widespread and flagrant violations of international humanitarian law and human rights. It determined that the situation in Rwanda constituted a threat to international peace and security in the region and under Chapter VII, imposed an arms embargo on Rwanda. As the situation continued to deteriorate, in a subsequent Resolution 929 (1994), acting under Chapter VII, the Council authorised the member states to carry out a military operation, "aimed at contributing in an impartial way, to the security and protection of displace person, refugees and civilians at risk in Rwanda" stressing the strictly humanitarian character of the operation. French subsequently carried out the military operation. By Resolution 955 (1994) the Council established an international Criminal Tribunal for Rwanda to prosecute persons responsible for genocide, crimes against humanity and other serious violation of international humanitarian law. Thus in Rwanda case, the Security Council confirms that violation of human rights and humanitarian law in itself constitutes a threat to international peace and security.

Humanitarian Intervention without the Authorisation of the Security Council

Indian invasion of the then East Pakistan (now Bangladesh) on 5 December 1971 is often cited as an example of intervention on humanitarian ground without the authorisation of the Security Council. The West Pakistani army (now Pakistan) carried out genocide and other atrocities on a vast scale in which large number of civilians were killed and approximately ten million people fled to India as refugees. In a Security Council debate, India initially claimed that the motive behind the invasion was to rescue the people of East Bengal from what they were suffering. To many international law scholars, India's later

change of rationale for invasion 'to self-defence' made the case of humanitarian intervention weaker, showing that humanitarian intervention was an insufficient justification for the use of force. Security council was paralysed. The intervention was criticised by General Assembly and among others by the US and China.

On 25 December 1978, Vietnamese forces invaded Kampuchea and ousted Khmer Rouge regime. The regime was responsible for killing almost two million people from 1975-79. They installed a puppet government with the help of rebel United Front members. Although the Vietnamese invoked humanitarian consideration and self-defence as justifications for invasion, it is widely held that regional hegemonic motives largely influenced the invasion. A Security Council resolution, demanding Vietnamese withdrawal, was blocked by a Soviet veto. The US and most other Western states criticised the invasion as unjustified. In 1979 Tanzania invaded Uganda ousting Idi Amin from power during whose reign almost three lakhs people were killed. However, Tanzania never invoked humanitarian grounds for the invasion. Rather Tanzanian President Nyerere declared that Uganda army's aggression against Tanzania and annexation of part of Tanzania were the causes of invasion.

0n 23 August 1990 the Economic Community of West African States (ECOWAS) intervened in Liberia to put an end to mass killing and disorder in the country caused by a civil war between National Patriotic Front of Liberia (NPFL) and Samuel Doe regime. Although there was no prior authorisation for the intervention by the Security Council, it later commended ECOWAS by a Resolution 788 (1992) determining that "the situation in Liberia constitutes a threat to international peace and security". It is to be noted that Article 53 of the Charter categorically points out that "no enforcement action shall be taken under regional arrangements …without the authorisation of the Security Council". In view of the widespread oppression and killing of Kurdish people by the Iraqi regime in the aftermath of the Gulf War in February 1991, the Security Council by a Resolution 668 (1991) demanded "that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately ends this repression" and appealed "to all Member States and to all

humanitarian organizations to contribute to these humanitarian relief efforts". As China or former Soviet Union were reluctant to pass a resolution permitting the use of force, the Resolution, as a compromise, did not expressly authorise any military intervention. On 16 April 1991 about eight thousand US, UK and French troops intervened to establish 'safe havens' for the Kurds in Northern Iraq. Although the G-7 endorsed the invasion, in the UN General Assembly some states criticised the action as violation to Iraq's sovereignty.

When the situation of mass-killing and other atrocities, caused against the Albanians by the Serbian police under the dictation of President Slobodan Milosevic continued to deteriorate in Kosovo, the Security Council in Resolution 1160 (1998) determined that such situation constituted a threat to international peace and imposed a weapons embargo. Although in a later Resolution 1199 (1998) the situation was regarded as falling under Chapter VII, no authorisation for military intervention was given in anticipation of veto from China and Russia. In March 1999, after negotiation with Belgrade became unsuccessful, NATO initiated a military operation which continued up to June 1999 when Belgrade agreed to sign the agreement with the G-8 on the autonomy of Kosovo. In Resolution 1244 (1999) the Security Council authorised under Chapter VII an international security presence in Kosovo.

Humanitarian Intervention without the Authorisation of the Security Council : Has it developed as a Rule of Customary International Law?

It is evident form the above discussion that the Security Council, while determining the existence of 'threat to the peace' under Article 39 of the Charter has, since the beginning of 1990's, consistently taken into account violations of human rights and humanitarian laws within the domestic jurisdiction of Member states. These instances reveal that humanitarian intervention is legally justified if carried out under the authorisation of the Security Council while acting under Chapter VII of the Charter. But a question may arise, whether intervention on humanitarian grounds, without the authorisation of the Security Council, could be justified as legal. Before addressing this issue, the

rules regarding the formation of international custom will be examined in the following paragraphs.

According to Article 38 (1) of the Statue of International Court of Justice, 1945[48], there are two essential elements of custom: 'general practice' and 'accepted as law'. While the former refers to state practice, the later refers to *opinio juris* i.e., a psychological or subjective belief that such practice or behaviour is law. There is no rigid time duration for a usage or practice to turn to an international custom. It rather depends on the circumstances of each case and nature of the usage in question. For example, customs relating to sovereignty over air space and the continental shelf have emerged in a short duration of time. In *Asylum* case,[49] the International Court of Justice, declared that a customary rule must be 'in accordance with a constant and uniform usage practised by the states in question'[50]. In the *Anglo-Norwegian Fisheries* case,[51] the ICJ rejected an UK argument against the Norwegian method of measuring the breadth of the territorial sea by pointing out that the actual practice of states did not justify the creation of any such custom. In other words, there had been insufficient uniformity of behaviour. In the *North Sea Continental Shelf* cases,[52] the ICJ remarked that the state practice had to be 'both extensive and virtually uniform in the sense of the provision invoked'[53]. However, in the *Nicaragua V. United States* case,[54] the Court emphasised that it was not necessary that the practice in question had to be 'in absolutely rigorous conformity' with the purported customary rule. The Court observes:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given

[48] See, Statute of the International Court of Justice, 1945 in Malcolm D. Evans, Blackstone's International Law Documents, 3rd Edition, Blackstone Press Ltd, 1996, pp. 26-36.
[49] *ICJ Reports*, 1950, p. 266.
[50] *Ibid*, pp. 276-277.
[51] *ICJ Reports*, 1951, pp 116, 131, 138.
[52] *ICJ Reports*, 1969, p. 3.
[53] *Ibid*, p.43.
[54] *ICJ Reports*, 1986, p.14.

> rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[55]

The Court also shed light on how a new customary rule is formed:

> for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitates.* Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[56]

New rule of customary law is often created by deviation from the original rule of customary law. As the Court in Nicaragua case observed: "reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law".[57]

In determining the existence of a customary rule it is always vital to consider the nature of the alleged rule and the opposition it arouses. Although universality is not required, a concurrence of states having sufficient interest in the matter is vital. It is observed:

> A regulation regarding the breadth of the territorial sea is unlikely to be treated as law if the great maritime nations do not agree to or acquiesce in it, no matter how many land-locked states demand it. Other countries may propose ideas and institute pressure, but without the concurrence of those most interested, it cannot amount to a rule of customary law.[58].

Malcolm N. Shaw suggests that state practice covers any act, claim or statements by a state from which views about customary law may be inferred.[59] In this context, the notion of 'legality' should be distinguished from the notion of 'legitimacy'. Legality tells us whether a particular act is legal or illegal in accordance with the provisions of

[55] *Ibid*, p. 98.
[56] *Ibid*, para, 207.
[57] *ICJ Reports*, 1986, pp. 14, 109.
[58]Malcolm N. Shaw, *International Law*, Fourth Edition, Cambridge University Press,1997, p.63.
[59] *Ibid*, p. 66.

particular law. But legitimacy refers to, whether an act is morally or ethically commendable even though illegal.

In view of the above discussion, it follows that a new rule of customary international law in favour of humanitarian intervention carried out without the authorisation of the Security Council has not yet come into existence for the following reasons:

First, the rule of non-use of force is so well settled that some scholars regard it not only a customary rule but also *jus cogens*, a peremptory norm which is accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character[60]. Therefore, a few instances of intervention on humanitarian grounds without the authorisation of the Security Council cannot justify derogation from the well-settled principle of non-use of force.

Second, although a few states have carried out armed intervention without the authorisation of the Security Council on humanitarian ground, vast majority of states especially from developing countries have not yet accepted it as justifiable. The number of criticisms against these instances by member states and international organisations demonstrate that the international community is not yet ready to accept it as rule of customary international law.

Third, in the few cases examined earlier the intervening states either did not officially use or showed reluctance to use humanitarian grounds as justification for the intervention mostly due to their hesitation about the legal status of the humanitarian intervention carried out with out the authorisation of the Security Council. Critics argue that political, economic or strategic considerations mostly motivate states to carry out interventions without the authorisation of the Security Council in the pretext of humanitarian crisis.[61]

[60] See, Article 53, Vienna Convention on the Law of Treaties, 1969.
[61]See, F.K. Abiew, *The Evaluation of the Doctrine and Practice of Humanitarian Intervention*, Hague, Kluwer Law International, 1999, p.131; A.C. Arend and R.J. Beck, *International Law and the Use of Force*, London, Routledge, 1993, p.122.

Many scholars have argued that interventions carried out in the then Eest Pakistan (now Bangladesh), Uganda, Liberia and Kosovo were not strictly legal as there were no authorisations from the Security Council even though morally legitimate in view of the large-scale atrocities, genocide, and violation of human rights that took place in those incidents.[62] Indeed, since the beginning of 1990s, there has been a trend towards invoking a customary right to humanitarian intervention. The legal counsellor to the British Foreign Affairs noted, ‘‘the intervention in northern Ira ‘Provide Comfort’ was in fact, not specifically mandated by the United Nations, but the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention”.[63] However, these claims are not free from objections and criticisms by other states and organisations.

Interventions in Liberia, Bosnia, and Kosovo even though carried out without the prior authorisation of the Council, received wider support from the international community. UN Secretary General Kofi Annan, referring to the Kosovo crisis observed, “We should leave no one in doubt that for the ‘mass murderers’, the ‘ethnic cleansers’, those guilty of gross and shocking violations of human rights, impunity is not acceptable. The United Nations will never be their refuge, its Charter never the source of comfort or justification.”[64] Referring to Rwanda, he notes, “If, in those dark days leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?”[65] Interventions carried out without the prior authorisations in Liberia, Kosovo received subsequent endorsement of the Security Council. These arguments inform us that a trend is emerging towards the

[62] T.M Franck and N.S. Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force”, *American Journal of International Law*, 67, 1973, p.300.
[63] See, “United Kingdom Materials on International Law”, *British Yearbook of International Law* , 63, 1992, p. 827.
[64] UN Press Release SG/SM/6949 of 7 April 1999.
[65] UN Press Release SG/SM/7136, 20 September 1999.

recognition of customary rule of humanitarian intervention in extreme cases where the Security Council fails to perform its primary responsibility to maintain international peace and security. Kritsiotis comments, “The NATO intervention …witnessed an important and undeniable invocation of the so-called right of humanitarian intervention in state practice, and it now remains for the wider normative implications of this development to be calculated”.[66] However, some scholars have made cautious comments. Hilpold observes,

> The unilateral recourse to force to end a grave humanitarian crisis can hardly be disapproved of morally, but there is no point in attributing to it legal status, revitalizing an instrument of the nineteenth century that would –in a completely different legal setting –do more harm than good and thus threaten those traits of a still imperfect system that it seem valid to maintain in the ultimate interest of the individual.[67]

Lessons Learned from the Cases of Interventions

Intervention itself does not very often bring solution to humanitarian crisis or atrocities. Following lessons can be learned from the interventions carried out on humanitarian grounds:

First: Humanitarian crisis or atrocities are not unpredictable paroxysm of ethnic rivalries. These situations do not pop up suddenly. Racial hatred, propagated by extremist leaders, over years and decades lead to civil strife or war. Genocides and massacres are often the results of long pursued policies of discrimination and exploitation by the ruling dictators against the ethnic minorities. In Rwanda, the 1994 atrocities were planned by Hutu extremists in the government and evidently did what Hitler and Stalin had done earlier in the century i.e., embitter the general public against the Tutsi, by blaming them for some or all of their country’s woes. It is agreed that extremist actually

[66] See, D. Kritsiotis, NATO’s Armed Force Against Yoguslavia, *International Comparative Law Quarterly*, 2000, p.358.
[67] Peter Hilpold, “Humanitarian Intervention: Is There a Need for a Legal Reappraisal?”, *European Journal of International Law*, Vol. 12, No. 3, 2001, p.467.

did pave the way for the violence by (a) whipping up anti-Tutsi frenzy through inflammatory radio broadcasts and street corner agit-prop; (b) distributing hit list of Tutsi and (c) providing machetes and other small arms to their supporters.[68]

Second: While non-intervention or delayed intervention can aggravate situation, timely intervention, even if modest, could save valuable lives with minimal costs. International community did not respond as quickly as it should have to the crises in Rwanda, Somalia, Bosnia, and Kosovo. As the Liberia case shows, regional organisations can play an important role in mitigating ethnic problems that endanger international peace and security on an urgent basis. However, regional political conflicts can be a significant barrier in using regional forces. Bosnia, Iraq and Kosovo cases show that economic and arms sanctions are not often effective in resolving dispute. In some situations they might even accelerate the pace of ethnic cleansing. International community has to work out quicker measures to meet urgent situations.

Third: Although an early warning information system can be useful, studies have shown that information itself cannot attract necessary intervention from the international community. James F. Miskel and Richard J. Nortorn carried out a study on humanitarian early warning system.[69] It demonstrated that substantial and credible early warning information was available before and during Rwanda, Zaire and Burundi crises. These humanitarian crises, however, illustrate two paradoxes inherent in the concept of early warning system. States that might be benefited from early warning system do not have adequate economic or military capabilities to prevent the crises from worsening. For example, Angola, Tanzania, the Central African Republic, and Uganda all were aware of the deteriorating

[68] James F. Miskel, "Some Lessons About Humanitarian Intervention", *The Journal of Humanitarian Assistance*, November 2005, pp. 1, 3. Available at www. Jha.ac/articles/

[69] See, James F. Miskel and Richard J. Norton, "Humanitarian Early Warning System", *Global Governance*, July-September 1998, Vol. 4, No. 3, pp. 317-329.

condition in Rwanda but their economic and social capabilities were too fragile to lead a timely intervention in Rwanda. The second paradox is that states that have economic and military capabilities to act upon early information might not be interested to intervene if they have no important security or economic interests at stake. Bosnia (early 1990s), Rwanda (1994), Zaire (1996) and Kosovo (1998)-- all illustrate this paradox.[70]

In September 1999, the UN Secretary General Kofi Annan stated that UN tarried because of the reluctance of member states to place their forces in harm's way where no perceived vital interests are at stake, a concern over costs and doubts in the wake of Somalia that intervention could succeed. In most cases, powerful states or group of states are only interested to carry out military intervention if it matches with their political, economic and strategic interests. Military operations entail loss of solders and weapons that involve huge costs and even loss of popular support for the government of intervening state. Humanitarian interventions, even if necessary, do not always get priority in the political agenda of powerful states.

Fourth: Deep rooted causes of ethnic violence or hatred are not often addressed. Military operations can compel the rival parties to maintain status quo for a period of time but they often fail to remedy deep rooted social, political and cultural policies and practices that encourage exploitation, racial discrimination. As a result violence and conflicts continue to exist long after the intervention, such as in Rwanda, Zaire (now Congo) and Burundi. A complete or long lasting solution to the crises might require decapitation of extremist leadership in order to bring them to justice. This is a complex and time-consuming task. Although in some recent instances international tribunals have been established for war criminals, the examples of failure to bring criminals to justice are many. UN forces failed to decapitate the most troublesome Somali clan in the early 1990s. Cambodia's Pol Pot died a free man in 1998 almost twenty years after his involvement in some of this century's most heinous atrocities. In Bosnia, alleged war criminals have eluded capture for years and have

[70] James F. Miskel, 2005, *op. cit.*, pp. 2-3.

continued to foment tension.[71] Rehabilitation and reconciliation measures are often overlooked.

Conclusion

Although use of force is generally prohibited in international law, the Security council in exercise of its power to maintain international peace and security can carry out military intervention under Article 42 of the UN Charter on humanitarian grounds. Humanitarian intervention carried out with the authorisation of the Security Council is legally valid. But as the present study reveals, interventions carried out on humanitarian grounds without the authorisation of the Security Council are illegal under the current international law. Security Council often fails to perform its primary responsibility to maintain international peace and security due to veto system that paralyses its decision making process. As a result the Council has repeatedly failed to take immediate action in cases in which it should have. Indeed international legal order lacks an effective central authority and a central police force to intervene as of necessity. Perhaps the framers of the UN Charter did not envisage a situation that would require intervention into internal matters of states for the safeguard of fundamental human rights, on which it reaffirms its faith.

Recent interventions in Iraq and Afghanistan remind us that intervention without the authorisation of the Security Council could jeopardise the rule of law on the international plane. Unauthorised humanitarian intervention, if legitimised, could be used to materialise imperialist agenda and left particularly small, weaker states vulnerable to the aggression of powerful states. Regional security organisations can play significant role in mitigating ethnic problems that lead to humanitarian emergencies.

Establishment of international criminal tribunals for the trial of war criminals or criminals that propagate civil wars within their jurisdictions are significant developments in international law. As the scanty of cases do not demonstrate an existence of customary international validating humanitarian intervention without the prior

[71] *Ibid*, p. 4.

authorisation of the Security Council, new treaty laws could be adopted with necessary monitoring, and information-gathering mechanisms.

The cases of Rwanda, Somalia, Kosovo demonstrate that one stroke surgical operation does not provide lasting solution to the humanitarian problems. Rehabilitation and reconciliation measures play an important role in resolving deep-rooted ethnic problems. These are complex and time-consuming efforts which require a comprehensive treatment to the humanitarian crises that erupt now and than in the international community.