

Lund University
Human Rights Studies
Author: Jon Jeppsson

MRSK30
Autumn Term 2009
Tutor: Olof Beckman

Contesting Illegality

A Critical Examination of the Unlawfulness of
Humanitarian Interventions

Abstract

This thesis aims to critically examine the unlawfulness of humanitarian interventions. It does so by theoretically adopting a legal positivist perspective, combined with a teleological approach. The thesis examines in detail the provisions of the Articles in the UN Charter relating to the prohibition of the use of force. Furthermore, it scrutinizes the central concept of sovereignty and provides an alternative comprehension of it, in which sovereignty is understood as the right of the citizen over the state. Humanitarian interventions are then discussed in order to illuminate the main arguments of the debate. Humanitarian and legal aspects are the central topics in this discussion. A case study, examining the Vietnamese intervention in Cambodia 1978-1979, is then provided to capture the arguments in a comprehensive and accessible manner. The conclusion suggests that international law regarding the prohibition on the use of force is not potent enough to undermine the legitimacy of humanitarian interventions.

Key Words: Humanitarian Interventions, UN Charter, Sovereignty, Legitimacy, Vietnam/Cambodia

Total Number of Words: 11,446 (73,261 characters including spaces)

1. INTRODUCTION.....	1
1.1 PURPOSE OF STUDY.....	1
1.2 METHOD.....	2
1.3 LIMITATIONS.....	3
1.4 DEFINITIONS.....	3
1.5 MATERIAL.....	3
2. THEORETICAL APPROACHES.....	5
2.1 LEGAL POSITIVISM.....	5
2.2 TELEOLOGY.....	6
3. INTERNATIONAL LAW.....	8
3.1 TREATIES.....	8
3.2 CUSTOMARY LAW.....	9
3.3 THE UN CHARTER.....	10
3.3.1 <i>Articles 2(4) and 2(7) of the UN Charter</i>	11
3.3.2 <i>Articles 39 and 42 of the UN Charter</i>	12
3.3.3 <i>Article 51 of the UN Charter</i>	13
3.3.4 <i>Articles 55 and 56 of the UN Charter</i>	13
4. RETHINKING SOVEREIGNTY.....	15
4.1 THE RESPONSIBILITY TO PROTECT BY THE ICISS.....	17
4.2 ENDORSEMENT OF THE RESPONSIBILITY TO PROTECT.....	19
5. ADVOCATING HUMANITARIAN INTERVENTIONS.....	21
5.1 THE STATE AND THE CITIZEN.....	22
5.2 LEGAL CONSIDERATIONS.....	23
6. VIETNAM'S INTERVENTION IN KAMPUCHEA.....	25
6.1 BACKGROUND.....	25
6.2 ATROCITIES COMMITTED BY THE KHMER ROUGE.....	25
6.3 THE INTERVENTION.....	27
6.4 AFTERMATH.....	28
6.5 LEGAL ASPECTS AND LEGITIMACY.....	29
7. CONCLUSIONS.....	32
8. REFERENCES.....	34
8.1 BIBLIOGRAPHY.....	34
8.2 ONLINE RESOURCES.....	35

1. Introduction

Humanitarian interventions are part and parcel of the international political landscape. Carried out by a range of different actors with different incitements and motives, they are recurrent features in global politics. The impact on world politics they bring about is tremendous. They reshape borders, topple governments, they cause heavy inter-state flows of people and refugees, and they do indeed fulfill their designed purpose of rescuing millions of people from oppressive governments and, sometimes, bring the leaders of these governments to justice. Yet, they are deemed unlawful, contradicting the doctrine of self determination and violating sovereignty.

1.1 Purpose of Study

The topic of humanitarian interventions is in political and judicial domains perhaps most easily recognized as one with no neutral positions. The prevailing view, it seems, does not favour humanitarian interventions on the basis of a proposed unlawfulness, conceived in terms of breaches of the provisions of the UN Charter. The advocates of these arguments most commonly refer to the principles of sovereignty, non-intervention and non-interference. The significance of these principles is, according to its proponents, of such a magnitude that they are referred to even when massive human rights violations such as genocide or ethnic cleansing are taking place. Even though a humanitarian intervention would effectively remedy such a disastrous situation, strict adherence to legal principles is nevertheless invoked in, what it seems, a purpose of its own. The purpose of this study is to challenge this view, by critically examining the proposed unlawfulness of humanitarian interventions.

1.2 Method

In order to criticize the restrictionist view on humanitarian interventions I begin by providing, in chapter two, a theoretical approach that aims to look beyond formal interpretations of international law. This is done by applying theories of legal positivism combined with teleology in order to encapsulate a qualitative understanding of the law. The qualitative approach is continued throughout the paper combined with empirical observations. Discussions on e.g. sovereignty, interventions, will indeed, by default, be of a qualitative character. Discussions on various articles of the UN Charter as well as historical accounts of Democratic Kampuchea will, by the same token, be empirical.

The thesis is constructed in such a way as to effectively criticise arguments of the illegality of humanitarian interventions continuously. In doing so, I proceed in chapter three, by discussing the two sources of international law before continuing to examine in detail the relevant articles in the UN Charter. As the UN Charter is the most authoritative document limiting the use of force in international relations, it is undeniably important to be accustomed with its content. I will discuss which circumstances allow for the use of force as a legitimate resort and how the rule of non-use of force can be circumvented.

Chapter four offers a discussion on the central concept of sovereignty. A discussion on this concept is of vital importance as it is one of the fundamental principles on which the international legal system rests. Hence, if the concept is effectively compromised, it contributes to an argumentation which aims at declaring humanitarian intervention enterprises as legitimate measures, a very potent critique. The chapter continues by discussing a potential transformation of the principle of sovereignty by framing it in the evolution of the concept of responsibility to protect. Having provided this discussion I proceed to chapter five. This chapter opens up for a discussion of humanitarian interventions in which the relation between the citizen and the state is discussed along with purely legal considerations. The chapter aims at continuing the critical argumentation before I, in chapter six, introduce a case study that seeks to cast light upon the previous and more theoretically oriented chapters. By providing a case study I hope that my arguments will become more comprehensive and conceptually accessible. Finally, in chapter seven, a few conclusions are suggested.

1.3 Limitations

This thesis does not intend to ventilate topics regarding collective as opposed to individual humanitarian interventions *per se*. In the same fashion, it is not a study of authorized versus unauthorized interventions. Finally, although I at times stumble across the subject, I make no claim as to whether humanitarian interventions are at times best regarded as morally permitted or, indeed, morally required.

1.4 Definitions

By a humanitarian intervention, I henceforth rely on Tesón's and Holzgrefe's respective definitions of it. To Holzgrefe, a humanitarian intervention is defined accordingly:

“the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied” (Holzgrefe 2003:18).

This definition is overlapping and compatible with that of Tesón who defines it as the:

“proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government” (Tesón 1997:5).

1.5 Material

A number of authors have been particularly helpful in the making of this thesis. Especially, Wheeler (2000), Beckman (2005) and Kofi Abiew (1999) has facilitated the whole working process, but most notably the chapters on international law where they supplied insightful and thoughtful aspects on humanitarian interventions. Österdahl (1997, 2004) was also a solid source of information in these contexts as was Tesón (1997). Bratt and Kron (2005) and Koskenniemi (2002) helped in providing perspectives to the theoretical discussion. The case study mainly gathered information from Klintworth (1989) and Ratner and Abrams (2001).

Additionally, a number of internet sources have been used throughout the working process. I have not had reason to question the credibility of any one of them. The Articles from the UN Charter have been found online as well as in the various publications dealing with the international law aspects. In accordance with conventional regulations they have not been explicitly referred to in the way the rest of the material has been. I have relied almost exclusively on second hand information throughout the thesis. This has, however, not posed any challenges to the working process.

2. Theoretical Approaches

Accurately described by Corten as a ‘dialogue of the deaf’ (Corten 2005:822) the debate on humanitarian interventions can be said to be locked in two opposing and polarized camps with seemingly few prospects of advancing therefrom. To put it simply; on the one hand there are those who reject humanitarian intervention as a legitimate action, claiming that interventions interfere with the internal affairs of other states and violates the principles of sovereignty and non-use of force. On the other, there are those who embrace interventions as a righteous act to end gross violations of human rights such as ethnic cleansing and genocide. From this outset I will try to contribute to the debate by arguing from a legal positivist perspective that interventions, albeit being in the outskirts of legality, can indeed be legitimate.

2.1 Legal Positivism

Jeremy Bentham, claimed by many as the father of legal positivism, clarified his attitude towards natural law in his referral to it as “nonsense upon stilts” (Utilitarian Philosophers). This position marks an ontological departure from the argument that presupposes rights as a given by nature, God or any other transcendental variable beyond the grasp of humankind. To the contrary, legal positivists argue that the law is a construct, created by people, and should also be regarded as an expression of human activity. To legal positivists a distinguishing mark must be maintained between what objective affirmable law actually stipulates and the normative question of what the law ought to stipulate (Bratt & Kron 2005:252). The law, therefore, does not necessarily reflect a common idea of moral righteousness, but simply provides what authorities have decided should count as law. There is thus the possibility of, though by no means necessitating, a discrepancy between what the law stipulates as legal and what is held by the majority as morally enforcing, which has made Beckman to argue that “even a correct understanding or application of law can be morally questionable” (Beckman 2005:28).

In the same fashion Koskenniemi argues that an adherence to formal law that is too rigorously observed can imply serious arrogance and insensitivity to the humanitarian dilemmas involved:

“It resembles a formalism that would require the a head of state to refrain from a pre-emptive strike against a lonely submarine in the North Pole even if that were the only way to save the population of the capital city from a nuclear attack from that ship – simply because no ‘armed attack’ had yet taken place as required by the language of Article 51...Surely the relevant texts should be read so as to produce a ‘reasonable’ result. If it is the *intention* of the self-defence rule to protect the State, surely it should not applied [*sic*] in a way to bring about the destruction of the State” (Koskenniemi 2002:163).

However extreme this scenario might be, the issue of intent that Koskenniemi emphasizes is nevertheless crucial to an understanding of the formal shortcomings of contemporary international law. It nurtures the argument that law alone cannot ensure that our moral convictions are realized and it determines us to appreciate that the law is not perfect in the sense that it does not offer full protection from the dangers and injustices it claims to protect us from.

But surely such a position does fuel an exaggerated negative attitude towards the legal system. It would indeed be to nihilistic to hold that the law simply is a cabotinage without any substantial value. If the law did not provide protection or at least to some extent reflected our society’s moral persuasions, it would merely be a castle in the air and hardly an expression of human activity. To circumvent the difficulties that arise from that objection I will add another notion to my theoretical argument, that of teleology.

2.2 Teleology

Kant regarded teleology as a principle of regulation that serves both as a source of empirical hypotheses and moral aspirations (Wilkins 2007:156). As such, teleology fits very well into the present argument as it allows for a balance between the otherwise dichotomous relationship between formal law and moral convictions that legal positivism sometimes presents. The teleological approach is not concerned with lesser details of a greater whole. It is the intended end result that is the single most important aspect of this school of thought. To

achieve this end result, all things must be designed to serve the end purpose. In the event that something, say a law for example, proves to be opposed to the end result, i.e. the purpose of the law, it will count as null and void. It will be counted as such because the purpose of the law is what reflects the intention, the original will, and a legal technicality that happens to run contrary to this intention and will cannot, and should not, be legitimate. Alexandre encapsulates this arguments as follows:

“Whenever teleology...serve as the reflective principle of judgement we see that the parts are always accounted for and accorded their meaning by virtue of an organism that codes them with principles and purposes” (Alexandre 2007:194).

In this way teleology provides us with adequate means of interpreting the law in terms of its intent. Legal positivists would claim that a law can be imperfect as it does not correspond with our moral convictions, but that the law is nevertheless a law and must be honoured as such. When we acknowledge formal law as imperfect we can accept some qualms knowing that they are not to be taken too seriously. Teleology allows us to do so by questioning the function of formal laws if they do not correspond with the intent of the law. Furthermore, the teleological dimension enables us to look beyond the parlance of formal law and makes us attentive to how these formal laws helps us serve the final and overarching destination at which we wish to arrive.

3. International Law

International law is, as familiar, comprised of two sources – treaty based law and customary law. In order to assess the legality of humanitarian interventions it is necessary to first scrutinize each of these sources respectively to provide a comprehensive framework of the nature of these two sources.

3.1 Treaties

A treaty is a written agreement between two or more states that establishes legally binding rules in a particular area (Davidson 1993:53). Establishing legislation through treaties is by far the most common way of making international law. Treaties become legally binding only when they have been ratified by the competent authorities of the respective countries that chose to join the agreement. Davidson argues that treaties have one supreme advantage over other methods of international law creation; Treaties are both accessible and the established rules therein are more or less clear (ibid.). Despite this, treaty law allows for some deviations from the provisions of the treaty by reservations from some articles, which effectively means that the contracting party simply is not bound to follow that article to which a reservation has been made. Another, more extreme, form of deviation is that of denunciation. In order for a denunciation to be valid it must follow the proper procedure for doing so provided in the treaty, and the country will be legally bound to the provisions of the treaty until it has properly denounced itself from it (ibid. ff).

Despite the possibilities of reservations and conflicting interpretations of a treaty, Article 31(1) of the Vienna Declaration on the Law of Treaties from 1969 provides that:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

This makes it very controversial to make reservations against some articles since it could effectively be argued that by doing so the object and purpose would by default be contradicted. This argument is further strengthened as Article 31(2) of the Vienna Convention provides that also the preamble and annexes of a treaty, which are in character commonly very broad and general, are to be recognized as subjects for interpretation in accordance to the object and purpose of the treaty.

The undermining of treaties by reservations or simply by ignoring the rules poses a serious threat to the principal method of making international law. Given the common practice of a significant number of countries to make reservations in various human rights treaties, it is not to overstretch plausibility in claiming that treaty law does have serious flaws, and perhaps is not that abundantly clear as Davidson wishes it was.

3.2 Customary Law

Customary law, the second source of international law, is even more obscure in terms of clarity. Nonetheless, it is custom that forms the bed-rock of international law as treaties derive much of their binding force from already existing customs (Davidson 1993:56). Custom is defined by Article 38(b) of the Statute of the International Court of Justice as “international custom, as evidence of a general practice accepted as law”. There are two fundamental dimensions that constitute customary law. The first one is created through patterns of interaction between states. These can include diplomacy and policy statements by the competent organs of a state in e.g. the UN, ASEAN, WTO and other international or regional organizations. This conduct, however, is not by itself sufficient to create binding customary law (ibid.). In order to attain customary law status it must be accompanied by the principle of *opinio juris sive necessitatis*. This principle demonstrates the necessity of the law in terms of its adherence to moral principles. It indicates a conviction that the law is necessary because it is righteous (Strömberg & Melander 2003:17).

As it is not clearly defined what kind of moral principles should count as necessary, or who is to define them for that matter, customary law is subject to inevitable critique. To argue for anything but that the development of international customary law has been dominantly orchestrated by the leading Western powers will certainly prove difficult (ibid.). Furthermore, customary law is often associated with a certain degree of vagueness and indecisiveness,

which makes it difficult to formulate rules that are sufficiently precise to provide guidance in legal settlements (ibid.f). Finally the most potent critique is one that puts the very concept of customary law in a suspicious position. If state practice can be elevated to customary law if it is practiced frequently by many actors for an adequately long period of time, and this practice is backed up by a genuine sense of moral righteousness, then we are faced with a number of serious challenges to international law. This argument would indeed allow states to conduct humanitarian interventions, violate the principle of sovereignty, and even engage in warfare as long as it followed the two aforementioned preconditions. The very definition of customary law is what makes it unlawful in this perspective.

Having now critically examined the two sources of international law, let us turn to the UN Charter to see in detail how the use of force is dealt with there.

3.3 The UN Charter

The UN Charter can claim to be the most authoritative document in international law. It functions as the constitution of the organization and contains a supremacy clause which outrules any other international obligation of a member state if this obligation runs contrary to the provisions of the UN Charter. Article 103 of the Charter provides that:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

As the UN Charter also regulates in detail how the use of force is legitimately executed it also marks a natural starting point of inquiry regarding these rules.

There is no single coherent interpretation of the legitimate use of force in the UN Charter that can claim universal acceptability. Neither are the interpretations static, but are under constant change due to political motives, moral incitements and developments of international law. This poses challenges to a rendering of an objective account of the true essence of the UN Charter. The following account reflects the relevant articles of the UN Charter relating to the use of force based on both the exact phrasing of the articles along with some supplementary comments.

3.3.1 Articles 2(4) and 2(7) of the UN Charter

To put it simply, states are prohibited to use force against each other. Article 2(4) of the UN Charter states that:

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

According to Österdahl, the parlance of the article is broad and absolute as well as straightforward and unequivocal and formulated in such a manner that it would not be credible to claim that the prohibition of the use of force is anything but all-embracing (Österdahl 2004:71). Nevertheless, Österdahl is also fast to recognize that the wording of the article gives rise to the possibility of an ambiguous interpretation in that force that is not aimed towards the territorial integrity or political independence of a state can be regarded as legitimate. She also notes that changing state praxis can have a modifying effect on the interpretation of the article (ibid.). Beckman adopts a similar view. He suggests that some arguments make possible for armed interventions to be carried out in accordance with the provisions of the article:

“An ultra extensive e contrario interpretation of Article 2(4) can open a possibility for arguments suggesting that the prohibition on the use of force is not absolute. It can be argued that armed interventions, without a UN mandate only aiming at implementing the norms enshrined in the Charter are consistent with the purposes of the United Nations. By being consistent with those purposes it could also be argued to be compatible with international law” (Beckman 2005:62).

In the light of what has been stated above, it seems fair to assert that article 2(4) of the UN Charter allows for multiple and contradicting interpretations despite its original intent to rule out any and all international use of force. It is highly noteworthy that the article also provides legal arguments for the use of force, such as an armed intervention, if the intent of such an endeavour aims at implementing the norms of the Charter.

Article 2(7) of the Charter reaffirms the provision of Article 2(1) that the Organization is based on the principle of sovereign equality of the members by providing a clause that prohibits intervention by member states in the internal affairs of others. Article 2(7) is thus:

“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.”

This article hence allows for Security Council action should the Council find, for example, evidence of a breach to the peace. Other than measures taken by the Security Council, one could argue that the article prohibits any kind of foreign intervention. But this view has been critiqued by Kofi Abiew who claims that general agreement of the internationalization of human rights has altered the essence of this article. Accordingly, the treatment of citizens by a state lies no longer in the domestic domain, but has transformed into a matter of international concern. Thus, action to support human rights can no longer be said to be an impermissible intervention that runs contrary to article 2(7) (Kofi Abiew 1999:131f).

3.3.2 Articles 39 and 42 of the UN Charter

Chapter VII of the UN Charter also enables the Security Council to use armed forces in order maintain or restore international peace and security as long as such attempts are not vetoed by any of the five permanent members of the Security Council. Article 39 prompts the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken”. Should the Security Council find that there has indeed been threats or breaches of international peace and security it may then resort to the provisions of article 41 which includes non-military measures or proceed to article 42 which allows the Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

As Wheeler points out, the provisions of the legal use of force under Chapter VII constitutes a troublesome dilemma. There is a considerable controversy regarding the extent the Security Council is permitted to authorize interventions to prevent humanitarian interventions that take place inside state borders. On the one hand, military intervention might be the only way to enforce global humanitarian norms, such as human rights, on the other hand such actions ultimately challenges the principles of non-intervention and non-use of force (Wheeler 2000:1).

3.3.3 Article 51 of the UN Charter

Despite the provisions of article 2(4) there is nevertheless another exception to the prohibition of the use of force enshrined in chapter VII of the UN Charter. A state is for example allowed to protect itself by using force in the case it is subjected to an armed attack. In a pure sense the right to self-defence is widely accepted, but is in a broader perspective rather vague and direly controversial, and can therefore serve as a strong potential argument for armed intervention (Beckman 2005:69f). Article 51 of the UN Charter holds that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

There is thus enshrined in the Charter the possibility of a breach of article 2(4). This possibility has prompted Thomas and Thomas to argue that the following prerequisites for a legitimate self-defence must be met:

“...the attack actually or impending must be objectively illegal; the state exercising the right of self-defence must show a danger, direct and immediate; and the act must not be excessive, going no further than to avert or suppress the attack; and it must not be continued after the needs of defence have been met” (Thomas & Thomas 1956:79).

It should also be noted that the right to self-defence can only be pursued as long as the Security Council has not taken measures it sees fit in order to restore international peace and security. Once it has done so the inherent right to self-defence automatically surceases.

3.3.4 Articles 55 and 56 of the UN Charter

Article 55 is part of Chapter IX of the Charter that stipulates provisions of international economic and social co-operation. Article 55(3) has a note on human rights and requires the United Nations to promote: “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. The

subsequent article, Article 56, goes one step further as it requires the members of the United Nations to ensure that the provisions of Article 55 are realized. Article 56 reads: “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”.

The member countries hence have a responsibility to ensure that human rights and fundamental freedoms for all are guaranteed. This is more than a responsibility, but a legal obligation (Kofi Abiew 1999:76). As such, one could argue that states must not remain passive in the face of breaches to this provision, but are required to take action when it is obvious that human rights violations and deprivations of fundamental freedoms are taking place.

4. Rethinking Sovereignty

Ever since the settlement of the Westphalian Peace in the seventeenth century, the state has been recognized as the supreme power within a defined juridical border (Barkin & Cronin 1994:111). This consolidation and monopoly of power by the state has fostered many definitions to describe sovereignty, among them Ruggie's concise articulation of sovereignty as "the institutionalization of public authority within mutually exclusive jurisdictional domains" (Ruggie 1986:143). As sovereignty can claim to be a principle of incomparable longevity and magnitude in international relations and remains one of the most prominent arguments against humanitarian intervention it deserves a discussion.

Given the description by Brownlie as "the basic constitutional doctrine of the law of nations" (Brownlie 1990:287), sovereignty is an ever-present theme in international law. It is a cornerstone from which other principles such as non-intervention, non-use of force and non-interference can gather momentum. Even the human rights regime presupposes a certain degree of state sovereignty to function properly today. In the light of this, it would be convenient to assume that sovereignty permeates all other international law and that it implies freedom for governments to go about as they see fit regardless of breaches of human rights law, including gross and systematic violations. Quite to the contrary, very few scholars, if any, would hold that the principle of sovereignty includes the right of a government to engage in activities that are blatantly and unequivocally designed to "do away" with uncomfortable categories of people that does not match the blueprint of a genocidal regime. Yet, a considerable number of the same scholars refer to the inviolability of the principle of sovereignty as soon as humanitarian intervention is even faintly articulated as a remedy against such regimes. Is there thus a considerable inconsistency in the argumentation of these scholars, or is the ambiguity situated in the very concept of sovereignty, or both? To answer these questions I will provide a critical outlining of sovereignty the way I conceptualize it. Part of the answer can be derived from the definitional and conceptual mess that blurs the succinctness of the term. In Krasner's words:

"Whether sovereignty is understood as the organization and efficacy of domestic authority structures, the ability to exercise control over transborder movements,

the right to enter into international agreements, or an institutional structure characterized by territoriality and autonomy depends on the analytic constructs and empirical concerns of particular analysts. There is no single definition of sovereignty because the meaning of the term depends on the theoretical context within which it is being used” (Krasner 1995:121).

Krasner argues that the concept of sovereignty is relational and that it therefore is subject to various interpretations that effectively undermines its conceptual and analytical point leading to a somewhat diminishing gravity of the term altogether. Barkin and Bruce provides a complementary argument:

“It is often not appreciated fully that sovereignty is a social construct, and like all social institutions its location is subject to changing interpretations. In other words, while the specific expression of sovereignty may remain constant, that which is considered to be sovereign changes. This inflexibility in the study of sovereignty has unduly constrained the usefulness of the concept for theories of international organization” (Barkin & Cronin 1994:109).

Sovereignty, as has been argued above, is indeed distant from any and all assumptions of being an expression of natural law, although it is often treated as a given constant superimposed by some kind of higher authority that lie beyond the reach of human understanding and influence. This, however, does not mean that sovereignty is a trivial thing. It does indeed affect the whole international system, but it is situated in the eyes of the observer and the value of sovereignty is what people wish to make of it.

Although the concept of sovereignty has undergone a profound development throughout the centuries, it is identified that the original intent of sovereignty as an escape from rule of outsiders remains today as a legal barrier against foreign interference in the jurisdiction of states (Jackson 1999:431). The evolution of sovereignty ended not only the transnational authority claims of the Church, but also the overlapping jurisdictions of nobles, kings and clerics, although much of the ties to these former legal titles and dynasties are still reminiscent (Barkin & Cronin 1994:111). The shift was geared towards what Jackson calls “popular sovereignty” in which sovereignty is positioned in the political will or consent of a population or political community rather than in its government or ruler (Jackson 1999:444). The twentieth century, above any other, brought about the most dramatic modifications to the concept of sovereignty:

“World War II, and above all the Holocaust, put an end to the principle of absolute sovereignty that had dominated political theory and practice since the

Peace of Westphalia in 1648. First the UN Charter, and then the UN Declaration of Human Rights, explicitly asserted that the state has an obligation to protect and advance individual rights. The Convention on the Prevention and Punishment of the Crime of Genocide in 1948 made the inadmissibility of genocidal violence a matter of international law” (Traub 2009:74f).

But the observations of Traub does not end there. With the birth of the United Nations a process of loosening up the rigidity of sovereignty had been set in motion and by the end of the Cold War new dimensions of the concept had come into fruition:

“...the Westphalian notion of sovereignty increasingly gave ground in the post-Cold War era to new human rights principles governing the rights of women, of children, and of refugees and displaced persons; to new mechanisms of enforcement of such principles, including the International Criminal Court and the doctrine of universal jurisdiction over mass crimes....In each case, the rights of citizens were understood to take precedence over the rights of states. The burgeoning human rights movement accepted both fundamental claims of the individual against the state and the obligation of outsiders to act to protect those claims” (Traub 2009:76f).

It would be a misinterpretation to claim that these changes imply that sovereignty has lost momentum or disappeared. Rather, keeping Barkin, Cronin and Krasner in mind, I would argue that the very defining essence of sovereignty has been inverted through a gradual shift in social context. As such, sovereignty still exists, but it has been modified, and it is this modification that allows for potent reinterpretations of the concept, such as those in favour of a right of the citizen over the state.

4.1 The Responsibility to Protect by the ICISS

The new, and fundamentally different, understanding of the relationship between the citizen and the state can also be said to have affected state-to-state relations. In his annual address to the General Assembly in 1999, General-Secretary Kofi Annan spoke of the importance of welcoming the “developing international norm in favour of intervention to protect civilians from wholesale slaughter” (SG/SM/7136). One year later in his Millennium Report the Secretary-General addressed the issue again asking the member states of the UN:

“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 offend every precept of our common humanity?” (United Nations).

Certainly not solely initiated by the Secretary-General, but surely inspired by his devotion to raise the issue to a more thorough debate, the International Commission on Intervention and State Sovereignty (ICISS) released “The Responsibility to Protect” in 2001. Under the authority of the Canadian government, the Commission was comprised by people with long experience from the UN and by distinguished scholars from a diverse range of backgrounds. The mandate of the commission was to bridge the two concepts of humanitarian intervention and state sovereignty and to foster a global political consensus on how to move towards action within the UN system (The Responsibility To Protect). The ICISS was an independent body, but it did however report its findings to the Secretary-General and to the international community. The conclusions of “The Responsibility to Protect” is competently summarized by Pattison:

“The report argues that we should replace the notion of sovereignty as *control* - according to which a state has freedom to do what it wants to its own people - with the notion of sovereignty as *responsibility*, according to which a state has the responsibility to uphold its citizens’ basic human rights. This responsibility primarily lies with the state, but if a state is unable or unwilling to uphold its citizens’ basic human rights, such as in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity, its sovereignty is temporarily suspended. In such cases, the responsibility to protect these citizens transfers to the international community, which has the ‘responsibility to react’ robustly to the crisis. This may involve undertaking humanitarian intervention, providing that some ‘precautionary principles’ have first been met” (Pattison 2008:262).

The commissions interpretation of sovereignty coupled with the normative content of preventive action in the case of gross human rights violations harmonizes with the debate on sovereignty mentioned earlier. And perhaps it goes even one step further. First of all it talks of a responsibility connected to sovereignty which implies upholding basic human rights. Many states have already committed themselves to such responsibilities through the signing of various treaties. But what is different here is that the state *per se* have responsibilities by virtue of being sovereign. Secondly, in case of breaches against such rights the sovereignty of the state can legitimately be suspended. Thirdly, by transferring the responsibility to protect the citizens to other states (implicitly also transferring the sovereignty of the genocidal state) one could argue that the responsibility to protect the suffering population becomes as

obligatory as protecting the population of one's own country. If extra-territorial sovereignty is allocated to a country, this implies a responsibility for the country to uphold the same standards in the allocated sovereignty as it does in its own country. If not, the sovereignty would have to be transferred again. It seems as if sovereignty, defined in terms of exercising power, is replaced by guarantees of refraining from the arbitrary exercising of power by a state against the fundamental rights of a population.

4.2 Endorsement of the Responsibility to Protect

Following the initiatives taken by Kofi Annan and the ICISS two reports were released. In 2003 the High-level Panel on Threats, Challenges and Change released "A More Secure World: Our Shared Responsibility" which endorsed international responsibility to protect populations from grave threats. A year after, in 2004, the Secretary-General released a report of his own, entitled "In larger freedom: towards development, security and human rights for all". Annan's report re-emphasized the need for governments to take action against large-scale acts against civilians and other massive human rights violations (ICRtoP). A rather surprising development was taking place in parallel. The African countries, known for being staunchly prone to safeguarding their sovereignty, signed in 2000 the Constitutive Act of the African Union in Lomé, Togo, thereby committing themselves to Article 4(h) of the Act which provides:

"The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity"

Furthermore, in the run-up to the 2005 UN World Summit, in which UN reform was to be discussed, including the responsibility to protect, the African Union expressed the Ezulwini Consensus, that embraced the responsibility to protect and recognized the authority of the Security Council to decide on the use of force in cases of crimes against humanity, ethnic cleansing, war crimes and genocide (ICRtoP). These circumstances indicate a shift in the mindset of some of the most dedicated advocates of sovereignty towards a more admitting attitude regarding humanitarian interventions.

Leadership from the global South during the UN World Summit was crucial to its success and included countries like Argentina, Chile, Guatemala, Mexico, Rwanda and South Africa (ibid.). The summit produced an Outcome Document that was adopted by the General Assembly in which states agreed to ensure:

”That each individual state has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing. And it is also a responsibility for prevention of these crimes. That the international community should encourage or assist states to exercise this responsibility. The international community has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations threatened by these crimes. When a state manifestly fails in its protection responsibilities, and peaceful means are inadequate, the international community must take stronger measures, including collective use of force authorized by the Security Council under Chapter VII” (World Summit Outcome Document, paragraphs 138-139).

The Security Council has also contributed to the advancement of the responsibility to protect by the unanimous adoption of Resolution 1674 on the Protection of Civilians in Armed Conflict. The resolution includes the first ever Security Council referral to the responsibility to protect (ICRtoP), which implies that the term now is included in the official parlance of the Security Council. Resolution 1706 by the Security Council that authorized UN peacekeeping troops to Darfur referred to Resolution 1674 as well as to paragraphs 138 and 139 of the World Summit Outcome Document (ibid.), further endorsing the concept and firmly rooting it as a legitimate basis of action by the Security Council.

5. Advocating Humanitarian Interventions

As has previously been mentioned the debate on humanitarian interventions is most comprehensively described as one composed of two polarized camps locked in a position where constructive advancement therefrom seems difficult. The purpose of this section is to present some arguments of the pro-interventionist camp.

The issue of legitimacy versus legality makes for a natural starting point of discussion. This is so because the law, on the one hand, provides rather strict limitations for state action, and therefore serves both as a guiding star and as a source of legitimacy for non-interference of states. On the other hand, moral imperatives that run contrary to the law can seem just as righteous and pose a serious challenge to international law. In Beckmans words:

”...virtually all of the arguments can be used to argue that that an armed intervention is legitimate in some general sense. Thus, the notion of legitimacy poses a challenge as it lends itself very well to pragmatic argumentation for basically any motive. To make matters even more complicated, there seems to be an increasing tendency to discuss issues of general legitimacy parallel with matters of legality without making sufficient distinction” (Beckman 2005:35).

Legitimacy can be derived from situations where, in Wheelers words, a supreme humanitarian emergency is taking place, or where actions that have violated human rights to such an extent that they have ‘shock the conscience of humanity’ have been undertaken (Wheeler 2000:34). Arguments like these makes for little concretization of what actually qualifies as such situations and have therefore prompted many different requirements of when and how a humanitarian intervention should be conducted. Drawing on Koskenniemis conclusion that any endeavour to establish objective criteria for humanitarian interventions will either be over- or under-inclusive (Koskenniemi 2002:167), I will instead focus on the part of the debate that discusses the relationship between that of the citizen and the state. This relationship displays a more profound and deeper inconsistency in the arguments of the restrictionists than does any technical imperfections of establishing proper criteria among the pro-interventionists.

5.1 The State and the Citizen

In an attempt to elucidate the contours of the permissibility of international violence, Tesón frames the nature of the situation as such:

“The first horn of the dilemma opens the door for unpredictable and serious undermining of world order. The second horn of the dilemma entails the seemingly morally intolerable proposition that the international community, in the name of the nonintervention rule, is impotent to combat massacres, acts of genocide, mass murder, and widespread torture....The normative force of the principle of state sovereignty is thus put to a difficult test in those instances where it clashes with our firm belief that individuals are entitled to claim fundamental human rights as moral barriers against the state” (Tesón 1997:4).

Tesón identifies the classical tension between rights of citizens and sovereignty. In order to establish a common ground, where legality and legitimacy are not mutually exclusive he advances an argument that has its roots in a social contract between citizens and state. Tesón contends that governments and states can exist because the people that inhabit the state have agreed to transfer some of their rights to these institutions in order to make cooperation possible. And as states do not have the same moral status as individuals, the discourse about the rights of the state ought to be reduced to a discourse about rights held by individuals. As such, governments are, both internationally and domestically, but agents of the people. Hence, the international rights of a state originate from the rights of the individuals that compose the state. Consequently, the very reason for founding and upholding a state is to ensure the protection of the rights of its citizens (Tesón 1997:117f). This leads Tesón to conclude that:

“[G]overnments who turn against their citizens are on a different moral footing. By denying them human rights they have forfeited the protection afforded them by international law. They are no longer justified *qua* governments, they no longer represent or are entitled to represent the citizens vis-à-vis the outside world, and therefore foreigners are not bound to respect them. In sum, dictators lose their international rights by virtue of the violation of the terms of the original contract – by betraying their *raison d’être*” (Tesón 1997:119).

5.2 Legal Considerations

Tesón's view corresponds with one put forward by Österdahl, in which she argues that human rights violations are not only the concern of other states, but also a concern that should trigger action from the Security Council in accordance with the provisions of Chapter VII of the UN Charter. Österdahl argues:

“Looking at recent humanitarian operations authorized by the SC it seems as if what has motivated the Council's actions is not actual threats to international peace, but massive violations of human rights not really threatening the peace and security of any other country than the one in which the violations take place. Why not take advantage of the fact that Article 39 only talks of ‘threat to the peace’ and not ‘threat to “international” peace’ and do away with the idea that there necessarily has to be an international connection before the SC can take enforcement action? Judging from its recent practice this seems to be consistent with how the SC reasons” (Österdahl 1997:270f).

The potency in this argument as I see it, is that it circumvents the argument that ‘matters which are essentially within the domestic jurisdiction of any state’ as provided in article 2(7), would provide immunity for states conducting gross human rights violations. Österdahls interpretation of Article 39 requires Security Council action to halt such violations, leaving no room for states to claim that their sovereignty is being infringed upon. As it is becoming more accepted that human rights are now increasingly a concern for the whole world community and cannot be singled out as a strictly domestic issue, humanitarian action to end violations of such rights does not constitute a breach of the non-intervention principle (Kofi Abiew 1999:98). Legitimacy in this context does not in any way disqualify legality. Rather, the two concepts seem to blend perfectly together while mutually reinforcing one another.

But what about the arguments of the restrictionsist view? What potency do they have in face of the aforementioned critique? According to Farer the parties to a convention in the classic, non-interventionist view hold “an original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired or has been replaced by mutual consent” (Farer 1991:186). Despite the seemingly clear provisions of non-interference and non-interventionism, this argument does not make for any convincing statement against humanitarian interventions. Firstly, the original intention of the founders of the UN Charter that Farer speaks of could hardly have had an accepting view on genocidal activities. We

should not too hastily forget that the UN was indeed set up to ‘save succeeding generations from the scourge of war’ as the preamble to the UN Charter reads. Therefore, any interpretation that runs contrary to the organizations content and true meaning cannot be valid (Akehurst 1985:219f).

Secondly, unforeseen changes in circumstances have indeed taken place. The context in which the UN Charter was drafted was coloured by the unparalleled global exhaustion by the end of WWII alongside the upcoming bipolar power rivalry of the Cold War. With the collapse of the Soviet Union and the subsequent rapprochement of the super powers, with increased globalization triggering political and economical interdependence both horizontally and vertically, and with new forms of terrorism and warfare that has dramatically changed the security climate, it is but wishful thinking to claim that the reality that the Charter is applied to corresponds to the reality in which it was drafted.

There have thus been significant changes in circumstances which would require the Charter to be reinterpreted to fit new challenges. The prevailing norm of humanitarian interventions in both pre-Charter and post-Charter regimes bear witness of what could be argued to be a binding customary law. Holzgrefe mentions the pre-Charter interventions in Greece in 1827-1830 by Russia, Britain and France, in Syria in 1860-1861 by France, in Bosnia-Herzegovina and Bulgaria in 1877-1878 by Russia, in Cuba in 1898 by the United States and in Macedonia 1903-1908 and 1912-1913 by Greece, Bulgaria and Serbia as examples that provide a basis for establishing customary law (Holzgrefe 2003:45). Examples of interventions in the post-Charter era include among others that in 1965 by the United States in the Dominican Republic, in 1971 by India in East Pakistan, in 1978-1993 by Vietnam in Kampuchea, in 1979 by Tanzania in Uganda, in 1991 by the United States, United Kingdom and France in Iraq and that of NATO in Kosovo in 1999 (ibid.f.).

Although it has been claimed that these interventions does not fulfill the necessary requirements of general observance and *opinio juris* to be established as binding customary law (ibid.), proponents of such an argument still face the difficulties of arguing that the norm of humanitarian intervention is not vital enough to meet these requirements. Furthermore, advocates of this standpoint place themselves in a rather dubious position as they make the claim of being the sole judge of what norms are to qualify as customary law, which could be argued, compromises their credibility and motives.

6. Vietnam's Intervention in Kampuchea

Spearheaded by the late Pol Pot, the Khmer Rouge ruled Cambodia under the name of Democratic Kampuchea between 1975 and 1979. Despite the relatively short time in power, the Khmer Rouge managed to write its organisations name into history as perhaps the most genocidal, brutal and atrocious regime ever to exist. After a few border skirmishes with Vietnam, the regime was finally brought down by a massive Vietnamese invasion that toppled the Khmer Rouge and had a puppet government installed in January 1979.

6.1 Background

The two countries had almost simultaneously gained independence just after the American withdrawal from Vietnam. Shortly after Pol Pot declared victory in the civil war and marched into Phnom Penh, the Khmer Rouge initiated an extreme reorganising of the country while announcing the beginning of a new Communist era – beginning with year zero. The new regime nurtured fears that anything that could be associated with the previous regime or with the West, were elements that could threaten the intended vision of the Khmer Rouge. This fear took on paranoid proportions which, in due course, would result in violations of the most basic human rights (Klintworth 1989:6).

6.2 Atrocities Committed by the Khmer Rouge

Beginning the campaign of remaking Khmer society, the regime began emptying the cities that were regarded as decadent centres of Western influence and intellectualism that constituted a breeding ground for counter-revolutionary activities. As such the cities threatened the new governments plan for a society based on communal agriculture (Ratner &

Abrams 2001:271), similar to how Mao Zedong had envisioned the organisation of Chinese society. People with education and vocational expertise and skills, intellectuals, and small-scale business owners were particularly regarded with suspicion (Klintworth 1989:6). An illustration of the severity of the evacuation can be done with reference to Phnom Penh that had a population of some two million people before the evacuation started and only twenty thousand residents left by the end of it (Ratner & Abrams 2001:271).

The Khmer Rouge purged what was believed to be “enemies of the revolution”. These included ethnic minorities, such as Vietnamese and Cham Muslims, intellectuals and educated elements of the population including teachers and students, religious institutions particularly Buddhists but also Christians and Muslims, as well as officials of the old government before the regime finally embarked to purge the Khmer Rouge Party (Ratner & Abrams 2001:271-4). The infamous interrogation center of S-21 received approximately twenty thousand of these “enemies” where they were subjected to constant torture in order to confess involvement with foreign intelligence services or crimes against the revolution. Only six of the people sent to S-21 survived (ibid.f). Finally, forced labour in camps with extremely harsh working conditions, with a scarcity of food and medicines, physical exhaustion and inadequate sanitary conditions killed hundreds of thousands throughout the Khmer Rouge years. The working camps were an integral part of the transformation of the country, and it was the reorganisation of the economic landscape in that aspect that impacted most on the death toll in Democratic Kampuchea (Ratner & Abrams 2001:272).

The heinous crimes that the Khmer Rouge committed to their own population were in many ways unparalleled, both quantitatively and qualitatively. Sir Robert Jackson, Under Secretary-General and Senior Advisor to the United Nations has made the following comment:

“ceaseless killings...torture, persecution, iron discipline, ruthlessly imposed, hunger, starvation, deprivation of even the most elementary essentials of life. Some of the methods of torture and execution were, if anything, more obscene than those practiced by the Nazis and degraded the human mind and body in ways never before known...two million Kampucheans – a quarter of the entire population – perished representing genocide on a scale never before witnessed in terms of a single country...rarely in history has the entire population of a nation been subjected to such bestial and inhuman treatment as that endured by the Kampuchean people under Pol Pot” (Jackson 1988:iii).

Although it is difficult to estimate the exact number of deaths as a result of the Pol Pot regime the Cambodian Genocide Program of Yale University has made an evaluation that

approximately 1.7 million people, counting for 21% of the population, died in the genocide (Cambodian Genocide Program).

6.3 The Intervention

Vietnam and Cambodia shares a long history of enmity and animosity, so the war between the two countries in 1978-1979 can be seen as a continuation of this neighbourhood conflict. Reports of border clashes occurring between the countries were reported immediately after Pol Pot took power (Wheeler 2000:79). This time Kampuchean animosity was rooted in suspicions of Vietnamese patronage, wounded pride and quarrel over the sea border separating the countries (Chandler 1999:133). Previous to the Vietnamese intervention in Cambodia several clashes occurred and tensions were heightened in 1977 as many of the few ethnic Vietnamese that still lived in Kampuchea, often in matrimony with Kampuchean nationals, were rounded up and killed. Additionally, Khmer Rouge troops penetrated Vietnamese territory later that year, and massacred hundreds of civilians in the province of Tay Ninh (Chandler 1999:134).

The aggression was followed by what can be called a punitive expedition by the Vietnamese army into Kampuchean territory in order to spur negotiations. Instead, the Khmer Rouge prepared for an all-out war and units from its army swept into Vietnam to massacre villagers, interrupting commercial life and burning houses (Chandler 1999:143). In October 1978 the Vietnamese leadership claimed that over two million people had been killed in Kampuchea by the Khmer Rouge (Smedberg 2008:299), making a claim that its neighbour was of a genocidal character. The actual war began in late December 1978 when some 100,000 Vietnamese troops along with 20,000 soldiers from the United Front for National Salvation, a Cambodian insurgent group headed by Khmer Rouge dissidents, invaded Kampuchea. The well-trained Vietnamese army easily defeated and outnumbered the Red Khmer Guard that made victory swift. By January 7th, the war was over as the troops captured Phnom Penh.

The international reactions to the invasion followed the accustomed Cold War symmetry, but with a peculiar twist. The Soviet Union and its allied satellites all supported the invasion and claimed that the United Front was now the legitimate government of the country (Kofi Abiew 1999:128). The Western countries, along with China and the Non-Aligned Movement

condemned the invasion in a very critical parlance, in which they reaffirmed their opinion that Pol Pot was the legitimate leader of the country and that any foreign troops on Cambodian soil must withdraw immediately and unconditionally. Vietnam maintained a position where it tried to sidestep such criticism by claiming that there were actually two distinct wars fought in parallel. The first one they claimed was a war fought by the United Front. Vietnam maintained that it was this war that had toppled the Khmer Rouge. This war had originated due to the harsh policies that the Khmer population was subject to under the Khmer Rouge. The other one, was fought as a means of self-defence by Vietnam against Red Khmer aggression. (ibid.). Thus, Vietnam could invoke its inherent right to self-defence as an argument against criticism insinuating that Kampuchea was an aggressor country. It is noteworthy that the states that criticised the intervention specifically rejected the idea that the deteriorating human rights situation could invoke legitimacy or warrant legal authority for Vietnam's military operations (Beckman 2005:141).

6.4 Aftermath

A new government comprised of people from the United Front was installed in Cambodia. The country changed its name to the People's Republic of Kampuchea (after 1989, the State of Cambodia and finally in 1993 the Kingdom of Cambodia). Vietnam maintained military presence in the country up until 1989 when it completed its withdrawal. Monitored by the United Nations Transitional Authority (UNTAC) in 1993, democratic elections were held for the first time in the history of the country. In 2004 the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established. The tribunal is designed to investigate the details of the Khmer Rouge regime, to foster reconciliation as well as to bring justice upon the political leadership responsible for the crimes committed in Democratic Kampuchea. As of now, the tribunal is in the process of prosecuting five top members of the Khmer Rouge cadre (Cambodia Tribunal Monitor).

6.5 Legal Aspects and Legitimacy

Keeping Beckmans observation in mind that “the understanding of international law in the field of armed intervention is apparently torn between highly pragmatic arguments indicating a process of change and utterly legalistic arguments of essentially *status quo*” (Beckman 2005:290), I will now provide an assessment of the legality of Vietnams intervention in Cambodia. In doing so, one can possibly rely on Chestermans sceptical observation that:

“Vietnam’s concern with Kampuchea was, at best, only partly humanitarian in origin. In terms of state practice this is not conclusive of the issue, but when one looks for *opinio juris* there is an immediate problem that neither the acting state nor any of the (few) states that supported the action articulated anything resembling a right of humanitarian intervention” (Chesterman 2001:81).

Chestermans account makes for little persuasion when it comes to rendering the intervention illegitimate or even illegal for that matter. Whether it was humanitarian in origin or not is overshadowed by the end results it produced. But does an act of self defence also include the right to maintain military presence some ten years after the intervention has taken place? And does it also include a right to install a new government? These are questions that undeniably stretch the provisions of the inherent right to self defence. Wheeler has, in an elegant description of the interests of Vietnam, captured what he sees as two Vietnamese objects concurring. His account provides both an argument for the sustained military presence as well as a legitimation for the intervention on purely humanitarian grounds:

“...by immediately pulling its forces out, there would have been nothing to stop the Khmer Rouge from returning to power. Given that disengagement by Vietnam would probably have returned the Khmer people to the tyranny of Pol Pot, its long-term military presence was probably the only means of preventing a return to the slaughter. Vietnam, of course, did not prolong its occupation because of these concerns, but its key strategic interest in eliminating the military and political threat from the Khmer Rouge coincided with the goal of protecting the Khmer people against a return of Pol Pot” (Wheeler 2000:102f).

In a similar fashion, Klintworth argues for the lawfulness of the intervention:

“From the viewpoint of international law, I would argue that the Vietnamese intervention in Kampuchea was a reasonable and legitimate act of self-defence. The Khmer Rouge border attacks in the south, together with Chinese pressure in

the north, were regarded by Hanoi as a serious threat to Vietnam's security and its sense of fragile national unity. The Khmer Rouge, by all accounts, struck first and displayed little promise of ever relenting. Vietnam's invasion of Kampuchea and the installation of a more compatible, less aggressive government was, arguably, a reasonable response to a regime apparently dedicated to seizing parts of southern Vietnam" (Klintworth 1989:109).

These two provisions make up a convincing argument for both a humanitarian intervention and self-defence. Particularly conceived in terms of self-defence, Vietnam's decision to remain militarily present in Cambodia was based on a real and immediate threat of the Khmer Rouge returning to power which would, indeed, have constituted a continued threat to Vietnamese sovereignty. Chestermans demand for a provision of *opinio juris* i.e. an opinion among a significant number of states that an intervention in this case was righteous, can be countered by accounts from inside Cambodia at the time of the intervention. Quoted in Wheeler, Nayan Chanda has made the following observation:

"In hundreds of Cambodian villages, the Vietnamese invasion was greeted with joy and disbelief. The Khmer Rouge cadres and militia were gone. People were free again to live in as families, to go to bed without fearing the next day...it was as if salvation had come...One refrain that I heard constantly from the survivors was that 'If the Vietnamese hadn't come, we'd all be dead'" (Wheeler 2005:101).

Such testimonies compromises the notion of *opinio juris* because if a third party, that is not being part of the conflict, shall have a right to determine whether an ongoing genocide is to cease or not, it hardly makes justice to the victims. A more relevant criterion of *opinio juris* would be to determine the will of the people actually subjected to the human rights violations taking place. From a purely humanitarian perspective this appears to more consistent in coming to terms with 'supreme humanitarian emergencies' instead of formally adhering to legal principles that does not correspond to its own objectives and purposes. Be that as it may, in any account, Chestermans attempt to denigrate the Vietnamese intervention smells of the formalism that Koskeniemi depicted as unreasonable in the theoretical chapter of this thesis.

Klintworth, in an assessment of the humanitarian aspect of the intervention, makes a similar proposal. While acknowledging that armed interventions, indeed, are acts of dubious character, even when they are designed to remedy situations of massive human rights atrocities, still do have legitimacy in the legal debate. Klintworth argues that:

"The law of humanitarian intervention is controversial and not easy to define. Nonetheless, it would appear that there are sometimes extraordinary situations

that qualify for the remedy implicit in the concept of forceful humanitarian intervention. It is submitted that in certain extraordinary situations, the use of force by one state against another in a way that is, prima facie, an international illegality, may be excusable, even condonable. There may indeed even be a legal and moral obligation on neighbouring states to intervene, on the basis of a higher universal morality that transcends the boundaries of parochial state interests....The obligation arises because of the fundamental nature of the human rights that are threatened and the great scale of the violations” (Klintworth 1989:110).

Judging from the legal aspects taken into consideration here in conjunction with the humanitarian provisions of the situation, it is my firm belief that the intervention by Vietnam in Kampuchea meets the requirements of legality as well as legitimacy. The right of self defence was indeed warranted given the continued border attacks and the hostile and aggressive political attitude of the Khmer Rouge towards Vietnam. On the humanitarian notion, one might ask; if the humanitarian situation in Kampuchea did not meet the requirements of a humanitarian intervention, which situation would then qualify for such a provision? Surely, it is difficult to find an example of a more severe and supreme humanitarian emergency.

7. Conclusions

It seems at this point not too far-fetched to conclude that international law relating to the non-use of force, and thus also to humanitarian interventions, cannot convincingly undermine the legitimacy of a humanitarian intervention. The law is perhaps unable to provide de facto legal arguments in favour of a humanitarian intervention, but is at the same time unquestionably dubious, making it difficult on legal grounds to deem it illegal. This is made possible through mainly five reasons.

Firstly, the law itself only provides a starting point for juridical reflection. What is more important is how the law is actually interpreted. If the law is in itself seen as an end goal, then rigid adherence to it is the best option, and formal compliance without any deviation, no matter the circumstances, is a perfect strategy. But if the law on the other hand is seen as instrumental in achieving purposes beyond formalism, and is used to actually advance towards the intended end results that triggered the drafters of the law to adopt it in the first place, then surely, the law is clad in a different garment. It appears absurd that a law intended to protect countries from foreign dominance simultaneously nurtures a legal argument to use force against a country that on humanitarian grounds comes to the assistance of a people suffering from a genocidal government. Such an inconsistency should not be accepted in a legal document claiming to ‘save succeeding generations from the scourge of war’, to ‘reaffirm faith in fundamental human rights’ and to ensure ‘that armed force shall not be used’ as the preamble of the UN Charter reads. This argument is strengthened by Article 31(1) of the Vienna Declaration that provides that the intention of a treaty is what should provide the basis for interpretation.

Secondly, the UN Charter does indeed have provisions that counteract the non-aggression principle. Article 56 for example requires states to take action in order to ensure universal respect and observance of fundamental freedoms for all. Seen together with article 2(4) that forbids the use of force as long as it is not aimed towards the territorial integrity or political independence of a state, makes for a rather convincing argument in favour of humanitarian interventions. Additionally, Beckmans observation that an ultra extensive e contrario interpretation of article 2(4), that I mentioned in chapter three, can nurture arguments of the

legality of humanitarian interventions as long as they are aimed at implementing the norms of the UN Charter further strengthens this conclusion.

Thirdly, the principle of non-intervention, profoundly embedded in the dogma of sovereignty, can effectively be compromised by referring to the imperfections of sovereignty observed in this thesis. By accepting that sovereignty is, just as law, a social construct, our perception of what is regarded as sovereign is subject to change. I have argued that the very concept of sovereignty is relational and have attempted to illustrate how it has undergone fundamental change. Its transformation to a right of the citizen over the state is one such significant change that clearly weakens arguments of those that hold sovereignty to be a barrier against foreign interference. The fact that this modern interpretation of sovereignty stretches so far as to speak of the obligation of outsiders to protect the rights of foreign citizens is another such change in attitude that further compromises the traditional interpretation of sovereignty.

Fourthly, the argument relating to changes of circumstances is another one that makes for a conclusion. Again, the aforementioned discussion on the development of sovereignty could be invoked here. All the same, I would like to emphasize two other aspects in this context. The UN Charter at the time of its drafting could not foresee that the global political climate some sixty years later would be challenged rather by intra-state violence, civil war and terrorism rather than state-to-state conflict. It is inconsistent that the Charter is unable to address these issues on the basis of provisions made in the immediate aftermath of WWII. Additionally, it could be argued that the long history of humanitarian interventions can establish precedence in customary law in favour of the legal right to intervene.

Finally, the brutalities committed in Democratic Kampuchea under the Khmer Rouge elucidates more than anything else that the humanitarian aspects of a situation of emergency are truly matters which cannot possibly be regarded as an internal affair of a state. The intervention of Vietnam effectively put a halt to the human rights violations, and by doing so it also contributed to an implementation of the norms enshrined in the UN Charter. The intervention indirectly also brought about positive outcomes such as democratic elections and a tribunal designed to put the Khmer Rouge to justice. This is an excellent example of how a humanitarian intervention not only can put an immediate halt to heinous human rights violations, but also bring about long-term positive results that contributes to internal reconciliation and justice as well as regional stability.

8. References

8.1 Bibliography

- Akehurst, Michael B., *"A Modern Introduction to International Law"*, Allen & Unwin, 1985.
- Alexandre, Lefebvre, *"Critique of teleology in Kant and Dworkin: The law without organs (LwO)"*, Philosophy & Social Criticism, Sage Publications, Vol. 33, No. 2, 2007.
- Barkin, Samuel J., and Cronin, Bruce, *"The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations"*, International Organization, Vol. 48, No. 1, Cambridge University Press, 1994.
- Beckman, Olof, *"Armed Intervention: Pursuing Legitimacy and the Pragmatic Use of Legal Argument"*, Media Tryck, Lund University, Sweden 2005.
- Bratt, Percy and Kron, Fredrik, *"Den "värdelösa" juridiken"*, in Gunner, Göran and Namli, Elena (eds), *"Allas värde och lika rätt: Perspektiv på mänskliga rättigheter"*, Studentlitteratur, Lund, Sweden, 2005.
- Brownlie, Ian, *"Principles of Public International Law"*, Clarendon Press, 1990.
- Chandler, David P., *"Brother Number One: A Political Biography of Pol Pot"*, Westview Press, Revised Edition, 1999.
- Chesterman, Simon, *"Just War or Just Peace? Humanitarian intervention and international law"*, Oxford University Press, 2001.
- Corten, Olivier, *"The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate"*, EJIL, Vol. 16, No. 5, 2006.
- Davidson, Scott, *"Human Rights"*, Open University Press, Buckingham & Philadelphia, 1993.
- Farer, Tom J., *"An Inquiry into the Legitimacy of Humanitarian Intervention"*, in Fisler Damrosch, Lori and Scheffer, David J., (eds), *"Law and Force in the New International Order"*, Westview Press, 1991.
- Holzgrefe, J. L., *"The humanitarian intervention debate"*, in Holzgrefe, J. L. and Keohane, Robert O, (eds) *"Humanitarian Intervention: Ethical, Legal, and political Dilemmas"*, Cambridge University Press, 2003.
- Jackson, Robert, *"Preface"* in Mysliwiec, Eva, *"Punishing the Poor, the International Isolation of Kampuchea"*, Oxfam Oxford, 1998.
- Jackson, Robert, *"Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape"*, Political Studies, Vol. 47, Issue, 3, 1999.
- Klintworth, Gary, *"Vietnam's intervention in Cambodia in international law"*, AGPS Press, 1989.
- Kofi Abiew, Francis, *"The Evolution of the Doctrine and Practice of Humanitarian Intervention"*, Kluwer Law International, 1999.
- Koskenniemi, Martti, *"'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law"*, The Modern Law Review, Vol. 65, No. 2, 2002.
- Krasner, Stephen D., *"Compromising Westphalia"*, International Security, Vol. 20, No. 3, 1995.
- Pattison, James, *"Whose Responsibility to protect? The Duties of Humanitarian Intervention"*, Journal of Military Ethics, Vol. 7 No. 4, 2008.

- Ratner, Steven R., and Abrams, Jason S., “*Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*”, Oxford University Press, second edition, 2001.
- Ruggie, John, “*Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*” in Keohane, Robert O., “*Neorealism and Its Critics*”, Columbia University Press, 1986.
- Smedberg, Marco, “*Vietnamkrigen 1880-1980*”, Historiska Media, 2008.
- Strömberg, Håkan and Melander, Göran, “*Folkrätt*”, Studentlitteratur, Lund, Sweden 2003.
- Tesón, Fernando R., “*Humanitarian Intervention: An Inquiry into Law and Morality*”, Second Edition, Transnational Publishers, 1997.
- Thomas, Ann Van Wynen and Thomas Jr., A.J., “*Non-Intervention: the Law and Its Impacts on the Americas*”, Southern Methodist University Press, Dallas, 1956.
- Traub, James, “*Absolute Fiction: The Perversion of Sovereignty*”, World Affairs, Vol. 171, Issue 3, 2009.
- Wheeler, Nicholas J., “*Saving Strangers: Humanitarian Intervention in International Society*”, Oxford University Press, 2000.
- Wilkins, Burleigh T., “*Kant on International Relations*”, The Journal of Ethics, Vol. 11, No. 2, 2007.
- World Summit Outcome, United Nations General Assembly, A/60/L.1, 2005.
- Österdahl, Inger, “*By All Means, Intervene! The Security Council and the Use of Force under Chapter VII of the UN Charter in Iraq (to protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti*”, Nordic Journal of International Law, Vol. 66, No. 2-3, 1997.
- Österdahl Inger, “*Ett rättfärdigt krig är ett folkrättsligt tillåtet krig*” in Aggestam, Karin (ed) “*(O)rättfärdiga Krig*”, Studentlitteratur, Lund, Sweden, 2004.

8.2 Online Resources

- Cambodian Genocide Program, <http://www.yale.edu/cgp/cgpintro.html> Accessed: December 30th 2009.
- Cambodia Tribunal Monitor, <http://www.cambodiatribunal.org>, Accessed November 26th 2009.
- SG/SM/7136, GA9596, Secretary-General Presents His Annual Report To General Assembly, 20 September 1999., <http://www.un.org/News/Press/docs/1999/19990920.sgsm7136>. Accessed: January 5th 2010
- Utilitarian Philosophers, <http://www.utilitarian.net/bentham/about/1995----.htm> Accessed: December 3rd 2009.
- United Nations, <http://www.un.org/preventgenocide/rwanda/responsibility.shtml> Accessed: December 15th 2009.
- The Responsibility To Protect, <http://www.iciss.ca/mandate-en.asp> Accessed: December 16th 2009.
- ICRtoP – International Coalition for the responsibility to protect, <http://www.responsibilitytoprotect.org/index.php/about-rtop> Accessed: December 17th 2009.