

**REVISITING THE CONTROVERSY ON THE
LEGALITY OF HUMANITARIAN INTERVENTION:
The Case of the Democratic Republic of Congo**

BY

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DECLARATION

I G. MBUZUKONGIRA NZABONA do declare that this research project is my original work and has not been submitted and is not being currently submitted for a degree in any other university.



G MBUZUKONGIRA NZABONA

This research project has been submitted for examination with my approval as a supervisor.



JOY K. ASIEMA

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May God multiply every thing you people did to me I wish to you all many blessings and success in your various projects!

DEDICATION

To my old man Zaché Mbuzukongira N'ghabo I know you are still far from seeing what you wanted to see in me but let me promise you that I have not gave up yet. To my friend Christine Kwitegetse Mbuzukongira the truth is that our friendship will last forever, for your surprise just watch out for a while.

TABLE OF CONTENT

Title	i
Declaration	ii
Acknowledgement	iii
Dedication	v
Table of Content	vi
Abstract	viii
Chapter One	
INTRODUCTION	1
I.1. Background	1
I. 2. Statement of the problem	5
I.3. Objectives of the research	13
I.4. Research questions	14
I.5. Justification and significance of the research	15
I.6. Scope of the research	16
I.7. Methodological approach	17
I.8. Chapter overview	17
Chapter Two	
THE LEGALITY CRITERIA OF A HUMANITARIAN INTERVENTION	18
II.1. Legality of the intervention	19
II.2. Criteria of intervention	24
Chapter Three	
THE DRC CASE	35
III.1. Background information	35
III.2. Violation of the common article 3	38
III.3. Rape Cases	42

III.4. Execution of Children	44
III.5. The International Reaction	45
CONCLUSION	52
Reference & Bibliography	59

ABSTRACT

According to Mahmood Mamdani, an International Rescue Committee Report estimates that 3.3 million people have died over the past four and a half years of war in the Democratic Republic of Congo. Yet no significant centre of power or opinion is calling for a "humanitarian intervention" in Congo

In his special report on the event in Ituri, (January 2002 - December 2003) presented to the Security Council on the 16th July 2004 the General Secretary Of the United Nations Koffi Annan, reported that the situation of human rights in the Ituri district, situated in the Oriental Province of the Democratic Republic of Congo is today one of the most disastrous of the world after it has staid unknown. According to the investigations done by the MONUC and other association of human rights defenders between January 2002 and December 2003, some 8 000 civilians – probably more, in fact – have been victims of murder or the blind use of force. It is impossible for the moment to give an estimation of the number of women who have been raped or put to sexual slavery. More than 600 000 civilians have been forced to run away from their places, Thousands of children aged from 7 to 17 years old have been unwillingly recruited by armed groups.

The RIPADHU has reported that since end of May the South Kivu is victim of an unjustified war which has opposed the 10th Military Region to insurgents. This war has left behind it a lot of damage. Systematic pillage, woman and children have been raped, imprisonment in inhuman conditions, houses have been bunt, killing of people

One asks then why is it that any intervention is being setting up for the Democratic Republic of Congo is it because what is going on has not reached the

level of becoming matter of international concern? The following question being what then is that level? Can there be set in advance some criteria of intervention? The heart of the matter is to try to find out if the humanitarian intervention is legal, if so what is its legal basis, one may ask that if human rights are being reported all over the world who then will intervene where in other world what is the level of human rights violation which warrant the intervention, who has to intervene, or what are the criteria of the intervention? The researcher will particularly focus on the situation of the Democratic Republic of Congo and analyse whether the situation has or has not reached the level required to the setting up of a humanitarian intervention. It is ambitious to pretend to provide answers to the controversial question who has the duty to intervene, when he shall do it, and how is he supposed to intervene though this will be the focus of the study.

After an introductory chapter the researcher will analyse in a second chapter the legality and the criteria of a humanitarian intervention, the third chapter will be focused on the particular case of the Democratic Republic of Congo, in the last chapter he will come up with some recommendations and conclude the study.

Chapter I

INTRODUCTION

I.1. BACKGROUND

The article 2(7) of the United Nations Charter states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

Though this article seems to be clear it has not defined what is “domestic jurisdiction of the state”? In other words where can we draw the line between matters of international jurisdiction and matters of domestic jurisdiction? According to Lyal S. Sunga “the broad interpretation of the scope of domestic jurisdiction, reflect the intensified concern of state to guard the breadth of their national sovereignty,”¹ And Brad R. Roth says “some observers mistakenly assume that wherever a state violates human rights, other states are, jointly and/or severally, privileged to take whatever intrusive measures needed to enforce those rights. Yet this view finds no support. International law, Sovereignty norms continue to sharply circumscribe intervention, leaving the implementation of human rights largely within the exclusive jurisdiction of the governing regime”². This is not the view of the Interaction Council which in its

¹Lyal S. Sunga, *The Emerging System of International Criminal Law*, kluwer Law International, Hague, 1997

² Brad R. Roth, *Government illegitimacy in International Law*, Clarendon press, oxford, 1999.

report says one of the most significant developments in International Law since the end of

World War II has been the growth in International Human Rights Law. The traditional position at International Law was that sovereign independent States were free to treat their own nationals as they chose without threat of external interference. The advances of international human rights law have rendered a State's treatment of its own nationals an issue of international concern"³. This point of view seems to be shared by the Danish Institute of International Affairs which accepts that "From a legal perspective there is a clear trend towards a changed scope of state sovereignty with regard to the way a state treats individuals and minorities within the state. Since 1945 the principle of international protection of human rights has progressively gained weight at the cost of the classical, highly prohibitive interpretation of state sovereignty. This development has been brought about, above all, by the adoption of international conventions for the protection of human rights. To the extent that a state has ratified these documents on human rights and humanitarian law, such issues (at least) no longer belong to the exclusive domain of this state."⁴

This is the position taken by the International Criminal Tribunal on former Yugoslavia, the appeals chamber ruled in Dusko Tadic case that "Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law,

³ Chairman's Report on the High-level Expert Group Meeting
International Humanitarian Law, Humanitarian Crises and Military Intervention, of the Interaction Council Established in 1983 Chaired by The Rt. Honourable Malcolm Fraser
22-23 April 2002 The John F. Kennedy School of Government, Harvard University
Cambridge, Massachusetts

⁴ Danish Institute of International Affairs Report of 1999

and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

One asks then to what extend can International Law develop as regards to collective or individual action conducted not under the United Nations auspice such as those not falling under Chapter VII as international or individual action to enforce observance of International humanitarian or Human Rights Law.

The 1993 World Conference on human Rights affirmed the crucial connection between international peace and security and the rule of law and human rights⁵. This new understanding of the connection between human rights and international peace and security makes us ask the question at what is the level of human rights or International Humanitarian Law violation which can warrant a humanitarian intervention? If humanitarian intervention is to be understood as military intervention in the territory of a given state without its consent for the reasons of grave violation of International Humanitarian Law what will be the legal basis in international Law of such intervention? What are the criteria of this intervention, who has the duty or the right to intervene and when must he intervene?

For instance in the context of war, starting from the limitation to freedom of movement of people to massacres, indiscriminate attacks on civilians, executions of prisoners, starvation of entire populations, torture, forcible relocations, mass expulsions, massive rapes by soldiers, extra-legal executions of detainees, attacks on

⁵ Human Rights today, United Nations briefing papers, United Nations Publication, 1998 p 46

humanitarian aid, and other violations of human rights, the international law should have given the bottom line of what kind of human rights falls in the scope of domestic jurisdiction and what kind of human rights violation falls under the jurisdiction of international law and its consequence being the possibility of envisaging the humanitarian intervention.

Since 1996 the Democratic Republic of Congo has been passing through a very hostile time characterised by armed conflict which has claimed up to the moment millions of souls⁶, the United Nations has sent its troops with the mandate of peace keepers. France intervened to stop the massacre which was between two opposing tribes Lendu and Hema. This action fortunately met the consent of all the “actors” unfortunately the terms of references of the intervention did not allow it to do much apart from reducing the intensity of hostilities. The issue here is if that intervention did not meet the consent of politicians including the government, could France still have intervened and on which legal basis? Why France and what are the limitations (rights and obligations) of the intervener in the context of an armed conflict? Will it be important to mention that this is not the only humanitarian catastrophe which Congo has undergone?

⁶ Some sources give the shocking number of 4 millions

I. 2. STATEMENT OF THE PROBLEM

I.2.1. Conceptualisation

a. Intervention

This concept has brought a lot of controversy for people who have tried to describe its content. Dr Kithure Kindiki had first suggested the definition of intervention given by Du Plessis saying that intervention will be taken to mean any coercive or forcible interference by an external authority in the sphere of jurisdiction of a sovereign state.⁷ Of course the concept of intervention has to be understood hand in hand with that of sovereignty. But the danger will arise when dealing with a certain case which jurisdiction *ratione matiriae* falls under international jurisdiction therefore not subject to national jurisdiction of the country.

In fact, in case a clear line was drawn of what is under the domestic jurisdiction and what it's not, then any external intervention in the sphere of international jurisdiction within a country will not be taxed external interference. The reference to jurisdiction of a sovereign state can at some extend empty the concept of intervention of its real content.

The other definition proposed by the same author as given by Teson that intervention is the proportionate transboundary help, including forcible help provided by government to individuals in another state who are being denied their basic human rights and who themselves would be rationally willing to revolt against their oppressive government.

⁷ Kithure Kindiki, *Humanitarian Intervention and State Sovereignty in Africa: The changing paradigms in international law*, Moi University Press, 2003

We owe respect to this definition for bringing out the issue of individuals who are being denied their basic human rights. Though the author did not define what he understands by basics human rights denial which can lead to the conclusion of an intervention. The other stressing thing is the hypothesis of help opposed to forcible help as if forcible help still does not constitute an intervention. This point of view will not be accepted by the ICISS according to which “the Commission has taken a similar view ‘has rejected’ the cases where a population, having clearly expressed its desire for a democratic regime, is denied its democratic rights”.⁸

The only hypothesis in which the intervention can be envisaged is when the government is opposed to the intervention. Otherwise it falls in the scope of military cooperation between countries.

b. Humanitarian intervention

According to the definition adopted by a NATO seminar in Scheveningen on the topic in November 1999, a humanitarian intervention is an armed intervention in another state, without the agreement of that state, to address (the threat of) a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights. The key aspects of this definition are related to sovereignty and human rights. Firstly, for an action to be intervention, sovereignty of the state being intervened in must be breached. Secondly, for an intervention to be humanitarian, the desire to address violations of human rights should be the driving force in the intervention decision.⁹

⁸ Report of the International Commission on Intervention and State Sovereignty, December 2001.

⁹ Humanitarian Intervention: Definitions and Criteria, CSS Strategic Briefing Papers Volume 3; Part 1; June 2000, ISSN 1175-1452

The same author has given a table where he has listed some criteria of intervention. But of course they are still far from getting the unanimous point of view of everybody for instance, if the humanitarian intervention must be subject to the support of regional states, one will then ask whether the failure of this condition is sufficient to stop the intervention. The other issue is that of unilateral intervention. The support of regional state may some how refrain the idea of unilateral intervention, and the opposite question which is if a given country may be released from the obligation of intervention because it did not get support of regional state.

The other criteria given by this author is that the government is unwilling or unable to take remedial action. This statement might be dangerous in case the government is only unable but willing to stop the catastrophe, then it should not oppose the intervention and this seems critical as noted by Dr Kithure giving elements of the definition the humanitarian intervention. In fact he is suggesting that the action must be taken without the consent of the government.

Finally he advises that it should be based on humanitarian consideration, may be it was important to distinguish this particular intervention with others which can happen in the same circumstances based on humanitarian consideration as well, like protection of nationals and precise that this intervention is based on violation of the law of war. As suggested by Layl Sunga the intervention must not involve any self-interest on the part of the interveners. Though again the concept of self interest must be understood in its very narrow meaning as one may say that the interest of the entire community include the interest of the intervener. Self interest here means a very particular interest of the intervener.

But the important aspect is that the intervention is done because of gross human rights abuse in a state and against the will of the government. The latter meaning targets the state sovereignty, which is crucial to the definition of the state as in international law and in national law.

c. The State sovereignty

The U.N. Security Council has broad authority with respect to the use of force. The general standard is embodied in the U.N. Charter, which in Article 2(4) prohibits member states from exercising the threat or use of force against the territorial integrity or political independence of another state.

Eric Rouleau in his article ‘Humanitarian Intervention’: A Forum posted in June 2003 says that “in principle, who could oppose a humanitarian intervention, especially if it is a question of preventing genocide or crimes against humanity? Yet the UN Charter bars interference in the internal affairs of member states. This provision was introduced by the founders of the international organization for two main reasons: first, to respect the sovereignty of member states, and second and more important to maintain world peace. The Charter's authors did not want to provide states, or groups of states, with a pretext to intervene for inevitably self-serving motives”.¹⁰

That's why the duty not to intervene in matters within the domestic jurisdiction of any state, was included in the Declaration on Principles of International

¹⁰ www.iciss-ciise.gc.ca, consulted on the 14th august, 2004, Eric Rouleau is a writer and former French ambassador to Tunisia and Turkey.

Law Concerning Friendly Relations and Cooperation among States adopted in October 1970 by the United Nations General Assembly. It was emphasised that; No state or group of states 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 other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural element are in violation of international law.¹¹

As taught by M.N. Shaw, another crucial principal is the legal equality of state. It is a concept of law and should not be confused with political equality. What is referred to here is equality of legal rights and duties. This was recognised in the 1970 Declaration on principal of International Law. Which provides: All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- (a) States are judicially equal;
- (b) Each state enjoys the rights inherent in full sovereignty;
- (c) Each state has the duty to respect the personality of other states;
- (d) The territorial integrity and political independence of the state are inviolable;
- (e) Each state has the right to freely choose and develop its political, social, economic and cultural systems;

¹¹ Malcon N. Shaw, International Law, Fourth Edition, Cambridge University Press, 2003.

- (f) Each state has the duty to comply fully and in good faith with its international obligations to live in peace with other states.¹²

For sure this point of view has been overtaken by time. But the idea of sanctifying the integrity of state has for a while dominated the International Law. This is reflected in article 2(4) of the charter of the United Nations. That is why some people believe that the world must continue to support the role of the UN Security Council in determining whether or not an intervention is legitimate.

In Constitutional Law one of the fundamental elements of the State is its sovereignty. In fact this concept which of course is the expression of the political independence of a state can not be under-estimated.

Indeed, if the political independence means the right to self determination, it is then obvious that any military intervention of any other country, can only alter this right which then requires that in case it's done must be under very well understood conditions. When exactly is it to happen, how and by whom?

1.2.2. Qualification of armed conflicts situation in DRC

Any political instability is not to be understood as Armed Conflict. When demonstrators in the streets throw stones to police officers who respond to them with tear gas or by pouring hot water on them, this is not an armed conflict.

The Additional Protocol to the Geneva Convention of the 12th August 1949, and relating to the Protection of Victims of Non- International Armed Conflict

¹² Opsi Citare

(Protocol II) adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts has failed to define what is supposed to be understood by Armed Conflict. Instead it has told us what it is not. In fact in its article 1 paragraph 2 It says ` this protocol shall not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature as not being armed conflict'.

In his article on the International Criminal Court and Non- International Armed Conflicts, Heike Spieker starts by the same procedure, uses the same procedure before defining what armed conflicts are not; he refers to the cited article and concludes his article with the ICTY article, which states that an armed conflict exist whenever there is a resort to armed force between States, or protracted armed violence between government authorities and organised armed groups or between such groups within a State. According to the author, in general the notion of armed conflict may be described as to include the use of force in a war like situation.

An armed conflict is therefore to be understood as a conflict opposing different parties militarily organised. It is most often characterised by grave violence, and the idea here is not to refer to the military equipment the parties in the war are using, but generally to the way they are conducting the offensive. The ICTY gave its understanding of armed conflict situation by saying that “we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹³

¹³ Prosecutor v. Dusko Tadic a/k/a "Dule" Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, Decision of: 2 October 1995

As regards to the qualification of the conflict in Democratic Republic of Congo it needs to be precised whether it is qualified as an international armed conflict or a non international armed conflict. The common article 3 of the four Geneva Conventions will apply. And in itself this article constitutes a rule of customary international law as regards to the law of war.

It is arguable that the conflict in DRC has some aspects of an internal armed conflict, if it is analysed from the geographic area of hostility which has never crossed the national borders of the DRC, and at the same time when it is looked at on specific fronts where some rebels confront the governmental troops. On the other hand as the ICTY noted that an internal conflict can become internationalized because of external support,¹⁴ therefore the involvement of foreign armed forces Zimbabwe, Angola, Uganda, Rwanda etc..., supporting different parties in the conflict is a sufficient element of its internationalization. This is what led us to the conclusion of the qualification of the international armed conflict without excluding the qualification of internal armed conflict where it applies.

It should be added that international humanitarian law applies in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there. For instance when prisoners of war are being deported to Rwanda they don't loose their regime of protection under the Geneva Convention by crossing the national boarder.

¹⁴ idem

I.3. OBJECTIVES OF THE RESEARCH

According to Mahmood Mamdani, an International Rescue Committee Report estimates that 3.3 million people have died over the past four and a half years of war in the Democratic Republic of Congo. Yet no significant centre of power or opinion is calling for a "humanitarian intervention" in Congo. Behind the continuing humanitarian tragedy in Congo are combinations of forces-local, regional and global-that profit from this conflict in various ways. So long as the beneficiaries of the Congo war outweigh millions of its victims in influence, there will be no humanitarian intervention-other than the small international force with a limited mandate recently sent to Bunia.

In his special report on the event in Ituri, (January 2002 - December 2003) presented to the Security Council on the 16th July 2004 the General Secretary Of the United Nations Koffi Annan, reported that the situation of human rights in the Ituri district, situated in the Oriental Province of the Democratic Republic of Congo is today one of the most disastrous of the world after it has stayed unknown. According to the investigations done by the MONUC and other association of human rights defenders between January 2002 and December 2003, some 8 000 civilians – probably more, in fact – have been victims of murder or the blind use of force. It is impossible for the moment to give an estimation of the number of women who have been raped or put to sexual slavery. More than 600 000 civilians have been forced to run away from their places. Thousands of children aged from 7 to 17 years old have been unwillingly recruited by armed groups.

The RIPADHU¹⁵ has reported that since end of May the South Kivu is victim of an unjustified war which has opposed the 10th Military Region to insurgents. This war has left behind it a lot of damage. Systematic pillage, woman and children have been raped, imprisoned in inhuman conditions, houses burnt, people killed ...

In fact Kalehe district has been particularly affected by this insurrection. Between the 9th and 11th of July 2004 the fights which took place in Kalehe caused hundreds of death and many houses burnt in many villages like Lemera, Bushaku, Katasomwa, Nyawaronga, Kichwambili, Kiranguzi, Kitenbebwa. One then asks why is it that no intervention is being set up for the Democratic Republic of Congo. Is it because what is going on has not reached the level of becoming matter of international concern? The following question being; what then is that level? Can there be set in advance some criteria of intervention? And many other questions as found in the research questions.

I.4. RESEARCH QUESTIONS

The heart of the matter is to try to find out what then can be understood as humanitarian intervention, what is its legal basis and what can be its criteria? One may ask that if violations of human rights are being reported all over the world in armed conflict. Who then will intervene where? In other words what is the level of human rights and International Humanitarian Law violation which warrant the intervention? Who has to intervene? The researcher will particularly focus on the situation of the Democratic Republic of Congo and analyse whether the situation has or has not reached the level required to the setting up of a humanitarian intervention.

¹⁵ Research and Information Centre on Peace and Human Rights is an NGO which deals with human rights issues in D.R.C.

It will be so ambitious to the researcher to pretend to provide answers to the controversial questions; who has the duty to intervene, when he shall do it, and how is he supposed to intervene though this will be the focus of this study.

I.5. JUSTIFICATION AND SIGNIFICANCE OF THE RESEARCH

It has been noted from various human rights reports that, different parties in the conflict in the Democratic Republic of Congo have no consideration to the rules of war. According to the Amnesty International Report of the 20th March 2003 “The Ituri region of north-eastern Democratic Republic of Congo (DRC) is suffering one of the world’s gravest humanitarian and human rights crises. An estimated 50,000 have died as a result of armed conflict in the region and more than 500,000 people displaced since mid-1999”.¹⁶

this is the fact which drew the attention of the researcher and wanted to investigate more the situation, and ask himself whether the situation in D.R.C. has not yet come to the level of envisaging a humanitarian intervention. The exercise here will be to confront the situation in D.R.C. in the required criteria of the humanitarian intervention, and then conclude by making an appeal to the international community to take action.

¹⁶ Amnesty International, Democratic Republic of Congo on the precipice: the deepening human rights and humanitarian crisis in Ituri 20 March 2003

1.6. SCOPE OF THE RESEARCH

The researcher intends to carry out the research on the Democratic Republic of Congo especially the eastern part, where it is believed to have many cases human rights abuse. For practicability reason, to analyse human rights cases requires some limitations and the researcher would like to focus more on the alleged cases done in the Democratic Republic of Congo.

In terms of temporal scope, the Democratic Republic of Congo started a recent series of war since 1996, when Laurent Kabila with his AFDL “Alliance des Forces Démocratiques pour la Libération du Congo” took arms with the support of some neighbouring countries to overthrow Mobutu Sese Seko, whom he easily out-throned in May 1997. But only one year later, the RCD (Rassemblement Congolais pour la Démocratie) in August launched another war on the 2nd of August 1998, which up to the moment is still going on. Though there have been many attempts to sign peace agreements, the situation on the ground is still dominated by armed conflicts up to date. It should be noted that a part from the RCD, other political formation have armed their youth who have become active on the battle field, on top of different ethnic conflicts which have taken a very serious level, taking to account the victims that it causes. This is what the research will be focused on.

I.7. METHODOLOGICAL APPROACH

I.7.1. Collection of Data

The researcher will rely on different reports published by other researcher on human rights; as different reports published by different NGOs, this is including Human Rights Groups which focuses on Democratic Republic of Congo as he intends to receive different reports through different means; electronic and postal.

Some other websites give information about the Human Rights situation in Congo and all this will be useful to the researcher. Other Human Rights Group avail information through electronic communication. The researcher will use all the tools, to get as more information as he can.

I.7.2. Analysis of Data

After collecting data the next exercise will be to confront the situation to a certain “standard” which ought to open a humanitarian intervention. Then the researcher will focus more on analysing the legal aspect of the problem. And will be trying to find out if International Law is not capturing the issue. After the analysis the researcher will make some suggestions.

I.8. CHAPTER OVERVIEW

After an introductory chapter, the researcher will analyse, in a second chapter the legality and the criteria of a humanitarian intervention. The third chapter will be focused on the particular case of the Democratic Republic of Congo. In the last chapter he will come up with some recommendations and conclude the study.

Chapter II

THE LEGALITY CRITERIA OF A HUMANITARIAN INTERVENTION

According to Dr Kindiki Kithure in his article the legality and the applicability of humanitarian intervention to internal conflict in Africa, “the most challenging if not the most difficult aspect of the concept of humanitarian intervention, is the task of identifying the legal principles on which it is based.”¹⁷

This chapter intend to find out where can be found a rule of international law, legalising the humanitarian intervention, whether carried out by a single state (unilateral intervention), or by an inter-governmental organisation (multilateral intervention) without the authorisation of the Security Counsel. It will be looking at different criteria required for the intervention to take place as well.

The article 38(1) of the Statute of the International Court of Justice gives the different sources of international law by stating: “the Court [...] shall apply:

- a. International conventions, whether general or particular, establishing rules expressly recognised by contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognised by civilised nations;
- d. Subject to the decision and the teachings of most qualified publicists of the various nations, as subsidiary means, for the determination of the rules of law.”

We intend to closely look at the UN Charter before we analyse different principles of Customary International Law.

¹⁷ East Africa journal of peace & human rights vol.7, no.1

II.1. LEGALITY OF THE INTERVENTION

II.1.1. UNDER THE UN CHARTER

The article 2 of the International Convention on the Law of Treaties, signed in Vienna in 1969 and which came to force in 1980, defines a treaty as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument, or two or more related instruments and whatever its particular designation. This definition must not be seen as excluding the treaties signed between states and International Organisations.¹⁸ So the UN charter is a treaty between States creating the United Nations Organisation. In terms of International Codified Law, the UN Charter is the most authoritative treaty because it creates obligation to parties and non parties.

The Article 55 of the charter of the United Nations says that, with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The article 56 of the same charter mention that, all Members pledge themselves to take joint and separate action in co-operation with the organisation, for the achievement of the purposes set forth in Article 55. Dr Kindiki has rightly based his argument on the kind of co-operation which is required with the UN bodies. In fact according to the wording of the charter, it does require the authorisation of the

¹⁸ Malcon N. Shaw, International Law, Fourth Edition, Cambridge University Press, 2003.

UN why Kindiki's point of view which says that "this co-operation can take any form, including necessary lobbying leading to the adoption of a 'uniting for peace' declaration by the UN General Assembly"¹⁹ is sustainable.

As the Charter did not precisely say what kind of co-operation is required, it will not be wrong to say that as long as there has been any kind of co-operation, it then meets the requirement of the Charter.

II.1.2. IN INTERNATIONAL CUSTOMARY LAW

Public international law is found upon many sources. Both international contractual law and international customary law can formulate binding legal standards.

International customary law is based on two elements as stated by the International Court of Justice (ICJ) in The Hague; *opinio juris* and corresponding state practice.²⁰ In fact article 38 (1) b says that the Court whose function is decide in accordance with international law, such dispute as are submitted to it, shall apply: [...] international custom, as evidence of general practice accepted as law.

a. General Practice

This element is what many authors refer to as state practice, as M. N. Shaw teaches, "it is how States behave in practice that forms the basis of customary law"²¹. This practice has to be general, extensive and consistent. The three requirements of practice are not absolute. There are examples of customary law emerging from a single action which are normally accepted as instant customary law, but still it

¹⁹ Kithure Kindiki. Humanitarian intervention and state sovereignty in Africa: The changing paradigm in international law, Moi University Press, Eldoret, 2003

²⁰ Wolf von der Wense, What does international law say?
<http://www.ishr.org/activities/hrthroughforce/wense.htm> last consulted on 5th May 2005.

²¹ M. N. Shaw, international law fourth edition, Cambridge, 2003

requires that there has to be a widespread support for that practice. However, as Mary Ellen O'Connell²² points out, such instances are rare.

Since it is impossible to list all the interventions that have taken place, we will just sample some of them:

- The collective intervention by Great Britain, France and Russia in Greece 1827-30 to stop the Turkish massacres and suppression of the revolutionary Greek population;
- The French intervention in the Lebanon 1860-61 authorised and supervised by the five European great powers to stop the massacres of the Christian Minorities committed by the Druses under Turkish supremacy;
- The dictatorial interference by Austria, France, Italy, Prussia and Russia in 1866-68 in the Turkish administration of Crete to protect the oppressed Christian population;
- The collective European great power interference and Russian intervention in the Balkans 1875-78 in favour of the insurrectionists Christians in Bosnia, Herzegovina and Bulgaria, who had been subjected to massacres under Turkish misrule;
- The dictatorial interference by the European great powers 1903-08 in the internal affairs of Turkey in favour of the oppressed Christian Macedonian population.
- The India's intervention in East Pakistan, 1971. In November 1971. India intervened in East Pakistan where Pakistani forces had

²² O'Connell, Mary Ellen, "The UN, NATO, and International Law After Kosovo," Human Rights Quarterly, 2000

committed large-scale human rights violations and had forced some 10 million people to flee to India. India defeated the Pakistani troops and contributed actively to the establishment of the independent state of Bangladesh.

- The Vietnam's intervention in Cambodia, 1978-79. In December 1978, Vietnam invaded Cambodia and expelled the Khmer Rouge regime, which had on several occasions violated the Vietnamese boarder. Vietnam installed a new government. Vietnam invoked humanitarian considerations as justification, for instance the genocide committed by the Khmer Rouge from 1975-79, by which close to two million people were killed.
- The intervention by France in Central Africa, 1979. In 1979, France intervened in Central Africa to put an end to the atrocities committed by President Bokassa, notably a veritable massacre on students, while Bokassa was abroad. France intervened – without meeting any resistance – and reinstated the ousted President Dacko.
- The Tanzania's intervention in Uganda, 1979. In 1979, Tanzania intervened in Uganda and conquered the Ugandan capital Kampala forcing Idi Amin to escape. Tanzania installed a new government. The reign of terror conducted by Amin – resulting in the loss of estimated 300,000 lives.
- The intervention by ECOWAS in Liberia in 1990, the Economic Organisation of West African States (ECOWAS) intervened in Liberia to put an end to the bloody civil war there and restored order in the country, in which at that time there was a complete breakdown of

government. The intervention was subsequently endorsed by the Security Council in Resolution 788 (1992), in which it welcomed the efforts of the ECOWAS to restore peace in Liberia

b. Practice accepted as law

This is the psychological and probably the most controversial aspect of the general practice to be accepted as law. Customary laws derived from a general and consistent practice of states which are accompanied by a belief in, and sense of, legal obligation (*opinio juris*). The difficult task being to prove to establish this element. For instance, it is not easy to precisely know if the state has acted, having in mind the respect of a certain rule of international customary law or if it was just acting on the basis of courtesy, fairness or morality.

To determine whether or not there exists the necessary *opinio juris* in respect of humanitarian intervention, one must critically consider that states continue to apply armed forces for humanitarian purposes without the formal authorisation of the UN²³. The Security Council's Resolution 788 endorsing the intervention done by the ECOWAS forces, is a great prove that the intervention was a very legal act, and to the same extent where the UN did not endorse it, it did not condemn the operation as well and this is a beginning of the foundation of the *opinio juris*.

Building a stable order after intervention for human protection purposes, remains an equally great challenge. Finding a consensus about intervention is not simply a matter of deciding on the legality of the intervention. It is also a matter of deciding when it should happen. In other words what is the level of human right violation which can warrant the intervention? Where should we draw the line in

²³ Kithure Kindiki(2003)

determining when military intervention can be set up? This is the issue we will be dealing with in the next paragraph.

II.2. CRITERIA OF INTERVENTION

As Professor Adams Roberts says, “almost all attempts to develop a consistent doctrine of humanitarian intervention, have depended heavily on that set of conditions or criteria that should be formalized, and would assist in determining whether, in a particular case, a humanitarian intervention would be justified. Should it be added that, extensive agreement on the criteria would be evidence of an emerging doctrine. Then it might make the idea of humanitarian intervention more acceptable to critics, and could also be to safeguard against abuse”²⁴.

The CSS strategic briefing paper suggest that the “Criteria for intervention might usefully be formulated to guide *conduct* in an intervention (proportional use of force, high probability of success, clear and articulated goals, post-conflict plans, following laws of war, etc.), but are unlikely to form the only basis of a *decision* to intervene”²⁵. One may argue that, whether the criteria of intervention will be used to decide or to guide the conduct in an intervention, it is still proved that there is a need to set those criteria.

²⁴ Adam Roberts, The so-called “right” of humanitarian intervention, Year of International Humanitarian Law, volume 3-2000.

²⁵ Humanitarian Intervention: Definitions and Criteria, CSS Strategic Briefing Papers Volume 3; Part 1; June 2000, ISSN 1175-1452

II.2.1.HUMAN RIGHTS OR INTERNATIONAL HUMANITARIAN LAW VIOLATION

There is a controversy concerning the kind of violation of rights which may warranty the humanitarian intervention. The issue being to determine if it is based on violation of Human Rights, or violation of International Humanitarian Law. We will be trying to find out whether the two concepts can apply simultaneously, or if one aspect gives way to another.

Dr Penelope says that, “Most of the writers surveyed who suggested criteria or general principles for intervention, agreed that in order for military intervention to be considered, one of the two conditions must exist:

- a) The government must be committing, supporting, or aiding and abetting widespread violations of internationally recognised human rights or
- b) There must have occurred a total breakdown of law and order resulting in such widespread deprivations of human rights which the government of the target state is incapable of preventing.”²⁶ Just like the adopted definition by NATO which states that “A humanitarian intervention is an armed intervention in another state, without the agreement of that state, to address (the threat of) a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights. The key aspects of this definition are related to sovereignty and human rights.”²⁷

Professor Robert Kolb found that, humanitarian intervention can be based on massive violations of the most fundamental human rights in his article note on

²⁶ Penelope C Simons, *Humanitarian Intervention: A Review of Literature*, Project Ploughshares, Institute of Peace and Conflict Studies, Ontario

²⁷ This definition was adopted by a NATO seminar in Scheveningen on the topic in November 1999.

humanitarian intervention. He says that “, humanitarian intervention is one form of foreign forcible intervention. It may be defined as the use of force in order to stop or oppose massive violations of the most fundamental human rights (especially mass murder and genocide) in a third State”²⁸

In his recent report to the Security Council on the protection of civilians in armed conflict, Secretary-General Kofi Annan (UN 1999) stated that the Security Council, in deciding whether or not to intervene, should consider, among other things, "the scale of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations," just like Professor Adams “most attempts to devise criteria [of the humanitarian intervention] put much weight on the proposition that only the most serious and massive violation of human rights and humanitarian international law can justify intervention.”²⁹

The interaction council report instead of advocating for both human rights and humanitarian law, advocate for humanitarian law or human right, it says that “expectations have been raised that the international community has an obligation to intervene and not simply shrug and turn away when gross violations of human rights or international humanitarian law take place.”³⁰ According to this report one of the two is sufficient; this position is the one which has been taken by the Danish Institute. In fact without supporting the doctrine of humanitarian intervention the Danish

²⁸ Robert Kolb, Note on humanitarian intervention, International Review of the Red Cross No 849, p.119-134, 2003.

²⁹ Adam Roberts, Op Cit

³⁰ Interaction Council, Established in 1983
Chairman's Report on the High-level Expert Group Meeting
International Humanitarian Law,
Humanitarian Crises and Military Intervention
Chaired by The Rt. Honorable Malcolm Fraser
22-23 April 2002
The John F. Kennedy School of Government, Harvard University
Cambridge, Massachusetts, <http://www.interactioncouncil.org>

Institute supports that in extreme cases “it is generally agreed that intervention should be undertaken only in extreme cases of gross and massive violations of human rights or international humanitarian law.”³¹

The same report has listed different writers and their point of view about what should justify the intervention “Cruelties against and persecution of nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind.” (Lauterpacht); substantial deprivation of human rights (Lillich); particularly widespread loss of human life (Moore); severe human rights violations (Scheffer); “widespread deprivations of internationally recognised human rights” (Murphy); “gross human rights violation” (International Law Association); “Genocide or comparable tragedy in which fundamental human rights, including and in particular the right to life are violated on a gross and massive scale”³²(Verwey).

The ICISS report decided not to describe the vase but describe the content. In fact this report doesn't mention whether the intervention should be to protect human rights or humanitarian law, it simply says “when all order within a state has broken down, or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale”. The same report supports that “First, the Commission has resisted any temptation to identify as a ground for military intervention human rights violations falling short of outright killing or ethnic cleansing, for example systematic racial discrimination, or the systematic imprisonment or other repression of political opponents. These may be eminently appropriate cases for considering the application of political, economic or military sanctions, but they do not, in the Commission's view justifies military action

³¹ Danish Institute for International affairs 1999 report

³² Idem

for human protection purposes. Secondly, the Commission has taken a similar view in relation to cases where a population, having clearly expressed its desire for a democratic regime, is denied its democratic rights by a military take-over.”³³ Though this report did not state it clearly this kind of violation the report is advocating for are most likely to occur in time of armed conflict and therefore seem to be more of violation of laws of war than any other human rights.

One may conclude that humanitarian intervention should happen exclusively, to prevent serious breach of humanitarian law except that the position of the ICRC itself on the matter is confusing. In fact the executive summary of the paper giving the position of the ICRC on humanitarian intervention says that “International humanitarian law cannot serve as a basis for armed intervention in response to grave violations of its provisions”³⁴. When article 2 of the four Geneva Convention says that states parties have the obligation to ensure that the convention is not violated by any state party, the ICRC interprets this disposition by advocating for the trial of the its violators. One may respond immediately that this proposition can never stop the violation which is going on. Humanitarian intervention being envisaged in situation of extreme emergency the length of juridical procedure are far from making this option capable of stopping the humanitarian catastrophe to happen.

According to the ICISS report, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert:

³³ ICISS report

³⁴ The ICRC 's position on “humanitarian intervention ”, The paper was prepared by the ICRC's Legal Division to aid in internal discussions intended to clarify the organization's position in this topical debate, IRRRC June 2001 Vol.83 N o 842 527

- 1) Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- 2) Large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

If either or both of these conditions are satisfied, it is our view that the "just cause" component of the decision to intervene is amply satisfied³⁵.

The same report state explicitly better what can be understood as gross human right violation as:

- ✓ Actions defined by the framework of the 1948 Genocide Convention that involve large scale threatened or actual loss of life;
- ✓ Threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving the state action;
- ✓ Different manifestations of "ethnic cleansing," including the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group);
- ✓ Crimes against humanity and violations of the laws of war, as defined in the Geneva Conventions and Additional Protocols and elsewhere, which involve large scale killing or ethnic cleansing;

³⁵ ICISS Report December 2001

- ✓ Situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war; and
- ✓ Overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.

One may conclude that whenever these acts are happening or they are likely to happen, a humanitarian intervention can be envisaged to stop or to prevent them to happen. Though the report did not attempt to define what it understood as large scale of loss of life, and it did not say who then has the obligation to intervene. In fact, it sounds more reasonable not to define what is large scale of human loss, than doing it for the reason that by doing so this gives the opportunity to the perpetrator of these killings to be excused as long as he has not killed up[to a certain number of persons]. In other words, the intervention will be only possible after genocide has happened.

As regards the question ‘who must intervene?’ this is what constitutes the next paragraph.

II.2.2. WHO HAS THE DUTY TO INTERVENE?

Instead of answering the question, the ICISS suggested that one of the conditions of the intervention is that, it has to stand a reasonable prospect. According to the commission, military action can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place. “Military intervention is not justified if actual

protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.”³⁶

Most writers agree that the intervention must be a multilateral action. The Danish Institute Report notes that “An intervention by one state may still be considered legitimate, if the humanitarian emergency is apparent, but no other states than the neighbouring states want to make the effort”³⁷. In addition, the Report states that, while the fact that an intervention is a multilateral endeavour, does not make it legal, where more than one state has participated in a decision to intervene for humanitarian reasons ... the chance that the doctrine will be invoked exclusively for reasons of self-interest [is reduced].

Cassese argues that “such action should be taken by a group of states rather than a single hegemonic Power, or such a Power with the support of a client state or an ally, no matter how strong that Power’s military, political and economic authority. Hence, the question of what entity can legitimately undertake such an endeavour, and which entity has the resources to mount a military intervention should be separated”³⁸. However, from a practical perspective this is not always possible and the history of United Nations humanitarian interventions shows that the humanitarian campaigns are usually led by the powerful states with the necessary military and economic resources.

³⁶ Idem

³⁷ Danish Institute Report 1999

³⁸ Cassese, Antonio 2000, "A Follow-up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*," *The European Journal of International Law* 10, 791-800.

Charney, on the other hand, suggests that “the unauthorised intervention should be undertaken by the relevant regional organisation.”³⁹ Regional organisations constituted under Chapter VIII of the Charter are prohibited from taking enforcement action without the authorisation of the Security Council (Article 53[1]). However, because they have a mandate of dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, the involvement of the respective regional organisation as the principal actor in an unauthorised humanitarian intervention would enhance the legitimacy of that intervention. “Practically speaking, most regions do not have sufficient capabilities and security organisations with the capacity to carry out major peacekeeping and peace enforcement operations.”⁴⁰

This literature has led us to the conclusion that only states that are capable of carrying out the intervention can do so, but one may argue that this position gives to these countries, the right to intervene but not the obligation. In the sense that if they don't intervene, they actually do not have any legal obligation to do so which is a very unfortunate thing. By giving these countries they should on the other hand be compelled to intervene, and if they fail they should be condemned for not intervening.

³⁹ Charney, Jonathan 1999, "Anticipatory Humanitarian Intervention in Kosovo," *Vanderbilt Journal of Transnational Law* 32, 1231-1248.

⁴⁰ Penelope C Simons, *Humanitarian Intervention: A Review of Literature*, Project Ploughshares, Institute of Peace and Conflict Studies, Ontario

II. 2. 3. NON SELF INTEREST AND LAST RESORT SOLUTION

Human Rights Watch suggests that “the intervention must be guided primarily by a humanitarian purpose; we do not expect purity of motive, but humanitarianism should be the dominant reason for military action.”⁴¹ This position seems to be ambiguous. One may ask if beside the fact that other conditions of intervention have been met, the fact that the intervener state has a particular self interest, can pollute the definition of the intervention or not.

When Tanzania intervened in Uganda in 1979, apart from the fact that the brutal regime of Idi Amin had at the time of the intervention, killed thousands of people, the background to the intervention was said to be a conflict concerning Kagera, a region of Tanzania annexed by Amin as well. Theoretically speaking, there should not be a self interest motive for the intervention, but from a practical point of view one may say that if other conditions for the intervention have been met and if there is still a personal interest that the intervener has, this can not stop the intervention to take place.

But this position need to be cleared a little more if for instance, the main reason for the intervention is to rescue nationals of the intervener’s state or a self defence reason then such intervention should be under that regime and be limited to it. It is only when the main motive of the intervention is violation of humanitarian law and that there can be found another factor that we are saying the existence of another subsidiary reason can not prevail the intervention to happen.

⁴¹ Human Rights Watch, The Standards for Humanitarian Intervention, January 2004

The International law has listed different authors and there point of view concerning this issue;” relative disinterestedness of intervening states – the overriding purpose must be humanitarian (Lillich); the humanitarian purpose and objective of the intervention must be paramount (Scheffer); relative disinterest, overriding motive should be the protection of human rights (Verwey). Primary goal to remedy gross human rights violation and not to achieve some other goal pertaining to the self-interest of the intervening state(s).⁴²

The other criteria given by the Human Rights Watch is that “military action must be the last reasonable option to halt or prevent slaughter; military force should not be used for humanitarian purposes if effective alternatives are available”⁴³. In fact this point of view has no opposition to it. It is as well shared by the Danish Institute which advocate for the exhaustion of diplomatic efforts and non-military measures of coercion. It says that “diplomatic efforts should first be made to bring pressure to bear on the government violating human rights.”⁴⁴ In fact, before intervention is commenced, a clear ultimatum should be given to the government of the state. The International Law School says that “All non-intervention remedies must be exhausted before a humanitarian intervention can be commenced.”⁴⁵

⁴²The International Law Association in 1965 established a Committee on Human Rights, which in 1969 established a Sub-Committee to study the international protection of human rights by general international law, including the status of the doctrine of humanitarian intervention. Between 1970 and 1976 the Sub-Committee delivered four reports on the issue of humanitarian intervention (chaired by the American professor Lillich). In the course of its work, the Sub-Committee discussed the feasibility of drafting a protocol for Humanitarian Intervention for the Protection of Human Rights including criteria for legitimate humanitarian intervention. Drawing on legal scholars, the Sub-Committee managed to

produce a preliminary list of criteria (International Law Association, 1974)

⁴³ Human Rights Watch, Op Cit.

⁴⁴ Danish institute report 1999

⁴⁵ The International Law Association, Op Cit

Chapter III:

THE DRC CASE

III.1. Background information

Rwanda, Uganda and Burundi invaded the DRC in August 1998 in an effort to bring down the government of Laurent-Désiré Kabila, whom they accused of supporting armed opponents based in the DRC. During the war, the DRC government received support from Zimbabwe, Angola, and Namibia and for a time Chad. This war is often referred to as the second war, to differentiate it from the earlier 1996 war that brought Laurent-Désiré Kabila to power.

In 1996, Laurent-Désiré Kabila was supported by all the countries that sought to overthrow him in 1998. The second war quickly resulted in an impasse. In the meantime, President Laurent-Désiré Kabila was assassinated in January 2001 and replaced at the presidency by his son Joseph Kabila. In late 2002, Rwanda and Uganda signed peace deals with the DRC government to end a conflict that claimed over three million lives in five years.

In December 2002, the DRC government, major armed political groups, unarmed political opposition in DRC and civil society signed a power-sharing accord. As a result of that agreement, in early July 2003 the leaders of armed groups that have committed war crimes in eastern DRC took their seats in a new government of transition and national unity. Article 199 of the transitional constitution granted an amnesty for acts of war and political crimes. This led many rebels to come back to the DRC with the hope of participating in the reconstruction of the country.

Thousands of children, women and men are dying every day from the effects of the conflict that has ravaged the region since 1998. Recent figures produced by the International Rescue Committee indicate that “the conflict has caused 3.8 million excess deaths, or 1,000 per day, the majority children dying from preventable disease”⁴⁶.

As if it was not enough a devastating inter-communal violence erupted in June 1999 between members of the Hema and Lendu ethnic groups. This conflict has been manipulated and exacerbated by leaders of armed political groups fighting for control of the region, who have used ethnic affiliations to recruit combatants, sometimes forcibly, and to acquire economic and political power. The Ituri region of north-eastern Democratic Republic of Congo (DRC) is suffering one of the world’s gravest humanitarian and human rights crises. “An estimated 50,000 have died as a result of armed conflict in the region and more than 500,000 people displaced since mid-1999.”⁴⁷

On May 26 dissident forces under Brigadier General Laurent Nkunda and Colonel Jules Mutebutsi started an uprising against the unified national army of the 10th Military Region in Bukavu. According to Human Rights Watch, “Government troops killed at least 15 civilians between May 26 and 28, including those from the

⁴⁶ Amnesty International Public Statement
D R Congo: Renewed fighting in North Kivu - need for unconditional protection of civilians AI Index: AFR 62/027/2004 (Public), News Service No: 326; 21 December 2004

⁴⁷ No truly authoritative figure exists for the numbers killed as a result of the violence in Ituri. In March 2002, a Congolese human rights organization based in Ituri, Justice Plus, estimated the death toll (both direct and indirect casualties of fighting) at 47,000. Other humanitarian sources have since put the figure higher, at around 58,000 by September 2002. The UN Office for the Coordination of Humanitarian Affairs (OCHA) cited 50,000 dead and 500,000 displaced in its Integrated Regional Information Network’s (IRIN) report on Ituri in December 2002.

minority Congolese ethnic group known as Banyamulenge. Dissident troops killed civilians and carried out widespread sexual violence against women and girls, some of them as young as three years of age”⁴⁸. In an unconfirmed estimate, international humanitarian agencies report that as many as 80 people may have died in fighting in the city from May 26 to June 6.

Stephan Van Praet, advocacy director for the Human Rights Watch’s Africa Division said “Once again, civilians have been targeted by all sides; Commanders say they acted to protect civilians, but instead their soldiers have raped and killed.” In the past few months, rebellious factions of former rebel groups in Ituri and the Kivus had used violence to oppose integration into the new Congolese army and to challenge the authority of the fragile transitional government in the capital Kinshasa. The Kinshasa authorities had been unable to meet the political challenges and failed to stop the violence. Local sources claimed to have identified Rwandan military working with the dissident forces, an accusation Rwanda has emphatically denied. Government troops retook Bukavu on June 9 after the retreat of dissident forces, though fears remained that civilians could again be targeted in retaliation. Earlier in May 2002 General Nkunda was accused by Human Rights Watch of having committed war crimes in Kisangani when an attempted mutiny in the Rwandan-backed rebel Congolese Rally for Democracy-Goma was brutally stamped out, resulting in the deaths of some 160 people.

In this chapter we will be doing a confrontation of some rules of International Humanitarian Law to the facts that went on in the DRC conflict and we will be trying to see whether different parties in the conflict respected the norms of war. Under the 1949 Geneva Conventions, the war in the DRC, including in Ituri, was an

⁴⁸Human Rights Watch, D.R. Congo: War Crimes in Bukavu, Brussels, June 11, 2004.

international armed conflict that intersects with several internal conflicts. International armed conflicts, defined as those occurring between states, are regulated by the 1949 Geneva Conventions, the First Additional Protocol of 1977 to the Geneva Conventions (Protocol I), and customary international humanitarian law.

As said earlier, internal armed conflicts are those arising within the territory of a state party to the Geneva Conventions and are covered by article 3 common to the 1949 Geneva Conventions and the Second Additional Protocol of 1977 to the Geneva Conventions (Protocol II), as well as by much customary law applicable to international conflicts. The DRC ratified the 1949 Geneva Conventions in 1961 and Protocol I in 1982.

III.2. Violation of the Common Article 3

The common article 3 to the Geneva Conventions expressly binds all parties to an internal conflict, including non-state armed groups, such as all RCD factions, MLC, Lendu militias, Ngiti militias, and UPC/Hema militias, although they do not have the legal capacity to sign the Geneva Conventions. The Common Article 3 requires the human treatment of civilians and captured combatants and prohibits violence to life and person, particularly murder, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. The practice shows that judgements has become highly politicised⁴⁹

⁴⁹ MLC forces. Bemba When the Kinshasa government and its ally, the RCD-ML, were outraged at Bemba's attempts to muscle into new territory and may have prompted publicity about abuses by

Customary international humanitarian law also prohibits armed groups from directly attacking civilians, or carrying out attacks that have a disproportionate or indiscriminate effect on the civilian population.

In violation of Common Article 3, the various armed political groups and militias, including the RCD-ML, MLC, RCD-N, UPC/Hema militias, Lendu militias, and Ngiti militias, have committed deliberate killings of unarmed civilians on a mass scale. They have also carried out summary killings of captured combatants, torture and arbitrary arrests⁵⁰, rape and other direct assaults. Some forces have also engaged in cannibalism and deliberate mutilation of corpses. Although in some cases the alleged perpetrators have been identified, those responsible for countless atrocities in Ituri have not been brought to justice.

reacted to the substantial national and international criticism by having MLC Lieutenant-Colonel Freddy Ngalimo and twenty-six others tried for "extortion, rape, assassination, looting and disobeying orders." Under Common Article 3 to the Geneva Conventions, the MLC had legal authority to prosecute and punish its own soldiers by a regularly constituted court, but the trials failed to meet internationally recognized standards for fairness. The judges were neither independent nor impartial and the prosecution had done no real investigation nor offered serious examination of the charges. The trial, held in February 2003, appeared to have been a public relations exercise with the aim of shielding Bemba and his main officers from more serious prosecutions. It resulted in a number of convictions, with the lower ranking officers sentenced to harsher punishments than their commanders. The most serious sentence of life imprisonment went to Corporal Katembo Kombi and Lt. Jose Zima for murder. Colonel Freddy Ngalimo, who had been in charge of the military operation with direct control over events, was found guilty only of permitting insubordination by troops under his control, and was sentenced to three years imprisonment. Sixteen combatants received sentences ranging from six months to three years for crimes of desertion, disobedience, or rape, and seven others received only "internal sanctions" for indiscipline. For actions that might have amounted to crimes against humanity, these trials made a mockery of justice.

⁵⁰ According to Human Rights News, D.R. Congo: Executions, Torture by Armed Groups in Ituri, published in London, October 22, 2004, People's Armed Forces of Congo combatants under the command of General Jérôme Kakwavu tortured 24 civilians and killed six of them. Operating in Ituri, a region in the north eastern corner of the Democratic Republic of Congo, the armed group has so far remained outside the peace process that has brought other rebel forces into a transitional government. The same report says that the People's Armed Forces of Congo (Forces Armées du Peuple Congolais, or FAPC) arrested the civilians in the Ituri town of Kaliko on October 12, accusing them of having participated in the killing of two soldiers in the area days earlier. They brought them to a FAPC military camp in Ariwara and detained them in a makeshift underground prison. Soldiers then beat the detainees with large wooden sticks on their heads and backs. Two detainees were executed and four others died later of their injuries. Soldiers released the remaining 18 civilians on October 14 after receiving payment from a local chief. All 18 were hospitalized with their injuries.

All parties to internal armed conflicts are obliged to uphold Common Article 3 of the 1949 Geneva Conventions which extends protection to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause..." The Article requires that "in all circumstances" such people shall be "treated humanly, without any adverse distinction found on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria". The Article prohibits certain acts against these persons "at any time and in any place whatsoever", including: "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples."

Under Article 14 of the 1977 Additional Protocol II to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts, combatant forces are also forbidden "to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works". When the loyal forces to the Kinshasa government fought with its insurgents in South Kivu, Ripardhu⁵¹ reported that at least 84 houses were burnt and 120 civilians were killed by armed group on the simple ethnic ground. These losses are said to have been committed by soldiers under command of Laurent Nkunda and Jules Mutebuzi.

⁵¹ see foot note no 15

The Fourth Geneva Convention, which governs the protection of civilians in time of war and applies "to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties". Article 27 provides that: "Protected persons" shall at all times be humanly treated and shall be protected especially against all acts of violence and threats thereof..." Article 146 of the Convention places an obligation on the High Contracting Parties to enact effective penal sanctions for persons who have committed, or ordered to be committed, "grave breaches" of the Convention. Article 147 defines "grave breaches" as "wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, wilfully depriving a protected person of the rights of fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

Article 146 additionally requires each High Contracting Party "to search for persons alleged to have committed or to have ordered to be committed, such grave breaches and ... bring such persons, regardless of their nationality, before its own courts". If it does not do so, it must extradite such suspects to any other High Contracting Party on request if that state has sufficient evidence to commence a prosecution.

III.3. Rape cases

The article 27(2) of the Geneva Convention says women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. In the course of the armed conflict in eastern Democratic Republic of the Congo (DRC), tens of thousands of women and girls have been victims of systematic rape and sexual assault committed by combatant forces. Women and girls have been attacked in their homes, in the fields or as they go about their daily activities. Many have been raped more than once or have suffered gang rapes. In many cases, women and young girls have been taken as sex slaves by combatants. Rape of men and boys has also taken place. Rape has often been preceded or followed by the deliberate wounding, torture (including torture of sexual nature) or killing of the victim. Rapes have been committed in public and in front of family members, including children. Some women have been raped next to the corpses of family members.

According to the Amnesty International Report, “experienced UN and international humanitarian NGO staff were unanimous that they had never come across as many victims of rape in a conflict situation as they had in DRC. They were unanimous, too, in believing that many more victims are still to be identified. Around 40,000 cases have been reported by the joint initiative to combat sexual violence against women and children (15), that is to say, 25,000 cases in South-Kivu, 11,350 cases in Maniema, 1,625 cases in Goma, the capital of North-Kivu, and 3,250 cases in Kalemie, Katanga province (16). These figures are only partial and represent only those women who have been able to seek assistance. It can be assumed that the actual

number of victims suffering the consequences of rape is much higher than these estimates.”⁵²

Some of the Human Rights reports chock people’s conscience when they report mass rapes of young girls as young as three years old. In Ituri, according to Human Rights combatants of all armed groups have committed rape and other forms of sexual violence. They have often raped women and girls as part of a more general attack in which these forces killed and injured civilians and pillaged and destroyed property. This was done to terrorize communities or punish them for real or supposed aid to opposing forces. In other cases, women and girls were raped simply due to their ethnicity. In some cases, victims were forced to leave with the rapists and have not been seen since. Some may have been killed and others may be being held by their abductors for continuing sexual and other services. Some rapists aggravated their crimes by other acts of extraordinary violence such as puncturing the vagina with spears or cutting off parts of the body. Armed combatants from militia groups and regular soldiers responsible for acts of sexual violence commit war crimes. Where these crimes are widespread or systematic, they could amount to crimes against humanity.

III.4. EXECUTION OF CHILD

International humanitarian law treaties, also known as the laws of war, also exclude child offenders from the death penalty:

- The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (the Fourth Geneva Convention) states in Article 68: “In any

⁵² Amnesty international, Democratic Republic of Congo: Mass rape - time for remedies AI Index: AFR 62/018/2004 of 26 October 2004

case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence”.

- The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I of 1977) states in Article 77(5): "The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed."

- The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II of 1977) states in Article 6(4): "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence. . ."

(Article 6(4)), this law has not been respected in the DRC conflict for instance according to the Amnesty International report of September 2004 “Kasongo, a 14-year-old child soldier, was executed in January 2000 within half an hour of his trial by a special military court. The special military courts were abolished in April 2003.”⁵³

⁵³ Amnesty International Report, Stop Child Executions! Ending the death penalty for child offenders, AI Index: ACT 50/015/2004, September 2004

III.5. The international reaction.

III.5.1. The SADC operation in DRC.

It is following the activation of the organ by President Kabila's request for assistance to repel the invading Rwandese and Ugandan soldiers, Zimbabwe as Chairman of the Organ convened, on 7 August at Vistiria Falls, a meeting for heads of the Southern Africa Development Community (SADC) States to consider the DRC's. Twelve days later SADC forces from Zimbabwe, supported by Zambia, Angola and Namibia started streaming into the DRC both to rescue and to sustain President Kabila's government, effectively intervening in internal affairs of another sovereign state.

As Jennings and watts wrote, "the requirement that interference should be dictatorial if it is to amount to intervention excludes from intervention assistance rendered by one sate to another at the latter's request and with its consent, which may be given ad hoc or in advance by treaty"⁵⁴ the consent and in this case the request of President Kabila for external help⁵⁵ is a major factor which removes the SADC operation under the possibility of being a humanitarian intervention. This position is supported by Kobina Daniel and Sisule who said that "in deed, it is even suggested by Verwey that the concept of humanitarian intervention necessarily embodies the absence of Security Council authorisation or the invitation of the targeted state's government."⁵⁶

⁵⁴ Jennings and Watts, eds., *Oppenheim's International Law*, Vol. I, Peace, (9th ed. 1992), Longman, London.

⁵⁶ Kobina Daniel and Sisule F. Musungu, *The African union and the Question of Humanitarian International: A New Dawn?* East African Journal Of International And Comparative Law

A part from the fact that the intervention was at the request of the Kinshasa government, it has to be précised that this was not intended to neither stop nor prevent violation of humanitarian international law. In fact the Zimbabwean defence minister Moven Mahachi made the announcement of the operation on a local radio saying that “it was unanimously agreed that we must, with urgency, make sure practical assistance, both material and manpower, is given to Congo in order to restore peace and stability.”⁵⁷ One may say that restoration of peace is something else and different from violation of humanitarian law even though both are most likely to happen at the same time.

III.5.2.The United Nations Mission in The DRC (MONUC)

After the signature of a Ceasefire Agreement for a cessation of hostilities between all belligerent forces in the DRC, on 10th July in Lusaka Zambia, signed by the Democratic Republic of the Congo (DRC) along with Angola, Namibia, Rwanda, Uganda and Zimbabwe, referring to the Secretary-General's recommendation featured in his report of 15 July 1999, the Security Council authorized by its resolution 1258 of 6 August 1999, the deployment of up to 90 United Nations military liaison personnel, together with the necessary civilian, political, humanitarian and administrative staff, to the capitals of the States signatories to the Ceasefire Agreement and the provisional headquarters of the Joint Military Commission (JMC), and as security conditions permit, to the rear military headquarters of the main belligerents in the Democratic Republic of the Congo and, as appropriate, to other areas the Secretary-General may deem necessary, for a period of three months, with the following mandate:

⁵⁷ <http://archive.abcnews.com/sections/world/DailyNews?Congo980819.html>

- To establish contacts and maintain liaison with the JMC and all parties to the Agreement;
- To assist the JMC and the parties in developing modalities for the implementation of the Agreement;
- To provide technical assistance, as requested to the JMC;
- To provide information to the Secretary-General regarding the situation on the ground, and to assist in refining a concept of operations for a possible further role of the United Nations in the Implementation of the Agreement once it is signed by all parties; and
- To secure from the parties guarantees of cooperation and assurances of security for the possible deployment in-country of military observers;

Once again the mandate of the UN personnel is clear, no where in its agenda is stipulated that it should bother no matter how many Congolese are killed or not. If it is true that the Security Council should not be blamed by that, then it should leave a way to somebody else that is capable of stopping or preventing the killings.

III.5.3.The French led multi force

After UPC Hema militia slaughtered hundreds of civilians in Bunia in early May. The U.N. Security Council authorized an Interim Emergency Multinational Force to restore order inside the town. The Multinational Force consisting mostly of French troops was the first mission ever deployed by the European Union.

In fact the Security Council, taking note of the request of the Secretary-General to the Council in his letter dated 15 May 2003 (S/2003/574) and taking note also of the support for this request expressed in the letter to the Secretary-General

from the President of the Democratic Republic of the Congo and also by the Ituri parties on 16 May 2003 in Dar es Salaam, as well as the support expressed in the letters to the Secretary-General from the President of Rwanda and from the Minister of State for Foreign Affairs of Uganda, as requested by the Secretary-General for the deployment of a multinational force in Bunia, Determining that the situation in the Ituri region and in Bunia in particular constitutes a threat to the peace process in the Democratic Republic of the Congo and to the peace and security in the Great Lakes region, acting under Chapter VII of the Charter of the United Nations, among other things authorized the deployment until 1 September 2003 'which was prolonged at before this date' of an Interim Emergency Multinational Force in Bunia in close coordination with MONUC, in particular its contingent currently deployed in the town, to contribute to the stabilization of the security conditions and the improvement of the humanitarian situation in Bunia, to ensure the protection of the airport, the internally displaced persons in the camps in Bunia and, if the situation requires it, to contribute to the safety of the civilian population, United Nations personnel and the humanitarian presence in the town;

The multi force had serious restriction which could not allow it to do much. Not only that it came late, after thousands have been killed, it had a sphere so strictly determined until may question it really motive, the protection of internally displaced persons as well as the protection of civilians precisely in Bunia seems not to the primary reasons of its setting up, this should not be a wonder its believed that this was the price the Republic of France had to pay to get an authorisation from the Security Council to interfere in the Great Lakes region after the Opération Turquoise, other wise it could have been vetoed against by another state member of the Security Council as it happen again when France requested for the authorisation to stop killing

of Rwandese Refugees in the Camps in the Democratic Republic of Congo. One may then conclude that resolution 1484 of 30 May 2003 though taken under Chapter VII of the United Nations Charter failed halt the grave violation of humanitarian international law in the Democratic Republic of Congo therefore the need to look for an alternative elsewhere.

III.5.4. A possible intervention under the Constitutive Act of the African Union

The article 4(h) of the African Union Charter says clearly that the Union shall function in accordance with the following principles: [...] the right of the Union to intervene in a Member state pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide and crimes against humanity. This move is one of the important depart the Union made from the former Organisation of African Unity.

Has it to be précised that the competent authority to authorise this intervention is the Assembly of the Union which is composed of heads of states and government or their duly accredited representatives, is the supreme organ of the Union as stated in the article 6 of the Constitutive Act. One asks then what is it that the Union did not set a humanitarian intervention in Darfur? If the basic argument as regard to intervention has been that because of the potential paralysis that is induced by the political sensitivity of the Security Council veto power, unilateral intervention is permissible where the Council fails to act, the AU was to serve better by acknowledging not only the conceptual difficulties of humanitarian intervention without prior UN endorsement but also the practical ones, in fact if “the NATO campaign in Kosovo cost approximately a billion dollars per week, if the humanitarian campaign of

ECOMOG in Liberia and Sierra Leone are said to have cost to Nigeria up to one million dollars per day, the practicality of cross border humanitarian assistance without the benefit of the UN's deep pocket is questionable.⁵⁸ as noted by Ben Kioko "in providing for the right of intervention , the African Union has moved away from non-interference or non-intervention to what could be referred to as the doctrine of 'non-indifference' ⁵⁹" but its financial situation will probable not allow it to undertake interventions. Still it was a good move to the change of values in international law unfortunately, the Heads of State and Government have passed the first amendments to the Constitutive Act of the African Union within seven months of the launch of the organization. This article provides a legal analysis of the broadening of Article 4(h) of the Act, the right of intervention, to prevent a "serious threat to legitimate order".

If the original aim of providing for the right to intervene in the AU Act was informed by the desire to protect the individual by allowing intervention in situations of grave violations of human rights including crimes against humanity, genocide and war crimes. As noted by Evarist Baimu and Kathryn Sturman, "the amendment to article 4(h) brings back the idea of protection of regimes and not individuals. In a sense it constitutes a step backward in the quest to enhance the protection of individuals' rights against infringements by the state."⁶⁰ A part the question of financial resources the African Union has gone back to where it was coming from if the OAU faced serious criticisms of being a club of Heads of States because of the protective aspects it had towards governments there should

⁵⁸ Kobina Daniel and Sisule F. Musungu, Op Cit.

⁵⁹ Ben Kioko, The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention, *International Review of the Red Cross, Humanitarian Debate: Law, Policy, Action*, December 2003 Volume 85, N0 852

⁶⁰ Evarist Baimu, and Kathryn Sturman, Amendment to the African Union's right to intervene: A shift from human security to regime security? *African Security Review* Vol 12 No 2, 2003

be any reason to transform the Union to a similar institution than what it replaced. Beside any intervention which will occur with the purpose of supporting a government though elected will never be called humanitarian intervention in fact the Geneva Conventions themselves do never say a word about it and by diluting the ground on which an intervention can occur such legal system will end up corrupting the whole theory behind the intervention.

The consideration of political factors framed as legal theory will become a serious breakdown to the whole system, indeed countries like Rwanda being at the same time at the front line of sending troop to Darfur when they are being accused of violation of the Laws of war in DRC leads us to question the whole operating system of the Union.

One may suggest that the union should constitute itself on the values it advocates for in its preamble and straighten itself on those basis regardless to political considerations this is how it can be able to address issues like humanitarian intervention properly.

CONCLUSION

Some commentators have argued that humanitarian intervention outside the United Nations system or other collective security organisation is authorized by general international law, or that at least a rule of customary international law is currently in process of development.⁶¹ On the other hand, many empirically-based examinations have reached the opposite conclusion, they say that there is lack of evidence to justify the notion there exist a customary rule of international law authorizing States to undertake Humanitarian Intervention,⁶² as there is a rule of international law protecting the state sovereignty and equality of states.

One may argue as it is stated in the Danish report that “humanitarian intervention does not violate the core of state sovereignty. The core of sovereignty is the territorial integrity and political independence of the state. Humanitarian intervention has a limited, strictly humanitarian purpose, and thus, although clearly encroaching upon, does not strike at the heart of state sovereignty.”

This is why it has been suggested that human rights mostly humanitarian law can no longer be considered a purely domestic concern and the concept of sovereignty cannot be used by governments to shield themselves from responsibility for gross violations of these rights, or from shirking their obligations with respect to the protection and treatment of civilians in situations of intra-state conflict.

⁶¹ Wil Verwey, *Humanitarian Intervention in the New Humanitarian Law of Armed Conflict*, (ed Cassese) (1986) at 60-66; and Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988), Jean- Pierre Fonteyne, *The Customary Law Doctrine of Humanitarian Interventions: Its Current Validity Under the United Nations Charter*, 17 *Comparative Juridical Review (USA)* (1980) and de Schutter, *Humanitarian Intervention: a United Nations Task*, 3 *California Western Law Review* (1972)

⁶² Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* 1993

Thus Fernando Tesón, a leading proponent of the legal right to unilateral humanitarian intervention, argues that “The human rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting human rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defence of fundamental human rights is therefore not a use of force inconsistent with the purposes of the United Nations⁶³”.

Nevertheless most likely, humanitarian intervention will be applied in the future, as in the past, by powerful states against weak states, notably third world states. Thus, humanitarian intervention may be seen as adding to the already existing inequality in the international community, thereby further undermining the principle of equality of states on which the UN Charter is formally based. This poses a problem of (political) legitimacy of humanitarian intervention in international relations if the intervention is to be done by states which can successfully carry it out it seems like there will never be a possibility of the intervention in the super power states regardless of the respect of humanitarian law by these states, except that this reality applies even for the intervention authorised by the security council in a country with veto. On the other hand, Humanitarian intervention might increase observance of human rights in weak states. Absence of humanitarian intervention in the face of

⁶³ Tesón, Fernando 1997, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., Transnational Publishers Inc., Irvington-on-Hudson, NY.

genocide and other gross and systematic violations of rules of war, is not only unjust but is also likely to encourage coercive methods of weak state regimes in their dealing with separatist groups and alienated ethnic and religious communities. By conducting humanitarian interventions where possible, the incentives to weak state regimes to observe human rights and seek peaceful solutions to internal problems will increase. Observance of human rights is a likely precondition for internal stability in weak states and for long-term global political order.

This reality brings out the need of having standard of criteria for legitimate humanitarian intervention. As it is hardly realistic in the foreseeable future that states should altogether refrain from such intervention if it is deemed imperative on moral and political grounds.

Recognising this, the crucial questions are: Under what conditions (criteria) should humanitarian intervention be considered legitimate? What kind of justification could and should these criteria provide? Is it desirable and realistic to formalise such criteria? Among legal scholars and political scientists these questions have been discussed for decades, if not for centuries.

The purpose of establishing criteria is to prevent the abuse of humanitarian intervention by defining conditions for its legitimate use.

Where intervention did not take place nor did not stop violation of humanitarian law, many African peoples, or to some extent countries of third world have concluded that, for all the rhetoric about the universality of human rights, some human lives end up mattering a great deal less to the international community than others. Again this is an argument in favour of a certain formalisation of the institution of humanitarian intervention.

Human Rights Watch⁶⁴ estimates that at least 5,000 civilians died from direct violence in Ituri between July 2002 and March 2003, with hundreds more having died in this eastern region during the past year. These victims are in addition to the 50,000 civilians who died there since 1999, according to U.N. estimates. Since the formation of the transitional government in Kinshasa last year, several thousand more have died in deliberate attacks on civilians by armed groups in the Northern Katanga province.

These losses are just part of an estimated total of 3.3 million civilians dead throughout the Congo, a toll that makes this war more deadly to civilians than any other since World War II. In Bukavu, south Kivu, both government and dissident forces carried out war crimes, killing and raping civilians in their battle to control the city. This is only the latest round of fighting in the eastern parts of Congo, where massive violations of human rights have become commonplace.

Women and girls have been particularly targeted in the Congo, with most of the forces involved in the conflict using sexual violence as a weapon of war. The United Nations estimates that more than 40,000 women and girls may have been raped in the eastern parts of Congo over the past five years, some as young as three years of age.

The conflict in the Democratic Republic of Congo has once again brought to our minds the fore the longstanding legal debate surrounding the doctrine of humanitarian intervention and in particular the right of states to intervene militarily in another state, without Security Council authorisation, in order to prevent gross violations of international humanitarian law. The armed forces and militias involved in the Ituri conflict have been responsible for serious violations of international humanitarian law.

⁶⁴ Human Rights Watch, ICC's First-Ever Probe Must Be Effective Criminal Responsibility in Congo Conflict Reaches Across Borders

What underlies the humanitarian intervention debate is a perceived tension between the values of ensuring respect for fundamental human rights and the primacy of the norms of sovereignty, non-intervention, and self determination which are considered essential factors in the maintenance of peace and international security as pointed out in the Danish Report.

These values are set out in the United Nations Charter as fundamental purposes of the United Nations. However, while there are mechanisms within the Charter for the protection and enforcement of peace and international security (i.e., Article 2[4] and Chapter VII), there are no equivalent provisions or mechanisms in the Charter for the protection of human rights⁶⁵.

Though it is argued that humanitarian intervention does not violate the core of state sovereignty, the core of sovereignty is the territorial integrity and political independence of the state. Humanitarian intervention has a limited, strictly humanitarian purpose, and thus, although clearly encroaching upon, does not strike at the heart of state sovereignty.

A similar argument is sometimes invoked to justify the use of force by a state to protect its own nationals abroad. It may be asked, whether such a doctrine – in light of the development of human rights after 1945 – is fundamentally different from humanitarian intervention to protect foreign nationals in their own state.

⁶⁵ Peterson, Frederick 1998, "The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations," *Arizona Journal of International and Comparative Law* 15, 871-904.

From the point of view of sovereignty there is a marked difference. First, in the case of intervention to protect nationals abroad there exists a legitimate bond between the intervening state and the individuals in jeopardy. Second, such operations are normally small-scale and, provided the intervention sticks to its stated purpose; the interests of the target state are not really at stake. Neither of these observations hold true for humanitarian intervention.

As the report to the United Nations on the Rwanda genocide states, “the United Nations—and in particular the Security Council and troop contributing countries—must be prepared to act to prevent acts of genocide or gross violations of human rights wherever they may take place,”⁶⁶ then states have an obligation, not merely an option, to use force as needed for humanitarian reasons.

How can it be determined whether a particular practice is evil enough to justify either humanitarian intervention or classification as a crime against humanity under the Rome Statute? This position will raise serious concern because no clear standards exist to deal with this issue. Yet the idea of requiring international responses to evil, and establishing a criminal court to punish particular acts assumes that standards can not only be articulated, but can be fairly applied to all states and all persons. What is the source of the belief that such universal standards exist?

At the United Nations General Assembly in 1999, and again in 2000, Secretary-General Kofi Annan made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues, to “forge unity” around the basic questions of principle and the process involved. He posed the central question starkly and directly:

66. *UN Rwanda Report*, *supra* note 3.

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

It is sure that, what is happening in DRC has reached the level of grave breaches of the Geneva conventions as stipulated in its article 147, and that all the attempted stepping in of outside military actions neither prevented nor stopped the killings, the question of what should be done then remain unanswered. One may suggest that the African Union, beside its financial difficulties, was the best institution which could give hope except that the amendment already done as regards to the intervention, should be discouraged. This is to give legal basis of the intervention which can be defensible on other grounds, apart from political ones since outside the UN sphere it seems hard to envisage it.

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