UNIVERSITY OF ALBERTA

REVISITING THE RIGHT OF HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW

BY

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **REVISITING THE RIGHT OF HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW** submitted by **FRANCIS KOFI ABIEW** in partial fulfilment of the requirements for the degree of **MASTER OF ARTS.**

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ABSTRACT

The decade of the 1990s has witnessed profound changes in the international system in a way that could not have been imagined several years ago. The end of the Cold War, the disintegration of the Soviet Union and the Persian Gulf War changed perceptions of the behaviour of states in the international political system. Also notable in recent times is the spectre of internal conflicts and their effect on human rights violations. Consequently, intervention for humanitarian or other purposes has become a more pressing international question and worthy of further investigation. It is in the light of these developments that the right of humanitarian intervention requires re-examination. The dilemma presented by competing claims based on territorial integrity versus humanitarian intervention calls for striking a new balance between sovereignty and the protection of human rights.

The thrust of the thesis is that although the right of intervention for human rights purposes is controversial, it is valid in international law and should be exercised only for very strong and legitimate reasons.

Chapter one attempts to show that the right of humanitarian intervention existed under customary international law and has its underpinnings in the views of publicists, state practice and treaties.

Chapter two seeks to establish that the customary international law right of intervention for purposes of humanity has survived the United Nations (UN) Charter, and that state practice in this area is not inconsistent with the present international legal order.

Chapter three discusses the role of the UN in the emerging new world order as it pertains to collective humanitarian intervention.

Chapter four generally concludes the study and suggests criteria to guide state action.

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Table of Contents

CHAPTER ONE

THE DOCTRINE OF HUMANITARIAN INTERVENTION

1. Introduction:

The doctrine of humanitarian intervention is one of the most controversial issues in international law and relations. Although the classical concept of the right of humanitarian intervention could be traced back to ancient times, opinions of scholars are still far from unanimous as to whether the right exists, and furthermore, if it exists, what its precise normative scope may be.

The dilemma relating to the right of humanitarian intervention hinges on competing claims based on territorial integrity versus humanitarian assistance, which calls for striking a new balance between sovereignty and the protection of human rights. Thus, the important question here is why a balance should be struck and how it should be done. This, among other concerns, will be the focus of this thesis.

This chapter seeks to define humanitarian intervention and determine when states may resort to intervention for the purpose of protecting human rights under customary international law. In doing this, I shall examine the views of international scholars and state practice regarding the doctrine in order to determine whether the customary international law principle has survived the post-Charter era, and if so, to what extent.

Before proceeding any further, however, it is appropriate to discuss briefly some general characteristics of intervention by one state in the affairs of another in the international system. This is important since humanitarian intervention is a species of the general principle of intervention and cannot be wholly divorced from the latter principle.

The term "intervention" as applied in the international system eludes any precise

definition.[1] It has been generally used to mean almost any act of interference by one state in the affairs of another. In a more specific sense, it denotes dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence.[2]

The problem of intervention distinguishes itself as an area where the hypocrisy of states abounds. There is often a disparity between solemnly professed principles and the reality of state behaviour. Most types of intervention are essentially exercises in power politics with little resort to legal principles.[3] Throughout history, intervention has been a frequent phenomenon. Intervention was common in the Greek city-state system, the Roman Empire, and in the religious wars of the 16th and 17th centuries. Morgenthau, for example, observes that: "From the time of the ancient Greeks to this day, some states have found it advantageous to intervene in the affairs of other states on behalf of their

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[1] See for example, R. Falk, "The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States" (1959) Howard Law Journal 163 at 166; E.C. Stowell, Intervention in International Law (Washington D.C.:John Byrne & Co., 1921) at 318, note 48; A.S.Thomas & A.W. Thomas, Non Intervention - The Law and its Import in the Americas (Dallas: Southern Methodist University Press, 1956) at Chap.IV. One writer for example has commented that "intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland". P.H. Winfield, "The History of Intervention in International Law" (1922-1923) 3 British Yearbook of International Law 130.

[2] For Kelsen, "dictatorial intervention" involves threat or use of force. See H. Kelsen, Principles of International Law (1956) at 64; W.Friedmann, "Intervention and International Law I" in L.G.M. Jaquet, ed.,Intervention in International Politics (The Hague:Martinus Nijhoff,1971) at 41.

[3] Schwarzenberger for example, states that power politics signifies "a type of relation between states in which certain patterns of behaviour are predominant; armaments,isolationism, power diplomacy, power economics, hegemony, imperialism, alliances, balance of power, and war. Additional elements are furnished by the assumption on which a system of power politics is based and the criterion by which the hierarchy between members of such a society is determined. Each group considers itself not as a means to a common end, but as an end in itself. At least for purposes of self preservation, any measure required to achieve this object is considered to be justified".[Emphasis added] He goes on to define power politics as a "system of international relations in which groups consider themselves as ultimate ends; use at least for vital purposes, the most effective means at their disposal and are graded according to their weight in case of conflict". G.Schwarzenberger, Power Politics - A Study of World Society (London: Stevens & Sons, 1964) at 13-14.

own interests and against the latter's will".[4] In his view, intervention is defined as a conflict relationship to be analyzed in terms of power with one state exercising control over the other.

Intervention was originally linked to three characteristics of state behaviour and the structure of international politics. Firstly, it was a last resort reserved by states for special cases. Secondly, its use was relatively direct and overt. It most often used military means in order to affect the existing authority structure in the target state or attempts to change it. Thirdly, it took place in a system of nation-states characterised by territoriality, a high degree of separateness of their affairs and relatively defined borders between them, and thus could be identified politically without difficulty.[5]

Within this broad political context, customary international law stressed the importance of the non-intervention principle which was based upon respect for the sovereignty of states. The liberty of states to wage war was regarded as inherent in the concept of sovereignty.[6] At the same time international law sought to regulate the use of force short of war; it rejected intervention by one state in the affairs of another save under certain circumstances. The situations under which intervention was allowed could broadly be categorised under self-defence.[7]

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[4] H.J. Morgenthau, "To Intervene or not to Intervene" (1967) 45 Foreign Affairs at 425. See also, C. Phillipson, The International Law and Custom of Ancient Greece and Rome, Vol.1 (London:Macmillan & Co.ltd.,1911) at 100-101, Vol.2 at 90.

[5] K.Kaiser, "The Political Aspects of Intervention in Present Day International Politics I" in L.G.M. Jaquet, ed., supra, note 2 at 77.

[6] J.Brierly, The Law of Nations (Oxford: Clarendon Press, 1963) at 397-398.

[7] See generally, D.W.Bowett, Self Defence in International Law (Manchester:Manchester University Press,1958). Waldock (editing Brierly) contends that intervention being a violation of another state's independence, was in principle a breach of international law. Thus any act of intervention had to be

It is however, worth noting that some publicists during the 19th century advanced a theory of absolute non-intervention. Their main contention was that intervention in the affairs of another state was never permissible.[8] Other commentators, mainly from the twentieth century, maintained that while non-intervention was the rule, intervention could be justified when it was necessary to protect human rights.[9] Thus, humanitarian intervention was placed in the category of an exception to the non-intervention rule.

1.1. Philosophical and Historical Foundations of Humanitarian Intervention:

Like the general principle of intervention, "a usable general definition" of humanitarian intervention is "extremely difficult to formulate and virtually impossible to apply rigorously".[10] It is generally an act performed for the purpose of compelling a sovereign to respect fundamental human rights in the exercise of its sovereign

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justified as a legitimate case of reprisal, self defence, protection of nationals, or alternatively, by reliance on a treaty with the state concerned. See, H. Waldock ed., Brierly's Law of Nations: An Introduction to the International Law of Peace, 6th ed.(Oxford:Clarendon Press,1963) at 402-403. Von Glahn argues that the only exceptions to the non-intervention rule are; 1.Intervention by right to protect a state's territory; 2.If the foreign relations of one state endangers the foreign affairs of another; 3.If a state is in breach of the rules of international law, for example the belligerent violation of the rights of a neutral state; 4.A more tenuous one is if the nationals of one state are mistreated in another; 5.Where there is lawful intervention by the collective action of an international organization; 6.Intervention at the invitation of another state. 7. Humanitarian intervention, and 7.The "abatement" of an international nuisance. See, G. Von Glahn, Law Among Nations:An Introduction to Public International Law (New York:MacMillan Publishing Co.,1992) at 159-167. Humanitarian intervention has been distinguished from intervention to protect a state's nationals abroad. It has been suggested that whatever the legal basis of the former might be, that right does not flow from the legal principle of self defence. See, infra,note 13.

[8] See for example, P. Pradier-Fodéré, Traité De Droit International European et Americain (1885) 655.

[9] See for example, L. Oppenheim, International Law (London: Longman's & Co.,1905) Vol.I at 347.

[10] T.M. Franck and N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 American Journal of International Law 275 at 305.

prerogatives.[11] The doctrine recognizes the right of one state to use force against another for the purpose of protecting the inhabitants of the latter state from inhumane treatment by their governing sovereign.[12]

The classical concept of humanitarian intervention covered any use of armed force by a state against another state for the purpose of protecting the life and liberty of the nationals of the latter state unable or unwilling to do so itself.[13] Perhaps it must be

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[11] Ibid. B. De Schutter, "Humanitarian Intervention: A United Nations Task" (1972-1973) 3 California Western International Law Journal 21 at 24. De Schutter goes on to state that "[i]t is an attempt to compel a state to act or refrain from acting, and may eventually be backed up by the use of force". ibid. Thomas and Thomas, for example define it as "the right of one state to exercise international control over the acts of another in regard to its internal sovereignty when such acts are contrary to the laws of humanity".Thomas & Thomas, supra,note 1 at 75. Fonteyne maintains that it is "[T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice". J.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under The U.N. Charter" (1974) 4 California Western International Law Journal at 203 footnote 3; It has also been defined 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". F. Teson, Humanitarian Intervention: An Inquiry into Law and Morality (Ardsley-on-Hudson, New York:Transnational Publishers,1988) at 5.

[12] This is based on a 1910 definition provided by the French legal scholar Antoine Rougier. A. Rougier, "The Theory of Humanitarian Intervention" (1910) 17 Revue Générale De Droit International Publique 468. Cited in supra, note 10 at 277. See also, infra,note 13.

[13] U. Beyerlin, "Humanitarian Intervention" in R.Bernhardt ed., Encyclopedia of Public International Law 3 (Amsterdam:North Holland Publishing Co.,1981) at 211. Some commentators tend to draw a distinction between intervention for the purpose of protecting a state's nationals abroad from other types of humanitarian intervention. The claim is made that although the former is a humanitarian act, the legal ground for protection of nationals is traceable to the independence of States, and thus it is not proper to consider both under the umbrella of humanitarian intervention. B. Asrat, Prohibition of Force Under the UN Charter:A Study of Art. 2(4)(Uppsala:Juridiska Foreningen i, 1991) at 184-185. Bowett claims the legality of humanitarian intervention is far more controversial than the right of protection of nationals abroad thus the two principles should not be lumped together; the reason being that if they are grouped together it might undermine the latter principle.D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad" in A. Cassese, ed. The Current Regulation of the Use of Force (Dordrecht:Martinus Nijhoff Publishers, 1986) at 49; See also, N. Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (Dordrecht: Martinus Nijhoff Publishers,1985). Fairley contends that this distinction exists in theory but should be abolished in practice. He states that "with respect to the use of force by states for humanitarian ends ....the utility of the two-fold classification of customary international law collapses for the purpose of assessing the legal propriety of humanitarian intervention in the post-1945 era...". H.S. Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box"(1980)10 Georgia Journal of International and Comparative Law 29 at 35; Gordon, however, indicates that humanitarian intervention "is employed to describe three

pointed out from the onset that humanitarian intervention is more comprehensive and complex today than the conventional sense in which it is understood indicates. The suggestion has been rightly made that:

> "A modern doctrine of humanitarian intervention should establish the legitimacy of certain types of non-forcible and forcible intervention undertaken without the express consent of the target country's government, but with collective authorization or, in some limited circumstances, unilaterally or multinationally for the purpose of defending or alleviating the mass suffering of people for whom no other alternative realistically exists".[14]

Far from viewing humanitarian intervention in a narrow sense of armed intervention, I shall use the term broadly to include any non-forcible initiative (including verbal criticism) of a state or states to change the situation in another state suspected of committing substantial violations of human rights, but without the express consent of the target state. The general rubric under which humanitarian intervention will be used in this thesis will be understood to include intervention for the following purposes:

1) To rescue or protect citizens abroad and other aliens whose lives are endangered.

2) To protect religious or ethnic minorities from genocide or violent oppression.

3) To end internal aggression or human rights atrocities.

4) To respond to mass human suffering caused by man-made or natural disasters.

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very different situations: first, where a state uses force to protect the lives or property of its own nationals abroad...second, where the use of force serves to prevent a foreign government from initiating or perpetuating a massive and gross violation of the human rights of its own or a third state's nationals; third, where a state intervenes in a foreign state's civil war or so-called war of national liberation". E. Gordon, "Article 2(4) in Historical Context" (1985) 10 Yale Journal of International Law at 277. It is suggested that the nature of interventions today does not warrant such a distinction. Whether the right of protection of nationals flows from self-defence or not, the ultimate objective involved here is the protection of human rights. Thus, for our purposes the protection of nationals will be subsumed under humanitarian intervention. For purposes of this thesis, I do not intend to draw any distinctions between the two concepts. Humanitarian intervention will be taken to encompass intervention for protection of nationals.

[14] D.J. Scheffer, "Toward A Modern Doctrine of Humanitarian Intervention"(1992) 23 University of Toledo Law Review 253 at 265.

5) To support anti-totalitarian rebellions or other movements of self-determination struggling for independence from oppressive regimes that violate human rights on a massive scale.

Going back to the genesis of the doctrine, it is traceable to ancient times and the religious wars of the 16th and 17th centuries, although its institution, it seems, is largely a creation of the 19th century.[15] Prior to the 19th century humanitarian intervention was based on Christian beliefs and the religious concept of the dignity of man.[16] St. Thomas Aquinas made references on the basis of religious solidarity to the effect that a sovereign has the right to intervene in the internal affairs of another when the latter greatly mistreats its subjects.[17] Similarly, the Spanish scholar Vitoria argued that:

> "if any of the native converts to Christianity be subjected to force or fear by their princes in order to make them return to idolatry, this would justify the Spaniards....in making war and in compelling the barbarians by force to stop such misconduct,...and in deposing rulers as in other just wars.... Suppose a large part of the Indians were converted to Christianity, and this whether it were done lawfully or unlawfully,....so long as they really were Christians, the Pope might for a reasonable cause, either with or without a request from them, give them a Christian sovereign and depose their other unbelieving rulers".[18]

Vitoria thus contended that resistance by the heathen princes to the Christian missionaries

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[15] Fonteyne, supra,note 11 at 205-206.

[16] L.C.Green, Law and Society (Leyden: A.W.Sijthoff,1975) at 294;"General Principles of Law and Human Rights" (1955-1956) Current Legal Problems at 162. Fonteyne comments that earlier examples of humanitarian intervention are too closely associated with the feeling of religious solidarity to consider them as genuinely humanitarian. Ibid. at 206.

[17] Fonteyne, ibid. at 214.

[18] J. B. Scott, The Spanish Origin of International Law, Francisco de Vitoria and His Law of Nations (Carnegie Endowment for International Peace,1934) at Para.401 (XLIII). Quoted in Green,supra,note 16 at 289. It is suggested however, that Vitoria's argument in justifying the conversion of heathens to Christianity whether it was done lawfully or unlawfully, does not suggest any criteria but instead opens the door for all kinds of pretextual intervention.

and measures to force converted Indians to return to paganism would entitle the Pope to remove the Indian Princes and justified war.[19] These statements provided the ideological grounds for most interventions undertaken by "civilized nations" in the affairs of "non-civilized nations".[20] When Christian populations in "non-civilized" nations were subjected to persecutions or atrocities it was lawful to intervene. It was also lawful to intervene to end such practices as human sacrifice.

Moving from the era of ecclesiastical underpinnings of the doctrine, the question of when humanitarian intervention is permissible in international law became secularised in the principle of lending lawful assistance to peoples struggling against tyranny. Support was found for this doctrine among several international scholars. For Grotius (regarded as the "father of international law") writing in 1625, it was important that the law governing every human society be limited by a widely recognized principle of humanity. If a sovereign, although exercising his rights, acts contrary to the rights of humanity, the right of intervention may be lawfully exercised.[21] In his oft-quoted words, he declares:

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[19] Suarez, unlike Vitoria, writing around the same period narrowed the right to wage war on behalf of non-nationals. He contended that "only on condition that the friend himself would be justified in avenging himself and actually proposes to do so....but if the injured party does not entertain such a wish, no one else may intervene, since he who committed the wrong has made himself subject not to everyone indiscriminately, but only to the person who has been wronged". He however went further to state that a punitive war might be waged to preserve a people's right to worship "on the ground of the defence of the innocent....(and) if the prince forcibly compelled his subjects to practise idolatry; but under other circumstances, (such a ground) would not be a sufficient cause for war, unless the whole state should demand assistance against its sovereign....[A] Christian prince may not declare war save either by reason of some injury inflicted or for the defence of the innocent...[which latter] is permissible in a special sense to Christian princes...". F. Suarez, De Triplici Virtute Theologica (1621), "De Charitate, Disputatio XIII", s.4, para.3, Carnegie Translation, Selections From Three Works(1944) at 817; s.5, paras.3, 6-8, at 824, 826-827. Quoted in L.C. Green, "International Criminal Law and the Protection of Human Rights" in B.Chen and E.D.Brown eds., Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger(London:Stevens & Sons Ltd.,1988) 116 at 122-123.

[20] Green,supra,note 16.

[21] Thomas & Thomas, supra,note 1 at 373.

> "[t]here is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries by their ruler. Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some especial right over his own subjects...[But]....[i]f a tyrant .... practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such case....[I]t would not follow that others may not take up arms for them".[22]

Consequently, the sovereignty or independence of states stopped where it was violated beyond the point of tolerance. Another writer of the period, Vattel, although seemingly contradictory[23] in his thoughts on the subject, stated:

> "[I]f the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance".[24]

Whereas publicists around the period in which Grotius and Vattel were writing formulated the rules of international law in terms of the recognition of natural rights, the nineteenth century saw the ascendancy of legal positivism as the basis of international law.[25] As indicated earlier, some writers recognizing the independence of sovereign

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[22] H. Grotius, 2 De Jure Belli est Pacis,(Whewell transl. 1853) at 288. Grotius also recognized the abuses inherent in exercising the right of humanitarian intervention by drawing interesting analogies, for he states, "the desire to appropriate another's possessions often uses such a pretext as this: but that which is used by bad men does not necessarily therefore cease to be right. Pirates use navigation, but navigation is not therefore unlawful. Robbers use weapons, but weapons are not therefore unlawful". Ibid.

[23] Vattel had earlier observed that "[t]he Sovereign is the one to whom the Nation has entrusted the empire and the care of government;it has endowed him with his rights;it alone is directly interested in the manner in which the leader it has chosen for itself uses his power. No foreign power, accordingly, is entitled to take notice of the administration by that sovereign, to stand up in judgment of his conduct and to force him to alter it in any way. If he buries his subjects under taxes, if he treats them harshly, it is the Nation's business; no one else is called upon to admonish him, to force him to apply wiser and more equitable principles". E. De Vattel, 2 Le Droit Des Gens, P. Pradier-Fodéré ed.(1863) Ch.IV, para.55. Quoted in Fonteyne,ibid. at 214.

[24] Quoted in ibid. at 215.

[25] For an exposition on the distinctions between "natural" and "positive" law as applied to humanitarian intervention see generally, B.Harff, Genocide and Human Rights: International Legal and Political Issues(Denver: Graduate School of International Studies Univ. of Denver,1984).

states denied the right of another state to intervene even though a neighbouring state treats its nationals in an atrocious way. To intervene was to usurp the sovereign characteristics of the state against which it was invoked. Mamiani[26] and Carnazza-Amari, both Italian scholars, for example, did not recognize the legality of intervention for humanitarian purposes. The latter states that "...[n]either can one justify intervention in the case where the local government does not respect the most elementary laws of justice and humanity".[27] The French scholar Pradier-Fodéré in essence observed that the doctrine is illegal since it constitutes a violation of the independence of states.[28] Other writers such as Halleck, Bonfils, and Despagnet expressed similar views.[29]

Nevertheless, the doctrine still had its advocates among scholars.[30] Some

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[26] Carnazza-Amari, quoting Mamiani, considered "[t]he actions and the crimes of a people within the limits of its territory do not infringe upon anyone else's rights and do not give a basis for a legitimate intervention...". Carnazza-Amari, 1 Traité De Droit International En Temps De Paix(Montanari-Revest Transl. 1880). Quoted in Fonteyne, supra,note 11 at 215.

[27] Ibid.at 555.

[28] He writes that:"This [humanitarian] intervention is illegal because it constitutes an infringement upon the independence of States because the powers that are not directly, immediately affected by these inhuman acts are not entitled to intervene. If the inhuman acts are committed against nationals of the country where they are committed, the powers are totally disinterested. The acts of inhumanity, however condemnable they may be, as long as they do not affect nor threaten the rights of other States, do not provide the latter with a basis for lawful intervention, as no State can stand in judgment of the conduct of others. As long as they do not infringe upon the rights of the other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed". Supra,note 8 at 663, quoted in F. Hassan, "Realpolitik in International Law: After Tanzanian-Ugandan Conflict 'Humanitarian Intervention' Reexamined" (1980-1981)17 Willamette Law Review 859 at 863.

[29] See, H.W. Halleck, International Law; or Rules Regulating the Intercourse of States in Peace and War (1861) at 340;H. Bonfils, Manuel le Droit International Public, 4th ed.(Droits des Gens) (1905) at 168 et seq.; de Boeck ed., F. Despagnet, Cours de Droit International Public 4th ed. (1910) at 258 et seq. Cited in N. Ronzitti,supra,note 13 at 89 and accompanying footnotes. Stowell also provides authorities denying the existence of the right of humanitarian intervention, Stowell, supra, note 1 at 58-60 and accompanying footnotes. South American jurists also rejected the doctrine. Writing at the beginning of the 20th century, Pereira, for instance, states:"Internal oppression, however odious and violent it may be, does not affect, either directly or indirectly, external relations and does not endanger the existence of other States. Accordingly, it cannot be used as a legal basis for use of force and violent means". L. Pereira, Principios De Direito Internacional (1902), quoted in Hassan, ibid.at 864,footnote 11.

[30] Hassan, supra,note [illegible] 860.

writers, however, partially accepted the doctrine. They seemed concerned about whether the doctrine could be incorporated into the principles of traditional international law. Their worries apparently were heightened by their fundamental ideological or political beliefs regarding sovereignty and non-intervention versus feelings of humanitarianism. Bernard, for example, stated that:"the [positive] law ... prohibits intervention...[However,] there may even be cases in which it becomes a positive duty to transgress [positive law]".[31] Referring to humanitarian considerations, Harcourt argues: "Intervention is a question rather of policy than of law. It is above and beyond the domain of law, and when wisely and equitably handled .....may be the highest policy of justice and humanity".[32] Similarly, Lawrence considered "intervention to put a stop to barbarous and abominable cruelty a high act of policy above and beyond the domain of law". He went on to state that it "is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree..... [international law, therefore,] will not condemn interventions for such a cause".[33]

By the early 20th Century, the right of humanitarian intervention had gained wide acceptance in the doctrine of non-intervention.[34] Non-intervention was relegated to the

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[31] M. Bernard, On the Principle of Non-Intervention(1860) at 33-34,quoted in Fonteyne, supra, note 11 at 218.

[32] W. Harcourt, Historicus: Letters on Some Questions of International law (1863) 14, quoted in Stowell, supra, note 1 at 60.

[33] T. Lawrence, The Principles of International Law 4th ed.(London:Macmillan & Co.,1910) at 129. Hall also observes that "While however it is settled that as a general rule a state must be allowed to work out its internal changes in its own fashion ....intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour". Supra, note 9, 2nd ed. at 265.

[34] See, A. Mandelstam, The Protection of Minorities I.(1923) Recueil Des Cours 367 at 391. Brownlie writes that: "[b]y the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention ....existed". I.Brownlie, International Law and the Use of Force by States (Oxford:Clarendon Press, 1963) at 338, although he points out elsewhere that "unilateral action by a State

background in favour of protecting higher human values in some situations. Oppenheim stated:

> "[T]here is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation."[35]

The doctrine had come to be justified as "an instance of intervention for the purpose of vindicating the law of nations against outrage".[36] It was grounded upon a minimum standard for the treatment of individuals within a state, or, to put it another way, minimum conditions for the survival of humanity. In situations where these standards were encroached upon, the offending state was to be held responsible for such actions.

Perhaps it is worth noting from an examination of scholarly views on the subject that while they concentrated on the philosophical, religious and ideological foundations of the doctrine they failed to provide definite criteria for exercise of the right of humanitarian intervention. However, gleaning through the various writings some yardstick

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in the territory of another State on the ground that human rights require protection, or a threat of force against a State for this reason, is unlawful". Ibid. at 226

[35] Supra,note 9. The editor of Oppenheim's treatise in 1955 observed that "[t]here is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible". H. Lauterpacht, ed. 8th ed.,(1955) at 312.

[36] "For it is a basic principle of every human society and the law which governs it that no member may persist in conduct which is considered to violate the universally recognized principles of decency and humanity". Stowell, supra,note 1 at 51-52. As regards its future status in international law, one writer concluded at the beginning of the twentieth century that "[a]s the feeling of general interest in humanity increases, and with it a world-wide desire for something approaching justice and international solidarity, interventions undertaken in the interest of humanity will also doubtless increase...We may therefore conclude that future public opinion and finally international law will sanction an ever increasing number of causes for intervention for the sake of humanity". H. Hodges, The Doctrine of Intervention (1915) 87, quoted in Fonteyne,supra,note 11 at 223, footnote 70.

for exercise of the right was advanced.[37] This included: firstly, lack of other interests than for purely humanitarian reasons on the part of the intervenor.[38] Secondly, there must be a preference for collective action.[39] Thirdly, intervention must be in response to situations such as tyranny,[40] extreme atrocities,[41] and violations of specific fundamental human rights.[42] Lastly, intervention was to be restricted to certain situations such as "civilized" against "non-civilized nations".[43] Interestingly, an attempt at setting out some normative criteria as to when it is permissible to exercise the right was provided by Rougier in his "Theory of Humanitarian Intervention" in 1910. Starting from a critique of the concepts of absolute sovereignty and non-intervention he rejected the legality of individual intervention but accepted collective action instead, basing his reasons on various policy and legal grounds.[44]

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[37] See generally, Fonteyne, supra, note 11 at 226-267.

[38] Amos indicated that:"so far as [humanitarian] intervention is concerned, it is above all, desirable that the purity of the motives should be conspicuous...".S.Amos, Political and Legal Remedies for War (New York:Harper,1880) at 159. Quoted in Fonteyne,ibid.at 227.

[39] Fonteyne, Ibid.

[40] E.Creasy, First Platform of International Law (1876) at 303-305.

[41] P.Higgins, ed., Hall's Treatise on International Law, 8th ed., (1924) at 344.

[42] P. Faucille, Traité De Droit International Public 8th ed. (1922) 570, cited in Fonteyne, supra, note 11 at 227.

[43] According to Stowell, however, "...when by exception a civilized state transgresses the dictates of humanity, it also may be constrained to reform its conduct".See,Stowell,supra,note 1 at 65.

[44] He established three requirements for legality. Firstly, "that the event which...motivates intervention be an action of the public authorities and not merely of private individuals". These included actions authorized by states as well as those by persons in a private capacity but condoned by the State. Secondly, "that the action constitutes a violation of the law of humanity and not merely a violation of national positive law". The only rights which justified intervention were the rights to life, freedom, and justice. Thirdly,"that the intervention fulfils certain [circumstantial] requirements". Factors relevant to this requirement included, "the extent of the scandal, a pressing appeal from the victims, the very constitution of the guilty state, and certain favourable conditions relating to the political balance,economic rivalries, and the financial interests of the intervenors". Rougier,supra,note 12 at 497-525.

Thus far, we have seen that while there was no unanimity regarding the incorporation of the doctrine into customary international law, a great number of authorities held consistent views on the subject matter, acknowledged its existence, and sanctioned permissible intervention. We shall now discuss the extent to which precedents in state practice tended to support such a right. While there are numerous examples of state practice on the subject, only the most salient ones will be discussed.

1.2. State Practice in the Nineteenth and Early Twentieth Century:

State practice regarding intercessions on humanitarian grounds date back to earlier times. One of the earliest known instances occurred in 480 B.C. The Prince of Syracuse, in defeating the Carthaginians, laid down as one of the conditions of peace that they refrain from the barbarous custom of sacrificing their children to Saturn.[45] In the history of international relations, there is evidence to support international protection of religious minorities undertaken by the European Powers during the latter half of the 17th century.[46] There were also some Treaties of Peace signed during this period, for

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[45] It is claimed, however, that a century later the Carthaginians suffered another defeat at the hands of a Sicilian Prince. This defeat was considered by the Prince a punishment for stopping human sacrifices, thus restoring it. See, L.B. Sohn & T. Buergenthal, International Protection of Human Rights (New York: Bobb-Merrill Co., 1973) at 178.

[46] Lord Phillimore in 1879 writes that: "The practice (if it can be called such) of intervention of one Christian State on behalf of the subjects of another Christian State upon the ground of religion, dates from the period of the Reformation....The great Treaty of Westphalia, in its general language respecting Germany, established, as a maxim of public law, that there should be an equality of rights between the Roman Catholic and Protestant religions; a maxim renewed and fortified by the Germanic Confederation of 1815. In these instances, it is true, that several States to which the stipulation related were all members of one confederation, though individually independent of each other. But the precedent does not stop here; for passing by the interventions of Elizabeth, Cromwell and even Charles II, on behalf of foreign Protestants, and going back no later than 1690, we find in that year Great Britain and Holland intervening in the affairs of Savoy, and obtaining from that kingdom a permission that a portion of the Sardinian subjects might freely exercise their religion." Lord Phillimore, Commentaries Upon International Law, Vol.1,3rd.ed.(London:Butterworth, 1879), quoted in M. Ganji, International Protection of Human Rights (Les Presses De Savoie, 1962) at 3.

example between Brandenburg and Poland, 1657 (Treaty of Velau); between Sweden, Poland, Austria and Brandenburg, 1660 (Treaty of Oliva); and between the Holy Roman Empire and France, 1679 (Treaty of Nimeguen).[47] All these treaties constituted examples of Roman Catholic intervention on behalf of their subjects in countries ceded to Protestant sovereigns.[48]

The doctrine as practiced in the 18th and 19th centuries was mainly concerned with the rights of Christians, as well as Jews and other minority groups in various countries and in parts of the Ottoman Empire. It was mainly done through diplomatic intercession, although there were instances of military intervention.[49]

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[47] For the full text of the Treaty of Velau see, C. Parry ed., The Consolidated Treaty Series (1655-1658) Vol.4 (Dobbs Ferry:Oceana Publications,1969) at 435-436;Treaty of Oliva, ibid.(1658-1660) Vol.6, at 60-87;Treaty of Nimeguen, ibid.(1679-1680) Vol.15, at 55-66.

[48] Article 16 of the Treaty of Velau for example, provided for "the free exercise ...of the Catholic religion...". Ibid. Vol.4, at 435-436. Similarly, Section 3 of the Treaty of Oliva stated:"[t]he towns of Royal Prussia which have been during this War in the possession of his Royal Swedish Majesty, and of the Kingdom of Sweden, shall likewise be continued in the Enjoyment of all Rights, Liberties and Privileges, in matters Ecclesiastical and Civil, which they enjoy'd before this War, (saving the free Exercise of the Catholic and Protestant Religion) as it prevail'd in the said Citys before the War...". Ibid. Vol.6, at 60-87.

[49] The principle of international protection of Jews, for example, was stated succinctly in a speech in the English Parliament by Burke as follows: "[h]aving no fixed settlement in any part of the world, no kingdom nor country in which they have a government, a community nor a system of laws, they are thrown upon the benevolence of nations....If Dutchmen are injured and attacked, the Dutch have a nation, a government and armies to redress or revenge their cause. If Britons are injured, Britons have armies and laws, the law of nations...to fly for protection and justice. But the Jews have no such power and no friend to depend on. Humanity, then must be their protection and ally". To further illustrate the principle, the British representative in a dispatch to the Rumanian Government in 1867 stated:"[t]he peculiar position of the Jews place them under the protection of the civilized world". E. Burke, 13 Parliamentary History of England From the Earliest Period to the Year 1803 (1814). Quoted in N. Feinberg, "International Protection of Human Rights and the Jewish Question (An Historical Survey)" (1968) 3 Israel Law Review 487 at 490;See also, L. Kutner, "World Habeas Corpus and Humanitarian Intervention"(1985) 19 Valpraiso University Law Review 593. Generally, the doctrine of humanitarian intervention embodied in these principles during this period protecting Jews and other minorities became part of diplomatic practice. The question of the situation of Jews in various countries was discussed either directly or indirectly at various Congresses. At the Congress of Vienna (1814-1815) for example, the question of the situation of Jews in the German Confederated States was addressed. Furthermore, at that same Congress an obligation was imposed on Holland not to discriminate between the members of all religious faiths (which included members of the Jewish faith). Also, another example of intervention by one or more of the Great Powers through diplomacy occurred in 1840 on behalf of the Jews in Rumania, when the Government, in breach

It was not until the nineteenth and early twentieth centuries that the institution of humanitarian intervention reflected in state practice gained ground, as the great powers occasionally sought to protect individuals and groups of individuals against their own states. Although individual states invoked the doctrine, in most cases, several of the major powers acted collectively under the aegis of the Concert of Europe, typically against the Turkish/Ottoman Empire.[50]

During the period 1827-1830, France, Britain and Russia intervened in Greece to protect the Greek right of self-determination and Greek Christians from the oppressive rule of the Turks following a number of massacres.[51] This action resulted in acceptance by the Porte of the 1827 London Treaty,[52] and ultimately in the independence of Greece in 1830. The major powers indicated in the London Treaty that their action was mandated "no less by sentiments of humanity, than by interests for the tranquility of Europe".[53]

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of the Treaty of Berlin refused them recognition as citizens and denied them fundamental rights. See generally, Feinberg, ibid.

[50] The interventions under the Concert of Europe (which functioned successively for some years) had some religious impetus as well, since most were carried out to protect Christian minorities in non-Christian states. Fonteyne, supra,note 11 at 232. Rougier, however, points out, other than the intervention in Syria in 1860 which was humanitarian, other interventions in the Ottoman Empire were exercised "less in the interests of Ottoman subjects than in order to resolve the conflicting interests of England, Austria, France and Russia in the Black Sea area". Supra,note 12 at 525. Quoted in Feinberg, ibid. at 492.

[51] On the issue of motives for that intervention, Stowell notes that the "motive of the intervention would seem to have been to protect the rights of [Greek] self determination". Stowell, supra,note 1 at 126-127. Other writers, like Oppenheim, point out the interest mainly to be the European Powers' concern for the Christian Population being subjected to great cruelty in an attempt to forcibly absorb them into the Muslim empire. Supra, note 9, 2nd.ed., at 194; For a detailed discussion see, Franck & Rodley, supra,note 10 at 280-283.

[52] This treaty was concluded by France, Britain, and Russia in which they unilaterally agreed to combine their efforts to put a stop to the horrifying treatment inflicted on the Greeks by the Porte. It proposed a limited local autonomy for the region within the Ottoman Empire. Supra,note 47 (1826-1827) Vol.77, at 308-315. The Turkish government rejected this proposal which consequently, resulted in an armed intervention by the Major Powers on 14th September 1829 and acceptance of the treaty. See, Ganji, supra, note 46 at 22-23.

[53] Parry,ibid. at 309.

On the question of whether considerations other than humanitarianism were involved, Brownlie points out the fact that a realist might see this action from the perspective of the other Powers being afraid of a unilateral Russian intervention.[54] This comment, perhaps, recalls the presence of power politics in the theatre of international relations. The tendency of powerful states in the system to invade weaker ones for a variety of reasons[55] cannot be totally discounted, as we shall see later. It should, however, be borne in mind that a number of scholars have accepted this intervention as based on humanitarian considerations.[56]

Another important instance of invocation of the doctrine to prevent religious persecution occurred in Syria between 1860 and 1861.[57] From the sixteenth century until World War I, geographical Syria, an area encompassing present-day Lebanon, Jordan, Israel, Syria, the West Bank and Gaza, constituted an integral part of the Ottoman Empire. For centuries before the Ottoman conquest of Syria, the mountains of Lebanon

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[54] Brownlie, supra,note 34 at 339.

[55] Verwey suggests that this particular intervention was also justified as a protection of commercial interests. W.D. Verwey, "Humanitarian Intervention Under International Law" (1985) 32 Netherlands International Law Review 357 at 399.

[56] See Stowell, supra,note 1 at 126,489; Moskowitz notes the 1827 intervention as an "....occasion...on which the doctrine of 'humanitarian intervention' has been invoked on behalf of nationals or inhabitants of foreign countries felt to have been subjected to practices which 'shock the conscience of mankind'". He goes on to cite other examples like "the numerous interventions protesting Turkish treatment of Armenians and other Christians, and the protests by the United States in 1891 and 1905 against anti-Semitic outrages in Russia". M. Moskowitz, Human Rights and World Order (New York:Oceana Publications,1958) at 16; Ganji also points out "[t]his intervention,..... can be identified as humanitarian intervention mainly because its primary motive was to bring an end to the effusion of blood and the human sufferings which had accompanied the six years of war between Greece (then a part of the Ottoman Empire) and the Sublime Porte".Ganji,supra,note 46 at 22; See also, R. Lillich, "Forcible Self-Help by States to Protect Human Rights" (1967-1968) 53 Iowa Law Review 325 at 332;M. Reisman and M. Mcdougal, "Humanitarian Intervention to Protect the Ibos" in R. Lillich ed., Humanitarian Intervention and the United Nations (1973) at 180. But see, Brownlie, supra,note 34 at 339.

[57] Stowell, supra,note 1 at 63.

offered a refuge for persecuted religious communities, particularly for Maronite Christians immersed in a generally hostile Islamic region. Turkish rule led to the suppression and massacre of thousands of Maronite Christians by the Moslem population. Consequently, France was authorized by Austria, Great Britain, Prussia, Russia and Turkey, meeting at the Conference of Paris of 1860, to intervene in Syria to restore order. As a result 6,000 French troops were deployed. A Constitution for the Lebanese region was adopted requiring a Christian governor who was responsible to the Porte. The French forces withdrew in 1861 after accomplishing their tasks.[58]

Although the Sultan was a formal party to this intervention as a result of the Protocol of Paris, Turkey assented "only through constraint and a desire to avoid worse".[59] This constraint was however deemed lawful by virtue of the humanitarian considerations involved.[60]

Again in 1866, when Crete revolted alleging Turkish oppression and persecution of Christians, the European Powers called for establishment of an International Commission of Enquiry to investigate the allegations. Turkey refused on grounds that the issue was one that fell within its domestic jurisdiction. Britain stepped in as a neutral mediator offering friendly advice to Turkey, thus preventing armed intervention. Consequently, the Turkish government adopted a constitution deemed acceptable to the

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[58] For details of this intervention see, ibid. at 63-66.

[59] Ibid. at 66.

[60] Some writers have questioned the humanitarian objectives involved here, contending the French expeditionary force stayed on after the rescue operations were completed and actually behaved like an occupational force. See for example, supra,note 55. For further discussions on the French intervention in Syria see, I. Pogany, "Humanitarian Intervention in International Law:The French Intervention in Syria Re-examined" (1986)35 International and Comparative Law Quarterly 182;S. Kloepfer,"The Syrian Crisis, 1860-61:A Case Study in Classic Humanitarian Intervention" (1985) 23 Canadian Yearbook of International Law 246.

Christian population as well as making commitments for the protection of human rights.[61]

Similarly, Russian intervention in Bosnia, Herzegovina, and Bulgaria in 1877 offers an illustration of state practice. Following Turkish harsh treatment of the Christian populations of Bosnia, Herzegovina and Bulgaria within the Ottoman Empire, the Concert of Europe powers requested that an International Commission operate in the areas to observe and protect the Christians. Turkey rejected the proposal, but the European powers signed a Protocol, stating that they reserved to themselves a right of action should Turkey fail to maintain the minimum conditions demanded in these areas. Russia declared war on Turkey with the consent of Austria, Prussia, France, and Italy. By the Treaty of San Stefano and the Congress of Berlin of 1878, a system of Christian autonomy was set up for Bulgaria and Montenegro, Serbia and Rumania were made independent and Bosnia and Herzegovina were occupied and annexed by Austria-Hungary.[62]

Although this particular example appears to have been justified by the overriding humanitarian concerns of the major powers, it also portrays the inherent risks in exercising the right of humanitarian intervention.[63] One writer points out generally, and as a fact pertaining to this example, the "alleged humanitarian motives were

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[61] Ganji, supra,note 46 at 26-27.

[62] Ibid. at 29-33. For an exposition on the question of treaty obligations on the successor states see, L.C. Green, "Protection of Minorities in the League of Nations and the United Nations" in A. Gotlieb ed., Human Rights, Federalism and Minorities (Toronto:Canadian Institute of International Affairs,1970) 180.

[63] The British Government insisted at the time that, whatever the repressive nature of Turkish rule over the Bulgarians, Herzogovinians, and Bosnians, the Russian intervention, sanctioned by the other powers, "based in theory upon religious sympathy and upon humanity....was a move, in fact, upon the Straits and Constantinople, in pursuance of Russia's century long program". T. Woolsey, America's Foreign Policy (New York,1898), quoted in Franck & Rodley, supra,note 10 at 283.

.....influenced or affected by the political interests of the intervening state...".[64] It is noted that there was a lack of inclusive supervision in implementation which facilitated abuse by Russia, ultimately resulting in only partial relief for the victims of oppression.[65] This case highlights the need for putting brakes on invoking humanitarian intervention, so as to anticipate and prevent the possibility of abuse.[66]

Another instance of intervention in the Ottoman Empire occurred in 1903. In the course of a rebellion, fuelled partly by attempts to convert the Christian population in Macedonia, Turkish troops committed atrocities by attacking the civilian population and destroying many villages. Austria-Hungary and Russia, acting under the aegis of the European powers, demanded the Sultan provide for future protection of the population including a year's remission of taxes as reparation.[67] Although Turkey accepted the demands, there was a subsequent revolution which led to perpetration of new atrocities. This led to a declaration of war on Turkey by Greece, Bulgaria and Serbia in 1912.[68]

Also, the American action against Cuba in 1898 could possibly be characterized as an example of humanitarian intervention.[69] Following the rebellion of Cubans against

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[64] C. Fenwick, "Intervention:Individual and Collective (1945) 39 American Journal of International Law 645 at 650.

[65] Reisman, supra,note 56 at 182.

[66] Ibid.

[67] Ganji, supra,note 46 at 36-37.

[68] Ibid.

[69] It must be noted that various interpretations have been placed on the American action;while some commentators perceive it as an example of humanitarian intervention, others have seen it as "the powerful influence of endangered investments and trade". See, R. Fitzgibbon, Cuba and the United States, 1900-1935 (1964) at 22, quoted in Franck and Rodley, supra,note 10 at 285. However, Woolsey after studying this case points out that as far as the facts go the American action in Cuba was justified on the ground of humanity. Supra,note 63 at 75-76; Stowell points out the basis of the action as putting "an end to the shocking treatment which the military authorities were inflicting upon the non-combatant population in their

Spanish rule, the President of the United States of America reserved to the United States the right of intervention. In President McKinley's war message to Congress, he declared the purpose of the United States intervention as being "in the cause of humanity and to put an end to barbarities, bloodshed, starvation and horrible miseries [in Cuba]".[70] A joint resolution of Congress[71] authorized an armed intervention by the United States in Cuba leading to the defeat of Spanish forces. A general election was held on the island under the authority of the United States, and within two years the Republic of Cuba was established.

While other motives may have prompted the United States action the evidence points to the presence of humanitarian ideals as well, and thus may well be considered to fall within the ambit of intervention for the cause of humanity.

Perhaps a general observation to be made is that international legal scholars examining these various instances of intervention have recognized that while the motives were not always pure (most often dictated by political advantage), the motivations of the intervening powers were in fact, humanitarian.[72] In each of the examples considered,

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futile efforts to suppress the insurrection". Supra, note 1 at 120. von Glahn also cites the American action in Cuba as an instance of humanitarian intervention. von Glahn,supra,note 7, at 165.

[70] See, J.B. Moore, A Digest of International Law, Vol.6 (Washington:Government Printing Office,1906) at 222-224.

[71] Brownlie contends the "Joint Resolution of Congress approved on 20 April 1898 justified the intervention in terms of American interests". Brownlie, supra,note 34 at 46. Lillich opposes this contention by referring to the Preamble to the Resolution which states "the abhorrent conditions which have existed for more than three years in the island of Cuba...[and which] have shocked the moral sense of the people of the United States...". He relies on the similarity between the words "shocked the moral sense" in the text in the preamble and "shock the conscience of mankind" as descriptive of conditions which sanction humanitarian intervention. R. Lillich, "Humanitarian Intervention:A Reply to Ian Brownlie and a Plea for Constructive Alternatives" in J.N. Moore, ed. Law and Civil War in the Modern World (Baltimore:Johns Hopkins University Press,1974) at 234.

[72] Supra,note 10 at 281.

the authorities concerned were either actively involved in committing atrocities or did nothing to prevent the killings of innocent individuals or groups, within their territorial jurisdiction. In sum, the humanitarian motives, for example, behind the Concert of Europe's "recurrent interventions in Ottoman affairs [should] probably not...be dismissed as bogus".[73]

By the early twentieth century, there became evident in state practice less willingness to intervene for the sake of humanity.[74] Following World War I, the principles of humanitarian intervention, as reflected in state practice, were manifested in treaties protecting minority rights. Institutional guarantees of human rights and collective intervention were vested in the League of Nations as the principal organ to ensure the treaties were kept,[75] with ultimate recourse to the Permanent Court of International Justice (PCIJ) for interpretation.[76]

In the 1920s the minority system of the League worked quite well, but broke

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[73] Ibid. However, Brownlie, after examining the various instances of state practice relating to the doctrine, asserts "the state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860 and 1861". Brownlie, supra,note 34 at 340.

[74] Earlier in the previous century,it was thought that the Treaties of Paris (1878) and Berlin (1878) which introduced the system of collective guarantees of certain rights for individuals by the European Powers would be likely to eradicate intervention for political purposes, under the guise of humanitarian intervention. In reality this did not work due to absence of machinery to deal with violations. See Thomas & Thomas,supra,note 1 at 375.

[75] The minority treaties concluded sought, among other things, to protect rights of linguistic and ethnic minorities within new state territories created by the Treaties of Versailles and St. Germain. Although the League's role regarding protection of minorities was not a great success, it paved the way for later concern to protect human rights. See, Robinson, Were the Minorities Treaties a Failure? (New York:Institute of Jewish Affairs,1943);Green, supra, note 62; P. Sieghart, The International Law of Human Rights (Oxford:Clarendon Press,1988) at 13; M.N. Shaw, International Law (Cambridge:Grotius Publications Ltd.,1986) at 29.

[76] The PCIJ had occasion to interpret the significance of particular Minorities Treaties and even the Minorities regime. See for example, Treatment of Polish Nationals in Danzig, P.C.I.J. (1932) 2 Hudson 789;Minority Schools in Albania, P.C.I.J. (1935) 3 Hudson 485.

down after 1931 in the face of the threat of totalitarian aggression.[77] States were either individually or collectively unwilling to intervene in the name of humanity. An unwillingness to intervene was shown by the Powers in light of Hitler's argument of oppression of minorities resulting in the incorporation of Austria into Germany, the disintegration of Czechoslovakia and the partition of Poland.[78] Again, there was no intervention in the mass extermination of Jews in Europe in the 1930s and 1940s.[79] This unwillingness to intervene led Smith, for example, to complain at the time that:

> "in practice we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means, in fact, that we have abandoned the old distinction between civilised and uncivilised states".[80]

In the light of Nazi Germany's aggression and the arguments used to support it, Thomas and Thomas observed that the ideal of humanitarian intervention for protection

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[77] Thomas and Thomas,supra,note 1 at 375. Green notes that "[d]uring the period between the accession to power of National Socialism in Germany and the outbreak of war in 1939,[the] desire to maintain the balance of power was fundamental in European politics [thus playing] a major role in frustrating the work of the League of Nations as a protector of minorities". L.C. Green, "The Intersection of Human Rights and International Criminal Law" in Cotler and Elindis eds., International Human Rights:Theory and Practice (1993) 231 at 250.

[78] Ibid. In justifying the German occupation of Bohemia and Moravia in 1939, Hitler referred to "assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities". Brownlie, supra,note 34 at 340.

[79] It must be noted military intervention by the Allies in World War II was in response to Nazi Germany's external aggression and not to its commission of human rights atrocities against Jews living in Germany and other European nations under Nazi occupation.Supra,note 14 at 255. See, Nuremberg Judgment (1964) H.M.S.O. Cmd.6964 (1964) 13.

[80] H.A. Smith, The Listener, Jan.26, 1938. Quoted in L.C. Green, "Institutional Protection of Human Rights" (1986) 16 Israel Yearbook of Human Rights 69 at 79.

of minorities "was twisted and warped into a cloak for illegal intervention".[81] Opponents of the doctrine have cited these instances of unjustified invasions of other nations as a reason why the doctrine should not be recognized in international law. The problem here relates to discerning credible exercise of the right from the non-credible.[82] These instances of misapplication of the doctrine, however, do not make it devoid of its inherent value as a safeguard for protection of human rights.

1.3. An Assessment:

This discussion suggests that humanitarian intervention is based on the notion that sovereign jurisdiction is conditional upon compliance with minimum standards of human rights.[83] Thus, an offending state which has abused its sovereign rights by violating all universal standards of humanity cannot invoke a claim of absolute sovereignty. In such situations, members of the international community should step in and exercise the right of humanitarian intervention. These fundamental considerations and precedents in state practice motivated the writings of international scholars, to document the legality of the doctrine.[84]

While the doctrinal writing is wider, state practice was limited to Conventions such as peace treaties and minority treaties. The precedents show in some instances a propensity to abuse the doctrine. However, the crucial underlying concern of the

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[81] Thomas & Thomas, supra,note 1 at 375.

[82] Franck and Rodley point out the difficulty, if not impossibility of "devis[ing] a means that is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarianism from the herds of goats which can too easily slip through". Supra,note 10 at 284.

[83] M. Reisman & M.S. Mcdougal, supra,note 56 at 167.

[84] But see, A. Michalska, "Humanitarian Intervention" in K.E. Mahoney and P. Mahoney eds., Human Rights in the Twenty-First Century: A Global Challenge (Dordrecht: Martinus Nijhoff Publishers, 1993) 393.

intervening States related to oppressive conditions and inhuman treatment suffered by populations at the hands of sovereigns who were supposed to protect human rights.

In conclusion, on the basis of the foregoing, it seems clear that the argument supporting the doctrine has its underpinnings in recognized sources of international law, as the views of publicists, state practice and treaties indicate. As Lillich tersely puts it, "the doctrine appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate".[85]

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[85] R. Lillich, "Intervention to Protect Human Rights" (1969) 15 McGill Law Journal 205 at 210. Shawcross has also asserted that " [t]he rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the recognized law of nations". Speeches of the Chief Prosecutors at Nuremberg, Command Papers 6964 (1946) at 40, quoted in Thomas & Thomas, supra,note 1 at 374; Fonteyne, after an in-depth analysis of the doctrine and state practice, concludes that "while divergences certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention, as well as to the manner in which such operations were to be conducted, the principle itself was widely, if not unanimously, accepted as an integral part of customary international law". Fonteyne, supra,note 11 at 235. Emphasis in original.

CHAPTER TWO

THE RIGHT OF HUMANITARIAN INTERVENTION IN THE POST-CHARTER ERA

1. Introduction:

In the previous chapter an attempt was made to show that the right of humanitarian intervention existed under customary international law. Even today the issue of whether this right has survived the promulgation of the United Nations (UN) Charter still generates a great deal of controversy among various commentators. One school of thought holds that the institution of humanitarian intervention still exists.[1] On the other hand, adherents have been found for the proposition that since the establishment of the UN, the right of intervention for human rights purposes is now considered illegal.[2]

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[1] It should be noted that it is sometimes difficult to put writers in strait-jacket categories of proponents for and against the doctrine. Some advocates against the right prefer collective humanitarian intervention by the UN as opposed to unilateral action by states. Still others opt for a limited right of humanitarian intervention. For a representative literature on writers favouring the survival of the right see for example, R.B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives" in J.N. Moore ed., Law and Civil War in the Modern World (Baltimore:John Hopkins Univ. Press, 1974) 229 [hereinafter cited as Lillich, "A Reply"]; F. Téson, Humanitarian Intervention:An Inquiry into Law and Morality (Ardsley-on-Hudson, New York:Transnational Publishers,1988);J.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N.Charter" (1974) 4 California Western International Law Journal 203;M. Bazyler, "Reexamining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia" (1987) 23 Stanford Journal of International Law 547;M. Reisman & M.S. McDougal, "Humanitarian Intervention to Protect the Ibos" in R.B. Lillich ed., Humanitarian Intervention and the United Nations (Charlottesville: Univ. of Virginia Press,1973) 167;
L.C. Green, "Rescue at Entebbe-Legal Aspects"(1976) 6 Israel Yearbook on Human Rights 312;L. Henkin, "Use of Force: Law and Policy"in L.Henkin, S.Hoffmann, J.J.Kirkpatrick et al.eds., Right v.Might: International Law and the Use of Force (New York:Council on Foreign Relations Press,1991) 37;T.E. Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Force:A Legal Survey (1978) 79 Military Law Review 157; M. Levitin, "The Law of Force and the Force of Law:Grenada, the Falklands, and Humanitarian Intervention" (1986) 27 Harvard International Law Journal 612;R. Lillich, "Forcible Self-Help by States to Protect Human Rights" (1967) 53 Iowa Law Review 325[hereinafter cited as Lillich, Self-Help]; G. Wright, "A Contemporary Theory of Humanitarian Intervention" (1989) 4 Florida International Law Journal 435.

[2] For a representative list of writers, see, for example, I. Brownlie, "Humanitarian Intervention"in Moore ed., ibid. at 217; "Thoughts on Kind-Hearted Gunmen" in Lillich ed., ibid. at 139; N. Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (Dordrecht; Martinus Nijhoff Publishers,1985);D. Bowett, "The Interrelation of Theories of Intervention and Self-Defense" in Moore ed., ibid. 38;B. Asrat, Prohibition of Force Under the UN Charter:A Study of Art. 2(4) (Uppsala;Iustus Forlag,1991);F.Jhabvala,"Unilateral Humanitarian Intervention and International Law"(1981) 21 Indian Journal of International Law 208;W.D. Verwey, "Humanitarian

The object of this chapter is first, to establish that the customary international law right of intervention for purposes of humanity has survived the UN Charter [hereinafter referred to as the "Charter"] era, second, that state practice in this area is not inconsistent with the present international legal order. This task will be undertaken in two parts. An examination of the legal status of the relevant provisions of the Charter will be undertaken. Also, the legal position will be applied to paradigms in state practice during the post-Charter era (1945-1989) to show the extent to which the right is supported.

1.1. The UN Charter's Effect on Humanitarian Intervention:

A consideration of the relevant principles of the Charter and related international instruments will now be undertaken to determine the justification for humanitarian intervention, although it does not specifically mention the institution.[3]

The inception of the UN Charter marks the most important contemporary event in international law and relations. The Charter, coming as it did immediately following World War II, was bound to establish the foundations of a new world order. The general approach adopted by the framers was guided by the objectives of the maintenance of

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Intervention under International Law" (1985) 32 Netherlands International Law Review 357;F. Hassan, "Realpolitik in International Law:After Tanzanian-Ugandan Conflict 'Humanitarian Intervention' Reexamined"(1980/81) 17 Willamette Law Review 859;U.Beyerlin, "Humanitarian Intervention" in R. Bernhadt ed., 3 Encyclopedia of Public International Law (Amsterdam:North-Holland Publishing Co.,1981) 211; A. Michalska, "Humanitarian Intervention" in K.E. Mahoney and P. Mahoney, eds., Human Rights in the Twenty-First Century:A Global Challenge (Dordrecht:Martinus Nijhoff Publishers, 1993) 393.

[3] Although the Charter does not expressly mention unilateral or collective humanitarian intervention by states, at the same time it does not specifically invalidate the doctrine. Lillich, A Reply, supra,note 1 at 236.

international peace and security[4] and the promotion of respect for fundamental human rights.[5] In order to realize objectives enumerated under the Preamble to the Charter, states are called upon to assume certain obligations. States are obligated to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[6]

One of the basic purposes of the Charter as stated in Article 1(3) is "promoting and encouraging respect for human rights". Similarly, by Article 55,[7] the members of the UN reaffirm a commitment to promoting universal respect for and observance of human rights and fundamental freedoms for all. According to Article 56[8] member-states pledge to take action in defence of human rights. Consequently, the cumulative effect of these provisions is that intervention to prevent human rights abuses is still valid under the

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[4] The approach adopted was "to save succeeding generations from the scourge of war.....". See, Preamble of the UN Charter.

[5] The Preamble of the Charter declares the determination of the peoples of the world "...reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women....." and a commitment "to ensure, by the acceptance of principles and methods, that armed force shall not be used, save in the common interest". In finding the connection between the maintenance of peace and security and the protection of fundamental human rights, Lauterpacht notes: "[t]he correlation between peace and observance of fundamental human rights is now a generally recognized fact. The circumstance that the legal duty to respect fundamental human rights has become part and parcel of the new international system upon which peace depends, adds emphasis to that intimate connexion". H. Lauterpacht, International Law and Human Rights (London:Stevens,1950) at 186.

[6] Article 2(3) of the Charter. See also, Articles 10-14, 33-38, and 97-101.

[7] Article 55 provides that: "[w]ith 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: [among conditions]
(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

[8] Article 56 states: "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".

Charter.[9]

However, in addressing the issue of survival of the right of humanitarian intervention, the provisions of Article 2(4), become pertinent. It provides:

> "[a]ll 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".[10]

This apparent prohibition of the threat or use of force is subject to a number of express limitations provided for in the Charter. Specific exemptions from Article 2(4) are actions taken or authorized by the UN in certain circumstances;[11] the use of force in individual or collective self-defence;[12] military action against former enemy states; and certain

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[9] Reisman and McDougal conclude that the effect of these Articles "in regard to the customary institution of humanitarian intervention is to create a coordinate responsibility for the active protection of human rights: members may act jointly with the organization in what might be termed a new organized, explicitly statutory, humanitarian intervention or singly or collectively in the customary or international common law humanitarian intervention". They add that "[i]n the contemporary world there is no other way the most fundamental purposes of the Charter in relation to human rights can be made effective". Supra,note 1 at 175. Teson also notes "the promotion of human rights is a main purpose of the United Nations.....[T]he use of force to remedy serious human rights deprivations, far from being 'against the purposes' of the U.N. Charter serves one of its main purposes". Supra,note 1 at 131.

[10] Incidentally, there has been considerable controversy surrounding the precise meaning of this provision. Whilst a comprehensive discussion of this article is beyond the scope of this work, I shall adopt a viewpoint that, in my opinion, is consistent with the aims and purposes of the UN in light of the principle of humanitarian intervention. For further discussions of this provision see for example, E. Gordon, "Article 2(4) in Historical Context" (1985)10 Yale Journal of International Law 271;M. Reisman, "Criteria for the Lawful Use of Force in International Law" (1985)10 Yale Journal of International Law 279. But see, Asrat,supra,note 2.

[11] See Chap.VII of the Charter which contains provisions for self-defence or forceful measures authorized by the Security Council.

[12] Art. 51 of the Charter states: [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence 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". Whilst some commentators regard as questionable whether the protection of nationals abroad falls within the ambit of Article 51, others have argued humanitarian intervention should be seen as a legitimate category of self-defence. Thus other states could act individually or in concert to protect individuals or groups against their own state. Commenting on this provision, Thomas

actions taken pursuant to regional arrangements or agencies authorized by the Security Council.[13]

Leaving aside the exceptions enumerated above, a conspectus of the meaning of the Article 2(4) norm for some scholars, indicates that it has established a total and complete prohibition of force in international relations.[14] The only exceptions allowed

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and Thomas contend that "a plea can be made that where it is legal to protect one's own nationals, it is an extension of this legality to protect the nationals of others. The so-called principle of nationality is not inflexible...." For them, self-help to protect one's own nationals is included in the "inherent" right to self-defence preserved by Article 51. This concept is then extended to situations where the nationality link is missing. A. Thomas & A. Thomas, in J. Carey ed., The Dominican Republic Crisis (Dobbs Ferry:Oceana Publications Inc.,1967) at 20. Although Bowett admits that intervention for protection of a state's own nationals still exists as part of the traditional right of self-defence, he contends that its use must meet the normal conditions of self-defence. These requirements include failure by the territorial state to extend protection for aliens in accordance with international law;the existence of an actual or imminent danger requiring urgent action; and lastly, the actions taken must be proportionate and confined to the necessities of freeing the nationals from danger. He however expresses doubt as to the validity of a right of intervention on behalf of aliens, grounded on purely humanitarian reasons as a category of self-defence in the absence of a link of nationality. Supra,note 2 at 45. See also, D. Bowett, "The Use of Force for the Protection of Nationals Abroad" in A. Cassese, ed., The Current Regulation of the Use of Force (Dordrecht:Martinus Nijhoff Publishers,1986) at 39-55. Hassan holds the conviction that "even if the protection of nationals was guaranteed under self-defense, extending this rationale to the protection of foreigners is a distortion of the Charter's language". Supra,note 2 at 888. Scheffer laments "the paradox of international law that while this customary rule to permit missions to rescue endangered nationals has been recognized, armed intervention to rescue thousands or even millions of people whose lives are at stake because of a government's repressive conduct somehow has not met the test of legitimacy under the U.N.Charter....." He argues that the "conventional categorization of rescue operations as acts of self-defense or self-help is an artificial distinction that should be scrapped. Interventions to rescue nationals from life-threatening dangers in another country are humanitarian in character and should be recognized strictly for that purpose, and not as some extended application of national self-defense". D.J. Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention" (1992)23 University of Toledo Law Review 253 at 272. Although Teson does not explore the interrelationship between the principles of self-defence and intervention for the protection of a state's nationals abroad, he notes that since "the law of human rights has a universal reach,...it extends to nationals and aliens" and that "there is no reason in principle why protection of nationals of the intervening state should be, by definition, less humanitarian than the action undertaken to protect nationals of the target state". Teson, supra,note 1 at 6. For some examples in post-Charter state practice which were justified on protection of nationals abroad, see infra,note 84. It is suggested that a distinction between rescuing nationals abroad as flowing from the right of self defence on one hand which is considered legal, and humanitarian intervention, which some writers consider illegal should be scrapped since humanitarian considerations are involved in both situations. There would have been a row if, for example, in the Entebbe case, both nationals and aliens were affected and only Israel's own nationals were rescued, leaving behind Jewish nationals of other countries.

[13] Chap.VIII of the Charter.

[14] See for example, I. Brownlie, International Law and the Use of Force by States (Oxford:Clarendon Press,1963) at 265-270.

under international law are the right to self-defence as stated in Article 51, and enforcement measures taken by the Security Council. According to this viewpoint, emphasis must be placed on the need to interpret Article 2(4) broadly and consistently with its plain language. It is the fundamental provision of an organization established 'to save succeeding generations from the scourge of war'. It cannot therefore be subject to an interpretation that would negate its true meaning and content.[15] The conclusion reached for an absolute prohibition of use of force in any manner, it is argued, is further reinforced by an examination of the travaux préparatoires that led to drafting of Article 2(4).[16]

Support has also been found by commentators in international case law such as in the Corfu Channel Case.[17] While this case can be distinguished on the ground that it

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[15] K. Skubiszewski, "Use of Force by States" in M. Sorensen ed., Manual of Public International Law (London,1968) 732 at 746. See also, Brownlie,ibid.; G.Schwarzenberger & E.D. Brown, A Manual of International Law (Milton: Professional Books,1976) at 151-152;M. Akehurst, A Modern Introduction to International Law (London:George Allen & Unwin,1985) at 219-220.

[16] A reference to the travaux préparatoires is permitted by Article 32 of The Vienna Convention on the Law of Treaties of 1969. U.N. Conference on the Law of Treaties, Official Records, Documents of the Conference (U.N.Publ.E70.V.5) It should be noted that Brownlie for example, does not subscribe to any attempt to find in the words "against the territorial integrity or political independence of any state" a qualified prohibition leaving open a resort to force not infringing these rights. See,ibid. at 267.

[17] [1949] I.C.J. Report 4. In that case, the United Kingdom government argued that its use of force in Albanian territorial waters was consistent with its Charter obligations because it "threatened neither the territorial integrity nor the political independence of Albania". The court in rejecting this argument stated:

> "To ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty". It went on further to state "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law". Ibid. at 35.

It is claimed that this case reaffirms the unassailability of state sovereignty as an essential foundation of international relations. See Hassan, supra,note 2 at 883;Oglesby, "A Search for Legal Norms in Contemporary Situations of Civil Strife" (1970) 3 Case Western Reserve Journal of International Law 30. This view is also shared in the United States v. Nicaragua decision. In that case the Court inquired whether there was a "general right of States to intervene, directly or indirectly, with or without force, in support of an internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified". In answering this question in the negative the

did not touch directly on the principle of humanitarian intervention, arguments have been made to the effect that the Court's "judgement should be interpreted as condemning all intervention, self-protection, or self-help involving the use of force - including...humanitarian intervention".[18]

Thus, according to the traditional interpretation of the Charter, the ban on the use of force was provided to preserve territorial integrity and political independence of states, its collective security measures were to ensure peace, and therefore unilateral humanitarian intervention is rendered illegal.[19]

Proponents of humanitarian intervention place a qualification on prohibition of the use of force under Article 2(4).[20] Intervention for human rights purposes would not contravene that provision if it is confined within the conditions for its exercise.[21] It is

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Court stated: "no such general right of intervention, in support of the opposition within another country, exists in contemporary international law". See, Military and Paramilitary Activities in and Against Nicaragua (U.S. v. Nicaragua) 1986 I.C.J. 14 (Judgement of June 27).at para.208. Whilst this statement did not deal with humanitarian intervention, it has been suggested that it is broad enough to preclude any right of humanitarian intervention under international law. For a detailed discussion of the decision in this case see for example, "Appraisals of the I.C.J. Decision: Nicaragua v. United States (Merits)" (1987) 81 American Journal of International Law 77;Teson, supra,note 1, at Chap.9;N.S. Rodley, "Human Rights and Humanitarian Intervention: The Case of the World Court" (1989) 38 International and Comparative Law Quarterly 321 at 327-330.

[18] [In original]. M. Akehurst, "Humanitarian Intervention" in H. Bull ed., Intervention in World Politics (1985) at 110.

[19] Verwey, supra,note 2 at 377. Bowett notes that quite apart from the legal incompatibility of humanitarian intervention with Article 2(4), policy considerations suggest allowing the institution under that provision will "introduce a dangerous exception to these prohibitions". Supra,note 2.

[20] It is claimed that the Article 2(4) norm does not proscribe all kinds of use of force. But see, Brownlie who argues on the contrary that, "[t]he conclusion warranted by the travaux préparatoires is that [it] was not intended to be restrictive but,....to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect". Supra,note 14 at 267.

[21] Reisman and McDougal relying upon a major-purposes interpretation of the Charter indicate that Article 2(4) "is not against the use of coercion per se, but rather the use of force for specified unlawful purposes". They further state that "[s]ince a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the

argued that Article 2(4) is not an absolute proscription of use of force; for, if force is used in a manner which does not threaten the "territorial integrity or political independence of a state, it escapes the restriction of the first clause".[22] Thus, Shachter observes that "if these words are not redundant, they must qualify the all-inclusive prohibition against force".[23]

In essence, Article 2(4) does not cover territorial inviolability so that a state's territorial integrity may be preserved even though there is a limited armed foray into that state's territory.[24] Provided conditions and limits set out under international law are

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Purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is distortion to argue that it is precluded by Article 2(4). In so far as it is precipitated by intense human rights deprivations and conforms to the general international legal regulations governing the use of force - economy, timeliness, commensurance, lawfulness of purpose and so on - it represents a vindication of international law, and is, in fact, substitute or functional enforcement". Supra,note 1 at 177.

[22] P. Jessup, A Modern Law of Nations ((New York: MacMillan, 1948) at p.162. According to Stone, "Article 2(4) does not forbid the threat of use of force simpliciter;it forbids it only when directed against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations". J. Stone, Aggression and World Order (London:1958, reprinted 1976) p. at 95. See also, Fonteyne, supra,note 1 at 253-254.[In original]. Such an interpretation of Article 2(4) has been questioned by those who view any act of armed intervention as at least a temporary violation of the target state's territorial integrity. See Brownlie, supra,note 2 at 222-223;D. Bowett,supra,note 2 at 44-45.

[23] O. Shachter, "The Right of States to Use Force" (1984) 82 Michigan Law Review 1620 at p.1625. In this context, Green also shares the view that "..ipso verba the Charter is referring to threats against or attacks upon the territorial integrity or political independence of a state and not to exercises which may be necessary but not directed to this end". L.C. Green, "Humanitarian Intervention - 1976 Version" (1976) 24 Chitty's Law Journal 217 at 222;See also, J. Stone, ibid. at 95;J.N. Moore, "The Control of Foreign Intervention in International Conflict" (1969) 9 Virginia Journal of International Law 205 at 262.

[24] See A. D'Amato, International Law: Process and Prospect (New York: 1987) at p.37. On the contrary, opinions have been expressed to the effect that even in situations where a rapid withdrawal by the intervenor takes place when its mission is accomplished without a dissolution of the existing authoritative structure, that intervention will still temporarily violate the target state's territorial integrity and political independence. Akehurst argues "[a]ny humanitarian intervention, however limited, constitutes a temporary violation of the target State's political independence and territorial integrity if it is carried out against that State's wishes". Supra,note 18 at 95,105. On the same subject-matter, Higgins notes "even temporary incursions without permission into another state's air space constitute a violation of its territorial integrity". R. Higgins, The Development of International Law Through the Political Organs of the United Nations (London:Oxford University Press, 1963) at 183. Levitin is of the view that a more sensible reading of Article 2(4) is that "a state's political independence is compromised whenever another state attempts through armed force to coerce it, to limit its choices on the international plane, or to interfere with its

met, there would be no violation of the territorial integrity or political independence of the target state.[25] In any case, humanitarian intervention does not seek to challenge attributes of sovereignty, territorial integrity or political independence of a state and thus will not fall within the scope of the Article 2(4) prohibition of force norm.

Another important provision of the Charter which must be considered in dealing with the right of humanitarian intervention is Article 2(7) which establishes the principle of non-intervention in the internal affairs of states. It provides:

> "Nothing 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".[26]

This Article, it seems, protects states against international action and activities occurring strictly within their territorial boundaries. Thus, it becomes crucial to determine whether human rights issues and their protection are matters lying essentially within the domestic jurisdiction of states. For, if they are, then any right of intervention for whatever purpose would appear to be precluded. The interpretation of this clause has been qualified despite its assertive nature.[27] In the past, the UN has found that matters lying within a state's

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domestic political regime". Supra,note 1. Nanda takes a more cautious approach. He advocates a limited use of force for humanitarian purposes, which he says is permissible under international law, even though a temporary breach of a state's territorial integrity is occasioned. V.P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti - Revisiting the Validity of Humanitarian Intervention Under International Law -Part I" (1992) 20 Denver Journal of International Law and Policy 305 at p.311. See also, Hassan, supra,note 2 at 887.

[25] See, D'Amato,ibid.See also, D.P. O'Connell, International Law (London:Stevens,1970) at p.304; J. D'Angelo, "Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law" (1981) 21 Virginia Journal of International Law 485 at 487; D.W. Bowett, supra,note 12 at 40.

[26] Article 2(7) of the Charter.

[27] See for example, I. Brownlie, The Principles of Public International Law, 4th ed.(Oxford:Clarendon Press, 1990) at 553-554;Higgins,supra,note 24 at 64-90,118-130.

domestic jurisdiction provided no impediment to de-colonization[28] or anti-apartheid actions.[29] In the same vein, some state treaty obligations affecting sovereignty and territorial boundaries cannot be regarded as matters "within domestic jurisdiction".[30] As states make commitments "to a larger and more intrusive regime of international treaties and conventions and as customary international law expands its reach, the concept of "domestic jurisdiction" shrinks.[31] If the further condition of essentiality mentioned in Article 2(7) is taken into account, issues subject to international inquiry become considerable,[32] and call for reorientation of priorities. Fundamental human rights must take precedence over any norms of non-intervention in the internal affairs of states.

In stressing the need for balancing the rights of States (as mentioned in the Charter) against individual rights affirmed by the Universal Declaration on Human

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[28] See for example, Declaration on the Granting of Independence to Colonial Countries, G.A. Res. 1514,(1960);G.A. Res.1805,(1962). There are in addition other Declarations on the subject-matter, culminating in General Assembly Resolution 2288 (1967) which called for global decolonization.

[29] See for example, S.C. Res.418, S/RES/418 (1977) (Security Council action against South Africa's government-imposed policy of apartheid).

[30] Article 27 of the Vienna Convention on the Law of Treaties of 1969 affirms the principle recognized by several international tribunals that a "party may not invoke the provisions of internal law as justification for its failure to perform a treaty". Brownlie points out that "the reservation [in Article 2(7)] is inoperative when a treaty obligation is concerned" and that "[t]he extent to which...states can now rely on some type of formal interpretation [of the provision], is in doubt. Supra,note 27 at 552-553.

[31] Scheffer argues that "'[d]omestic jurisdiction'does not exempt everything within sovereign borders from scrutiny of the international community any more than the domestic jurisdiction of the city of Toledo shields its government and residents from the reach of Ohio state law, federal law, or, for that matter international law". Scheffer, supra,note 12 at 261. It is perhaps relevant to recall that as far back as 1923, the Permanent Court of International Justice stated in a dictum that:"the question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question;it depends on the development of international relations". See Nationality Decrees in Tunis and Morocco Case (1923) PCIJ, Series B no.4. at 24. As there may be no permanent demarcation between internal and international affairs, or between domestic and international jurisdiction within which authority is exercised, what was once impermissible intervention into domestic affairs may become permissible international action.

[32] Ibid. See supra,note 30.

Rights[33] and other human rights Conventions, Perez de Cuellar as Secretary-General of the UN, challenged the traditional construction placed on Article 2(7). He maintained that a new balance must be struck between sovereignty and the protection of human rights.[34]

It is now increasingly accepted that human rights issues are no longer strictly within the domestic purview of states. It is a matter of concern for the whole world community.[35] Consequently, human rights abuses prompting humanitarian action are

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[33] Universal Declaration of Human Rights, G.A. Res. 217A (III) at 71, U.N. Doc.A/810 (1948).

[34] He writes: "I believe that the protection of human rights has now become one of the keystones in the arch of peace. I am convinced that it now involves more a concerted exertion of international influence and pressure through timely appeal, admonition, remonstrance or condemnation and, in the last resort, an appropriate United Nations presence, than what was regarded as permissible under traditional international law.

It is now interestingly felt that the principle of non-interference within the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that, in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is also threatened. Omissions or failures due to a variety of contingent circumstances do not constitute a precedent. The case for not impinging on the sovereignty, territorial integrity or political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection. With the heightened international interest in universalizing a regime of human rights, there is a marked and most welcome shift in public attitudes. To try to resist it would be politically unwise as it is morally indefensible. It should be perceived as not so much a new departure as a more focused awareness of one of the requirements of peace". J Perez De Cuellar, Report of the Secretary-General on the Work of the Organization:1991 (1991) at 11-13. Quoted in Scheffer, supra,note 12 at 262-263.

[35] See, Fonteyne, supra,note 1 at 241; According to Lauterpacht, "human rights and freedoms having become the subject of a solemn international obligation and of one of the fundamental purposes of the Charter, are no longer a matter which is essentially within the domestic jurisdiction of the Members of the United Nations..." H. Lauterpacht, International Law and Human Rights (Praeger:New York,1950) at 178. Another writer has also concluded that massive human rights violations "are no longer essentially within the domestic jurisdiction of States, and therefore the principle of nonintervention is not applicable". F. Ermacora,"Human Rights and Domestic Jurisdiction (Article 2(7) of the Charter)"(1968) 124 Recueil Des Cours bk.II, 371 at 436. Beyerlin states that although this issue is still highly debatable "...the scope of domestic jurisdiction in human rights matters seems to be narrowing".See, supra,note 2 at 214-215. Asrat contends that while unilateral humanitarian intervention does not appear to be valid under contemporary international law, it does not mean states do not have the legal option of compelling governments to redress human rights abuses. They could resort to non-violent reprisals since respect for basic human rights has been held to be the "concern of all [s]tates and to constitute an obligation erga omnes". He cites the International Court of Justice decision in the Barcelona Traction Case to support this position. Asrat, supra,note 2 at 185. The Court indicated in that case that obligations of this type "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from

no longer "matters essentially within the domestic jurisdiction of a state". It should also be noted that Article 2(7) ends with a critical proviso:"this principle shall not prejudice the application of enforcement measures under Chapter VII" which deals with enforcement actions to maintain international peace and security. As we will see in the next Chapter, the Security Council is now engaging in more Chapter VII enforcement actions in matters that were previously considered within the domestic jurisdiction of states.

Thus, it could be claimed that Article 2(7) does not affect the right of humanitarian intervention.[36] This position is desirable. For, in the absence of a general consensus in the international community on this issue, albeit, that at least the most basic rights should be protected, there will still be states indulging in gross violations of human rights. Attempts made by other states aimed at protesting the occurrence of human rights violations will only meet with rebuff under the cloak of non-intervention in domestic matters.

Looking at the law beyond the Charter, commentators have marshalled an array of international instruments like various General Assembly resolutions (which are not

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the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination...". See, Barcelona Traction (Judgement) (1970) International Court of Justice Reports 3 at para.33. This case thus lays down the proposition that obligations towards the international community as a whole derive from, among others, the principle and rules concerning the rights of the human person.

[36] Ganji states "with regard to action pertaining to the international protection of [human rights and fundamental freedoms that]...the provisions of Article 2, paragraph 7 cannot be invoked". M. Ganji, International Protection of Human Rights (Geneve:Librairie E. Droz, 1962) at 135. Lillich asserts the UN definitely has the legal right to intervene for humanitarian reasons if a state violates fundamental human rights causing an actual threat to the peace. R.B. Lillich, "Intervention to Protect Human Rights" (1969) 15 McGill Law Journal 205 at 212. It has been further suggested that human rights concerns have been placed outside the scope of Article 2(7) even in cases not amounting to a threat to the peace. See, Reisman & McDougal, supra,note 1 at 189,190-191.

legally binding) and conventions to either buttress existence of the principle of humanitarian intervention or to refute it.

Opponents of the doctrine refer to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States.[37] This resolution, adopted by the General Assembly in 1965, it has been argued, did not only outlaw "armed intervention" but went beyond, condemning also "all other forms of interference or attempted threats against the personality of the State".[38] In addition to this, is the more fundamental 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[39] It provides:"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State".[40] Commenting on this, Verwey states that the phrase 'for any reason whatever' obviously includes humanitarian intervention.[41]

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[37] Res.2131(XX) 20 U.N. GAOR Supp. (No.14), (U.N. Doc. A/6014 (1965).

[38] H.S. Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box" (1980) 10 Georgia Journal of International and Comparative Law 29 at 43.

[39] See, G.A. Res.2625, 25 U.N.GAOR Supp.(No.28) at 121, U.N. Doc. A/8028 (1970). Reproduced in (1970) 9 International Legal Materials 1292. See also, The 1974 U.N. Definition of Aggression, G.A. Res. 3314, U.N. GAOR, Supp. No.31, at 142, U.N. Doc. A/9631 (1974). Reprinted in (1975) 69 American Journal of International Law 480. This document defines "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State". It further specifies "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". Opponents of the doctrine have also used this resolution as a springboard to argue any first use of force, including humanitarian intervention, is 'aggression' unless the Security Council (and not the states actors) removes this label. See, Verwey, supra,note 2 at 389.

[40] 25 U.N. GAOR Supp. (No.28) at 123. Franck and Rodley state the Resolution "brooks no exceptions, not even for the protection of human rights" and that its "clarity is not obscured by the addition of a paragraph reiterating the obligation of states to respect the right of self-determination and human rights". T.M. Franck & N. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 American Journal of International Law 275 at 299-300.

[41] Verwey, supra,note 2 at 390.

It should be noted that the latter resolution approved the principles enunciated in the 1965 Declaration as the "basic principles" of international law and laid down a broad non-intervention principle, perhaps, merely restating Article 2(7) in detail.

These declarations, however, are not ordinary international treaties or conventions, and like general assembly resolutions do not create obligations binding on states. Fairley argues this is the case. But nevertheless, "there is a wide consensus that these declarations actually established new rules of international law binding upon all States"[42] and that "the support generated for this idea certainly enhances its persuasive value..."[43]

In direct opposition to these Declarations, however, stands the ever-expanding body of international law on human rights concerning promotion and protection. These are embodied in various General Assembly Declarations and Conventions.[44] They provide an "...overriding commitment to the protection and fulfilment of human rights"

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[42] Supra, note 38 at 44, quoting, L. Sohn, "The Shaping of International Law" (1978) Georgia Journal of International and Comparative Law 16.

[43] Supra,note 38 at 44.

[44] See for example,the Universal Declaration of Human Rights, G.A. Res. 217A, U.N.Doc. A/810 (1948);International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, U.N. Doc. A/6316 (1966), stating in sufficient detail the duties of states and the rights of individuals. International Convention on the Suppression and Prevention of the Crime of Apartheid, 1015 United Nations Treaty Series 244 (This Convention adopted by the UN in 1973, in its Preamble and in Article 1, described apartheid as a "crime against humanity" violating the "principles of international law, in particular the purposes and principles of the Charter of the United Nations, and [constituted] a serious threat to international peace and security"). In addition, the Convention on the Prevention and Punishment of the Crime of Genocide,1948,78 United Nations Treaty Series 277, defines genocide as: "[A]cts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 1 of the Convention makes genocide an international crime and mandates its signatories to "undertake [steps] to prevent and to punish" genocide. This Convention thus reiterates validity of the doctrine of humanitarian intervention.

in the Charter system, "coequal with that of the maintenance of peace and security", affording justification for the right of humanitarian intervention.[45]

Also, other legal, moral and practical grounds can be advanced in support of the legitimacy of humanitarian intervention. It is argued that the justification for the existence of states is not derived from any supposed international order. It originates from protection and enforcement of the rights of individual citizens.[46] Consequently, Governments committing outrageous human rights violations abandon the very purpose for which they exist and thus lose their legitimacy under international law.[47] In such situations intervention by another state for purposes of humanity is permissible.[48]

In addition to the above considerations, some proponents express their concern over the preservation of humanity, arguing that the value of human life takes precedence over legal principles.[49] Thus, basic humanitarian feelings lend credence to the view that

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[45] See, M.S. McDougal, H.D. Lasswell, and L.C. Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (1980) at p.241;"Response by Professors McDougal and Reisman"(1968-69)International Lawyer 438. On the contrary Franck and Rodley contend "none [of these international human rights instruments] in any way purports to extend this right".Supra,note 40.

[46] The moral underpinnings of Téson's theory is akin to the social contract thesis. He notes that "[s]tates and governments exist because individuals have consented, or would ideally consent, to transfer some of their rights in order to make social cooperation possible". Supra,note 1 at 112.

[47] Teson's justification is that "...the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well". Ibid. at p.15. Levitin, adopting the view of Grotius, also argues along similar lines to the effect that governments committing atrocious human rights violations lose their legitimacy. See, supra,note 1 at 652.

[48] There is no distinction here, between the rights of citizens of one state and the rights of foreigners;all people deserve protection where human rights are concerned, and therefore humanitarian intervention should be legal. Téson, ibid. at 113-114 .

[49] Lillich writes: "....to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress blackletter at the expense of far more fundamental values". Lillich, "Self Help", supra,note 1 at 344.

states cannot remain indifferent whilst massive human rights violations take place.[50] Also, Teson points out that defensive wars aimed at the protection of human rights are considered the only morally justified wars.[51]

A principal reason for continued justification of the right of humanitarian intervention lies in the failure of the UN realizing its original aims. The founding fathers of the Organization expected states would take collective action under the aegis of the UN in situations of "threats to the peace", "breaches of the peace", or "acts of aggression", rather than rely on unilateral state action.[52] The Security Council under Chapter VII of the Charter is seized with mandatory jurisdiction to take action in those situations.[53] This machinery for collective security and enforcement has however, proved to be largely ineffective.[54] As a result, "[t]he deterioration of the Charter security regime has

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[50] A.A. Leff, "Food for the Biafrans" New York Times, October 4, 1968 at A46, Col.3, quoted in T.J. Farer, "Humanitarian Intervention:The View from Charlottesville" in Lillich, ed., supra,note 1 at 151. Leff puts it tersely in context of the Biafran war thus:"I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra.....Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death". Ibid.

[51] Téson, supra,note 1 at 247.

[52] See Articles 39-51 of the Charter. On the issue of the appropriateness of unilateral intervention by a state in the interest of humanity see J. Westlake, International Law,Part I;Peace (London:Cambridge University Press,1910) at 318-320.

[53] Articles 39-44 of the Charter. Also, by the "Uniting for Peace" Resolution, where the Council is unable to function, the secondary authority of the General Assembly becomes operative. The Assembly may thus perform duties and powers of the Council. See, Uniting for Peace, G.A. Res. 377(v), U.N. G.A.O.R. Supp. No. 20 (A/1775) at p.10. See also, L.C. Green, "The Little Asembly" (1949) 3 The Yearbook of World Affairs 169.

[54] Soon after the Charter regime came into effect, Jessup observed, "[i]t would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take sometime before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international actions shall be timely as well as powerful". P. Jessup, A Modern Law of Nations (New York:Macmillan, 1948) at 170. McDougal and Behr in a comment that is still valid today, note "the most difficult problem still confronting the framers of the United Nations' Human Rights Program is that of devising effective procedures for enforcement". M. McDougal and Behr, "Human

stimulated a partial revival of a type of unilateral jus ad bellum".[55] This "contemporary doctrine relates only to the vindication of rights which the international community recognizes but has, in general or in a particular case, demonstrated an inability to secure or guarantee".[56] Included in this category of rights is humanitarian intervention.[57]

Lastly, another significant factor which is relevant for the continuing validity of the doctrine, is the progress made in information systems technology.[58] Satellite technology, facsimile machines, telecommunications systems, and video recorders have made possible the instant detection, transmission and documentation of human rights violations.[59] Thus, any concerns about pretextual humanitarian intervention can be

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Rights in the United Nations" (1964) 58 American Journal of International Law 603 at 629. Lillich points out the UN's inability to function effectively in intervening for humanitarian purposes by citing Friedmann's comments that "[a] combination of the failure to establish a permanent international military force and the existence of the veto power, has effectively destroyed the power of the United Nations to act as an organ of enforcement of international law against a potential lawbreaker" and concludes "the effective power of using military or lesser forms of coercion in international affairs essentially remains with the nation [s]tates". Supra,note 22 at 170-171. Bazyler observes that "[w]hen mass slaughters occur, and the United Nations fails to act, the possibility of individual state action must remain open". Bazyler, supra,note 1 at 577,footnote 130. Examples of the UN's inability to act swiftly abound in state practice which will be discussed infra. An examination of the UN's role in the 1990s in so far as humanitarian purposes are concerned will also be undertaken in the next Chapter.

[55] Reisman,supra,note 10 at p.281.

[56] Ibid. Ronzitti writes that "...a simple truth [must be] taken into account: the absence of - or partial-implementation of the United Nations collective security system. This factor has mounted a process which has led States to try and resurrect-albeit with necessary modifications-part of the law which existed before the entry into force of the United Nations Charter. This can explain why a number of States, while verbally abiding by the prohibition of force, are at the same time rediscovering such pre-Charter law as...the time honoured institution of humanitarian intervention". Ronzitti, supra,note 2 at xi.

[57] Ibid.

[58] B.M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities" (1992-93) 16 Fordham International Law Journal 120 at 144.

[59] Roberts et. al., note that:"[d]irect dial telephones and satellite uplinks carry information into countries like China, and they also carry it out. Those images and ideas appear instantly on American television, engaging voters and altering the environment of formal diplomacy". S.V. Roberts et. al., "New Diplomacy by Fax Americana" U.S. News and World Report (June 19, 1989) at 32. Quoted in Benjamin,ibid.145,footnote 168. Also, Halvorson observes the United States has a network of spy satellites capable of taking pictures of objects as small as a licence plate, seeing through darkness, and intercepting

easily ascertained and sanctions applied to the intervenor.[60] This way, humanitarian interventions motivated predominantly by altruistic reasons will help the cause of strengthening world peace and ending human suffering.[61]

1.2. Selected Case-Studies of State Practice from 1945-1989:

In examining the extent to which state practice supports the doctrine, it is important to keep in mind the circumstances under which humanitarianism was largely a motivating factor, and deemed lawful in the decision of one state intervening in another.

There have been instances in which UN efforts had been involved in attempting to restore order given circumstances in which human rights could not be sustained. Examples of UN action in Palestine, the Congo and Cyprus have been cited as illustrations of the institution of humanitarian intervention.[62] Apart from these,instances of state intervention in the post-Charter era where a variety of reasons were offered abound. However, only the most salient ones involving humanitarian considerations will be addressed.

a. The Congo Intervention of 1964:

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walkie-talkie communications on earth. This network for example, was used to monitor Soviet activities during the abortive coup d'etat which sought to depose Mikhail Gorbachev in 1991. T. Halvorson, "Spy Satellites Monitor Developments in Soviet Union" Garnett News Service (August 19, 1991) at 20. Cited in ibid. footnote 169.

[60] In this context, Benjamin notes "... the possibility of a disingenuous invocation of the doctrine would be significantly minimized because such disingenuousness is recognizable". Benjamin, ibid.at 146.

[61] Ibid.

[62] McDougal and Reisman, supra,note 1 at 184.

On or about the 26th September 1964, insurgents fighting the Congolese government took over two thousand foreign residents as hostages in Stanleyville and Paulis, with the objective of extracting certain concessions from the central government. When the government rejected their demands, the insurgents killed forty-five of the hostages within a period of weeks. The

situation was worsened by threats of further executions.[63] Efforts to secure the release of the hostages proved futile. As a result, Belgian forces with the aid of United States airplanes and using British military facilities intervened in the Congo, evacuating the endangered persons on a rescue mission that lasted four days.[64] The interventionary force withdrew from the country upon completion of their mission.

The intervention was condemned by many African states insisting at the time that even as the operation went on - with the rescue of the white foreign residents - innocent blacks were being killed in the process, a conviction which smacked of racism.[65] Perhaps this point was driven home to emphasize the idea that the rescuers valued the lives of one particular group of people (whites) more than another (i.e. blacks). Whilst an accurate account of whatever took place during the operation is still disputable,[66]

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[63] A telegram from a rebel general to an officer in charge of the hostages was allegedly intercepted which read;"[i]n case of bombing region, exterminate all without requesting further orders". United States Department of State Bulletin (1965), at 18. Quoted in Lillich, Self-Help, at 339; See also, ibid. at 185.

[64] Lillich,ibid.

[65] Franck and Rodley,supra,note 40 at 288. Some African delegates expressed their dislike for the whole operation at the UN. The Congo Brazzaville delegate for example had this to say: "why, in a conflict in which the Congolese are fighting between themselves, should there be no concern for the safety of the civilian population in general and why should the fate of the whites be the sole consideration?". 19 U.N. SCOR, 117th meeting 14 (1964). Quoted in H.L. Weisberg, "The Congo Crisis 1964:A Case Study in Humanitarian Intervention"(1972) 12 Virginia Journal of International Law 261 at 267.

[66] Franck and Rodley,Ibid. It has been pointed out that whilst the facts are unclear as to responsibility for the deaths of several blacks, the circumstances indicated an active role played by the white mercenaries of the Tshombe army. Weisberg, ibid.

there is some degree of certainty that its fundamental purpose was aimed at the saving of life given the dangerous situation posed by rebel activities in the region. This was evident in the fact that Congolese (including other Africans) as well as people of other nationalities were rescued.[67]

In justifying their action, the intervening states pointed to the humanitarian aspect of their mission. A statement from the U.S. Department of State read:

> "This operation is humanitarian - not military. It is designed to avoid bloodshed - not to engage the rebel forces in bloodshed. Its purpose is to accomplish its task quickly and withdraw - not to seize or hold territory. Personnel engaged are under orders to use force only in their own defense or in the defense of the foreign and Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished."[68]

Similarly, the Belgian official statement pointed out that

> "[i]n exercising its responsibility for the protection of its nationals abroad, [the Belgian] government found itself forced to take this action in accordance with the rules of international law, codified by the Geneva Conventions. What is involved is the legal, moral and humanitarian operation which conforms to the highest aims of the United Nations: the defence and protection of fundamental human rights and respect for national sovereignty".[69]

A point worth noting about the mission is that it was undertaken with express authorization of the Congolese government. It was understood that the intervening forces

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[67] Whilst the primary aim of the intervening forces was to rescue their own nationals, the overall humanitarian consideration was not absent. This is evident, for example, from the statement of the U.S. ambassador to the UN that "while our primary obligation was to protect the lives of American citizens, we are proud that the mission rescued so many innocent people of 18 other nationalities from their dreadful predicament". United States Department of State Bulletin (1965) at 17. Quoted in Lillich, Self-Help, supra,note 1 at 340.

[68] United States Department of State Bulletin (1964), at 842. Quoted in ibid.

[69] See, Note of the Belgian representative to the President of the Security Council dated 24th November, 1964. U.N. Doc. S/6063; SCOR, Supp. Oct.-Dec. 1964, At 189-192.

would withdraw as soon as the operation was completed, which was done.[70] Thus, it could be argued that this satisfied the requirement of consent by the de facto government of the target state in a situation in which it was unable to protect the lives of the endangered nationals. Whilst this consent factor adds to the legitimacy of the intervention, it should however not be treated as the necessary prerequisite in the circumstances of this case.

This intervention, however, is not free from criticism. Some broad political and economic objectives have been proffered as motivating factors. Some African states, Czechoslovakia, and the former Soviet Union considered the mission as a pretextual humanitarian intervention aimed at consolidating the central government of Tshombe's power.[71] References were made to 'colonialism' and the fact that the Stanleyville operation was a dangerous precedent which might threaten the independence of African states.[72] Perhaps these criticisms were levelled due to the fact that by the time the foreign troops withdrew, Tshombe's position vis-a-vis the rebels had been strengthened. One writer thus concludes that "the combined military operation was enough to destroy the rebel stronghold. It is clear that this had been the prime objective of US and Belgian policy from the beginning".[73] It is suggested that if the central government gained any advantages from the mission, that would possibly be pure coincidence. Of course, the rescue operations would necessarily have involved some kind of conflict with the rebels

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[70] Lillich, "Self-Help", supra,note 1 at 340.

[71] See, Yearbook of the United Nations,1964 (New York:United Nations,1966) at 96-98.

[72] Ibid. at 96.

[73] Verwey, supra,note 2 at 401.

in the process of extricating the hostages.

The Stanleyville operation was undertaken in circumstances in which both the UN and the Organization of African Unity (OAU) were unable to act with the necessary dispatch given the urgency of the situation in the Congo.[74] It is quite clear that humanitarian considerations were a motivating factor. Thus, this case could properly be classified as a precedent in state practice on the matter.[75]

b. The Dominican Republic Intervention of 1965:

The events preceding the Dominican Republic intervention and after seem to be much more complicated than the Congo situation.[76] Briefly, an interim military government which ousted the Constitutional government of President Bosch in a putsch in 1963 was subsequently challenged by a revolt on 24 April 1965. As a result, civil strife erupted which left the Republic without an effective government and consequent break down of law and order. On 28 April 1965, US Marines landed in Santo Domingo in order to protect its nationals and those of other countries in the wake of the unfolding events.[77]

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[74] Lillich, "Self-Help", supra,note 1 at 340.

[75] Lillich "reaches the inescapable conclusion that if ever there was a case for the use of forcible self-help to protect lives, the Congo rescue operation was it". Ibid.

[76] For a more detailed account of the facts see for example, A.J. Thomas and A.V. Thomas, The Dominican Republic Crisis 1965 (Dobbs Ferry:Oceana Publications Inc.,1967); J. Slater, Intervention and Negotiation: The United States and the Dominican Crisis (New York,1970);V. Nanda, "The United States' Action in the 1965 Dominican Crisis: Impact on World Order-Part I " (1966) 43 Denver Law Journal 439;(Part II) (1967) 44 Denver Law Journal 225.

[77] Prior to sending its forces into Santo Domingo, a note had been sent to the US Embassy signed by Colonel Benoit, President of the Military Junta to the effect:"[r]egarding my earlier request I wish to add that American lives are in danger and conditions of public disorder made it impossible to provide adequate protection, I therefore ask you for temporary intervention and assurance, in restoring order in this country". (1965) 4 International Legal Materials at 565. It is however doubtful to rely on this note as a

In stating reasons for the US intervention after the first five hundred marines were sent in, President Johnson said:"[f]or two days American Forces have been in Santo Domingo...in an effort to protect the lives of Americans and nationals of other countries in the face of increasing violence and disorder".[78] He later on indicated in greater detail that:

> "We didn't intervene. We didn't kill anyone. We didn't violate any embassies. We were not perpetrators. But as ...we had to go into the Congo to preserve the lives of American citizens and haul them out when they were being shot at, we went into the Dominican Republic to preserve the lives of American citizens and citizens of a good many other nations - 46 to be exact, 46 nations. While some of the nations were denouncing us for going in there, their people were begging us to protect them".[79]

Given the situation in the Dominican Republic at the time, the reasons advanced so far for the intervention, and the fact that thousands of foreigners were indeed evacuated,[80] it is not difficult to point out the humanitarian considerations involved here. Action by the United Nations or the Organization of American States (OAS) in terms of consultations and negotiations would have proved costly in terms of lost lives given the time span within which some immediate action was needed.

The Dominican situation however, runs into problems when, inconsistent with

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request for intervention since it appears that at the time there was no effective government in control of affairs in the country. However, Lillich notes that the US, torn between inaction or going in to help one of the contending factions, "...chose instead a more complicated and,...more constructive course. [It] landed troops in the Dominican Republic in order to preserve the lives of foreign nationals - nationals of the United States and many other countries". Meeker, "The Dominican Situation in the Perspective of International Law" United States Department of State Bulletin (1965) at 62. Quoted in Lillich, "Self-Help", supra,note 1 at 340.

[78] New York Times, May 1, 1965, at 6, col.4.

[79] United States Department of State Bulletin (1965) at 20. Quoted in Lillich, "Self-Help",supra,note 1 at 342.

[80] See Security Council Debate,3-4 May,1965,United Nations Yearbook 1965 ,at 141.

their earlier objectives, the US declared later that its aim was to prevent a communist take-over.[81] It did not leave the Dominican Republic, but maintained its presence for over a year, with a troop build-up of over 20,000 military personnel. The reasons offered for this presence was that the breakdown of law and order necessitated the preservation of a situation for a period of time which would enable the OAS to act collectively.[82] The troops subsequently formed the core of an Inter-American Peace Force which was established with the purpose of cooperating in restoring conditions to normal. This drew criticisms from some states that the establishment of this Force was a prohibited intervention in a situation of domestic conflict.[83]

It is noted that some commentators have tended to justify the US action in the Dominican Republic on the more narrow ground of intervention to protect nationals abroad.[84] Nevertheless, what can be said about the Dominican situation is that the

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[81] See, Nanda, Part II, supra, note 76 at 225 and accompanying notes 6-16. President Johnson had declared in connection with the crisis that: ".. the American nations cannot, must not and will not permit the establishment of another communist government in the Western Hemisphere. This was the unanimous view of All American nations when, in January, 1962 they all declared, and I quote: 'The principles of communism are incompatible with the principles of the American system". Documents on American Foreign Relations,1965, at 245.

[82] New York Times, May 9, 1965,at E3,col.4. Quoted in Fillich, "Self-Help", supra,note 1 at 343.

[83] See, Thomas and Thomas, supra,note 76 at 49-52.

[84] The principle of self-defence to protect nationals abroad was also subsequently used as basis for US involvement in the Mayaguez incident of 1975, and the Israeli raid on Entebbe in 1976. In the Mayaguez incident, Cambodian forces, on 12th May, 1975, seized an American vessel - the "Mayaguez" - and its crew in what Cambodia claims to be her territorial waters. Diplomatic efforts to secure the release of the ship and its crew having proved futile, President Ford authorized US forces to board the illegally seized ship and land on a Cambodian island, with the object of rescuing the crew and the ship, and also to conduct strikes against nearby Cambodian military installations. For factual details and comments on this incident see for example, Digest of United States Practice in International Law (U.S. Government Printer's Office:Washington,1975) at 777-783;R.Rowan, The Four Days of the Mayaguez (1975);Paust,"Comment:The Seizure and Recovery of the Mayaguez"(1976) 85 Yale Law Journal 774;Note, "Pueblo and Mayaguez:A Legal Analysis"(1977) 9 Case Western Reserve Journal of International Law 79. In the Entebbe rescue operation, an Air France plane with over 250 passengers aboard en route from Tel Aviv to Paris via Athens was hijacked on June 27, 1976 after leaving Athens. The hijackers, claiming to be members of the Popular Front for the Liberation of Palestine, forced the

initial U.S. response showed a commitment to intervene based on humanitarianism. Its subsequent presence however, cannot be justified for the same reason. This example, perhaps, shows the limits within which the doctrine can be applied. The initial aim of saving lives having been accomplished, the U.S. should have withdrawn its troops. However, maintaining its presence beyond that limited objective lends credence to the view that motives other than purely humanitarian considerations were involved.

c. The East Pakistan (Bangladesh) Intervention of 1971:

The Indian intervention in East Pakistan which resulted in creation of the independent state of Bangladesh provides an instance of intervention to protect its own interests when threatened by an influx of refugees.

The origins of this intervention could be traced back to the partition of India in 1947 as a result of which Pakistan came into being, composed of two different parts geographically separated by a distance of over 1,000 miles. It was also divided by ethnic, cultural and linguistic differences. The two common factors, namely Islam and alienation from India, which held these parts together, were, however, not sufficient to ensure stability.[85] By the late 1960s political and economic domination of East Pakistan by West Pakistan had resulted in increasing political discontent.

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plane to Entebbe Airport in Uganda where it was given permission to land. The hijacking ended on 4th July, 1976 with an Israeli commando raid on Entebbe Airport freeing 105 hostages held by the hijackers. For comments on this incident see Green, supra,note 1; "Rescue at Entebbe-Legal Aspects" (1976) 6 Israel Yearbook on Human Rights 312;Note, "Entebbe:Use of Force for the Protection of Nationals Abroad" (1977) 9 Case Western Journal of International Law 117.

[85] For details of events leading to the breakup of Pakistan and comments on the Indian intervention in East Pakistan see for example, International Commission of Jurists, The Events in East Pakistan,1971 (Geneva,1972); V. Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis" (1972) 49 Denver Law Journal 53;Teson,supra,note 1 at 179-188.

The Pakistani general elections of December 1970 resulted in an overwhelming victory for Sheikh Mujibur Rahman's East Pakistani Awami League party, which campaigned for political and economic autonomy.[86] Following results of the elections, there were simmering fears in West Pakistan, given the demand for autonomy and the possibility of being ruled by the Awami League Party. The National Assembly having been postponed indefinitely,[87] the situation degenerated into mass demonstrations with the East Bengalis clamouring for total independence. With no possibility of peaceful settlement of the political impasse in sight, the Pakistani army moved into Dacca on 25 March 1971, unleashing a reign of terror. There were reported cases of mass murders and other human rights atrocities committed by the Pakistani army.[88] A result of these atrocities saw the influx of over 10 million people seeking refuge in India.[89] Relations between India and Pakistan deteriorated, erupting into a full-scale war on 3rd December, 1971 - a war that lasted 12 days and ended with the surrender of the Pakistani Army.[90] In the aftermath of the intervention, political prisoners were released, refugees returned to East Pakistan and finally, Bangladesh was established as a new independent state.

Adducing reasons for its intervention, India claimed protection of the Bengalis from gross and persistent violations of human rights by the Pakistani army, and also addressing the problem of over 10 million Bengali refugees that crossed into its territory,

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[86] International Commission of Jurists, ibid. at 12.

[87] Ibid. at 13-14.

[88] Ibid. 24-27.

[89] The precise number of refugees is in dispute.Whilst the Pakistani government claimed there were no more than 2 million people, the Indian government claimed otherwise. What is certain is that, this influx of people put a severe strain on India's economy. See, Teson,supra,note 1 at 182.

[90] International Commission of Jurists, supra,note 85 at 43-44.

India's representative at the Security Council stated that:

> "[r]efugees were a reality. Genocide and oppression were a reality. The extinction of all civil rights was a reality. Provocation and aggression of various kinds by Pakistan from March 25 onwards were a reality. Bangladesh itself was a reality, as was its recognition by India. The [Security] Council was nowhere near reality".[91]

Elsewhere, the Indian representative again notes "that we have on this particular occasion absolutely nothing but the purest of intentions: to rescue the people of East Bengal from what they are suffering".[92]

While the Indian action could be looked upon as intervention to stop the human rights atrocities that were being perpetrated,[93] some writers have considered it unlawful.[94] Comments have been made to the effect that more importantly, the operation was a strategic one undertaken by a partisan actor. India was interested politically in the secession of East Pakistan. It thus seized the opportunity to curtail Pakistan's power and to diminish the territory of its political and military rival.[95] It is probable that taking into consideration the overall political dynamics for control of the

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[91] See, UN Monthly Chronicle, January 1972, at 3,25.

[92] Statement of Ambassador Sen to the UN Security Council, UN Doc.S/PV.1606,86(1971). Cited in T.M. Franck and N.S. Rodley, "The Law, The United Nations and Bangla Desh" (1972) 2 Israel Yearbook on Human Rights 142 at 164. Some writers claim India did not invoke humanitarian considerations as a reason for intervention. Others note that it did not claim the doctrine as her main line of defence. See for example, Hassan, supra,note 2 at 884 footnote 167;Akehurst, supra,note 18 at 96; Ronzitti, supra,note 2 at 96; But as Teson correctly observes, whether India invoked it or not is not important. The significant thing to note is to take into consideration the totality of the circumstances which called for intervention on grounds of humanity.Teson, supra,note 1 at 186.

[93] Teson points out that this action could also be viewed as rendering foreign assistance to a people engaged in a struggle for their right to self-determination, which is a collective human right. However, he notes that it is not necessary to draw those distinctions since claims of self-determination and human rights violations both converge in this example. Teson,ibid. at 185.

[94] See for example, Franck and Rodley,supra,note 40; I. Brownlie, "Thoughts on Kind-Hearted Gunmen" in Lillich ed. Humanitarian Intervention and the United Nations (1973),139.

[95] See Verwey, supra,note 2 at 402;Bazyler, supra,note 1 at 589.

region, it was in India's interest to take some form of action to cause the break-up of Pakistan and thus reduce the threat posed by its neighbour. If that happened, then predictably India would have emerged as a dominant power in the region. But, if one brings into focus the entirety of the crisis, there was no doubt that given the massive scale on which human rights were being violated, India had the right to intervene for purposes of humanity.

Other factors that could justify India's action relate to the UN's inability to deal with the situation over the period in which these massacres were going on. India withdrew its forces promptly. Also, many members of the UN viewed the action favourably. The fact that the UN did not condemn the intervention could also be interpreted as an implied recognition of the doctrine. Given the extraordinary circumstances in East Pakistan, which some writers view as being of genocidal proportions, this case fits into the category of acts 'shocking the conscience of mankind' for which intervention to redress the situation is justified.[96]

d. The Tanzanian Intervention in Uganda of 1979:

The dictatorship of President Idi Amin came to an end in April 1979, with his overthrow by Ugandan rebels aided by Tanzanian army units. Amin's reign, from 1971 until his ouster from power in 1979, had been consistently notorious for its gross

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[96] Teson, after studying this case states that the action "...directed toward rescuing the Bengalis from the genocide attempted by Pakistan, is an almost perfect example of humanitarian intervention".Teson, supra,note 1 at 185. Fonteyne holds the opinion that "...the Bangladesh situation probably constitutes the clearest case of forceful individual humanitarian intervention in this century". Fonteyne, supra,note 1 at 204.

violations of human rights.[97] Prior to the Tanzanian invasion, relations between the two countries had been far from cordial.[98] There had been a series of border clashes between them. However, the immediate cause precipitating Tanzania's invasion stemmed from Uganda's incursion into the former's territory in October 1978. Ugandan troops, crossing into Tanzanian territory, occupied a 710 square mile strip of that country known as the Kagera salient.[99] Amin thereafter declared annexation of that territory and the creation of a new boundary between the two countries.[100] In light of this aggression, the Organization of African Unity (OAU) did nothing to condemn it but urged Uganda to withdraw its forces.[101] Amin's troops withdrew after 15 days of plunder but continued in their harassment of the Tanzanians along the border.[102] By February 1979, the Tanzanian army along with Ugandan exiles and refugees had launched a full scale invasion into Uganda. In April 1979, these combined forces toppled Amin's regime. A new provisional government of the Ugandan National Liberation Front under Yusufu Lule was formed.[103]

At the commencement of the conflict Tanzania grounded its intervention as a

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[97] There had been widespread reports of executions, rape, torture, and arbitrary arrests. See for example, Amnesty International, Human Rights in Uganda Report, June 1978, Doc.AFR 59/05/78. Putting in perspective the extent of human rights atrocities committed by the regime, one writer observes that "Amin's Uganda...has been classified with Hitler's Germany and Stalin's Russia as, historically, the world's three most brutal regimes". Hassan, supra,note 2 at 893.

[98] For an account of prior relations between the two countries and details of the conflict see, U.D Umozurike, "Tanzania's Intervention in Uganda" (1982) 20 Archiv Des Volkerrechts 301; Hassan, ibid.

[99] New York Times, November 1, 1978, at 15.

[100] New York Times, November 2, 1978, at 2.

[101] Supra,note 98 at 303.

[102] Ibid. 304.

[103] Hassan, supra,note 2 at 880-881.

reaction to the aggression against it at the end of October 1978, pointing specifically to the occupation of the Kagera salient.[104] Given the fact that Ugandan forces had already withdrawn from the territory in question and also, that the nature of the response far exceeded the bounds of proportionality, it is difficult to sustain this claim of self - defence.[105] In referring to the intentions of President Nyerere of Tanzania[106] as well as the length and scope of the invasion, Hassan observes that "Tanzania did not contemplate a singular objective. From the beginning, [it] seemed determined to pursue a military solution and overthrow [of] Amin's government".[107] Taking into consideration the lack of goodwill between these two countries it is not difficult to imagine that other objectives were on the Tanzanian agenda during the conflict.

After the capture of Kampala, Tanzania declared on April 12 its limited objective.[108] It invoked humanitarian considerations as one of its objectives.[109] Its Foreign Minister stated that the fall of Amin was "a tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity".[110] Some

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[104] Ronzitti, supra,note 2 at 102.

[105] See supra,note 12.

[106] Nyerere metaphorically referred to "driving this snake from our house". Quoted in Hassan,supra,note 2 at 893.

[107] Ibid.

[108] It should be pointed out that Nyerere declared from the outset Tanzania's aim was not to punish Amin. "The aim of uprooting Amin was not our task [he said]; it was the task of the people of Uganda..." (1979) 16 Africa Research Bulletin (Political, Social and Cultural Series) at 5223. Quoted in Ronzitti, supra,note 2 at 103.

[109] See Ronzitti, ibid. However, Hassan is of the view that once the war started Tanzania never even invoked humanitarian reasons for its intervention.

[110] Ibid.

writers note that Tanzania did not invoke humanitarian considerations in this conflict.[111] Whilst it may be moot whether it did or not, it is important to realize that Tanzania did not seek any territorial aggrandizement. Even if its objective was to remove Amin from power, that aim by itself is not inconsistent with the doctrine of humanitarian intervention. If we recall the classical statement by Vattel,[112] this case would seem to fit the situation he envisaged. The brutality of the Amin regime against his own citizens is a well known fact which does not need recounting here. One writer describes this as "the efficiency of the state's repressive machinery" which had become "destructive of human rights".[113] The Ugandan people were left with no possible alternative but to seek foreign assistance in getting rid of this tyrant.

In sum, one could argue that the Tanzanian intervention was not justified in some respects. However, if one takes into consideration the inability of the OAU to act given the massive scale of human rights violations in Amin's Uganda, which was repulsive, Tanzania had no option but to intervene in the cause of humanity despite the fact that it might have had other motives.

e. Vietnam's intervention in Cambodia (Kampuchea),1978:

The Vietnamese intervention in Cambodia is another illustration of the use of force for the protection of human rights. In April 1975, the Khmer Rouge forces of Pol

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[111] See for example, Hassan, supra,note 2 at 894.

[112] See Chapter 1.

[113] Umozurike, supra,note 98 at 313.

Pot took over power from the Republican government.[114] Soon thereafter it embarked upon a programme of total reorganization of the country. In the process of this reorganization, massive violations of human rights by the regime against its own citizens took place.[115] There were reported cases of tortures, killings and mass deportations. In a three year period, an estimated number of over 2 million (out of a total population of 7 million) were reported dead through starvation, disease and slaughter.[116] The enormity of the human rights violations in Kampuchea at the time have been described as of genocidal proportions.[117]

Despite the international community's expression of outrage at the human rights atrocities, no effective measures were taken to stop what was happening in Kampuchea.[118] In December 1978, Vietnamese troops and the Kampuchean United Front for National Salvation invaded Kampuchea and overthrew the Pol Pot regime, installing a Vietnamese-supported government.[119]

In this precedent, no official justification based on humanitarian concerns had been offered by Vietnam.[120] Indeed, it has been observed that Vietnam had other motives.

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[114] The genesis of the Cambodian calamity was a result of the Vietnam -Indochinese conflict. Cambodia escaped the conflict in the 1960s but became involved in it in the 1970s. In early 1970, Lon Nol forces deposed Norondom Sihanouk's regime which attempted to keep its neutrality in the Indochinese conflict. Consequently, a civil war began between the American-backed Khmer republican forces and the Khmer Rouge communists supported by North Vietnam and China. Bazyler, supra,note 1 at 551.

[115] See, Ronzitti, supra,note 2 at 98.

[116] See, Bazyler, supra,note 1 at 551.

[117] The Chairman of the UN Human Rights Subcommission described it as "the most serious to have occurred anywhere since Nazism". Quoted in ibid. at 552.

[118] Ronzitti, supra,note 2 at 98.

[119] Ibid. at 98-99.

[120] Bazyler, supra,note 1 at 608.

It harboured territorial ambitions over Kampuchea and seized the opportunity, given the situation, to invade Kampuchea and install a puppet government.[121] Added to this is the fact that, even over a decade after the invasion Vietnamese troops and advisors were still present on Kampuchean soil.[122]

On the basis of the facts noted, it is difficult to discern whether in actuality, the objective of the Vietnamese was merely humanitarian. There is however, no doubt that the Kampuchean case was "a perfect candidate for humanitarian intervention".[123] The failure of the international community, including the UN, to find a diplomatic solution or to take any concrete measures of response, left the Vietnamese action as the viable option to end the atrocities that were being committed.

2. An Assessment:

Before drawing conclusions on the survival of the institution of humanitarian intervention in the period under consideration, two further instances of the use of force are worth mentioning:the U.S. intervened in Grenada in October 1983;[124] and, in

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[121] Ibid.

[122] Ibid. at 609. It has been claimed that the troops departed in early 1993.

[123] Ibid.

[124] For a detailed discussion of the Grenada intervention see, for example, W.C. Gilmore, Th... Intervention - Analysis and Documentation(London:Mansell Publishing Ltd., 1984);C.C. J... United States Action in Grenada - Reflections on the Lawfulness of Invasion"(1984) 78 Ame... of International Law 131;L.Wheeler, "The Grenada Invasion:Expanding the Scope of H... Intervention" (1985) 8 Boston College of International and Comparative Law Review 413;V. N... United States Intervention in Grenada - Impact on World Order" (1984) 14 California We... Law Journal 359; J. Moore, "Grenada and the International Double Standard" (1984) 78 Americ... of International Law 145;L.C. Green, "The Rule of Law and the Use of Force - The Falklands and Grenada" (1986) 24 Archiv Des Volkerrechts 173.

December 1989, intervened in Panama.[125] The preponderant justification for these interventions as put forward by the U.S., related to action to defend and free nationals whose lives were endangered.[126] Whilst some considerations of humanitarianism may have been involved here, it is very doubtful that these two incidents can be justified under the doctrine of humanitarian intervention.

In evaluating the legal position within the international community with the advent of the UN Charter, there is every indication to suggest that the customary institution of humanitarian intervention still exists. This is buttressed by the doctrinal writing. As Reisman and McDougal point out:

> "...the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in motion a continuous authoritative process of articulating international human rights..."[127]

An analysis of state practice in the Charter era shows the need for the doctrine of humanitarian intervention. Although in some situations one admits the potential for pretextual intervention, as noted earlier, the advancement of modern technology should easily ascertain such instances and sanctions applied to the intervenor. The scale of atrocities committed in the Ugandan, Pakistani and Cambodian paradigms show that states must be prepared to utilize the doctrine where it is imperative so to do. Not only do

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[125] For a discussion of the Panama invasion see L.Henkin, "The Invasion of Panama Under International Law: A Gross Violation" (1991) 29 Columbia Journal of Transnational Law 239; R. Hedgewood, "The Use of Armed Force in International Affairs: Self Defense and the Panama Invasion" (1991) 29 Columbia Journal of Transnational Law 609;A.D. Sofaer, "The Legality of the United States Action in Panama" (1991) 29 Columbia Journal of Transnational Law 281;J. Quigley, "The Legality of the United States Invasion of Panama" (1990) 15 Yale Journal of International Law 276.

[126] For reasons upon which the Grenada intervention was based see "Contemporary Practice of the United States Relating to International Law" (1984) 78 American Journal of International Law at 200-204.

[127] Reisman and McDougal, supra,note 1 at 171.

principles of justice require its invocation, but also the realities of the international situation demand its use. As Bazyler correctly indicates: "inaction now sows the seeds of future massacres".[128]

Difficulties relating to the institution of humanitarian intervention require a balancing of state sovereignty and the prohibition of the use of force. This balancing act should be done in a manner consistent with "other well established principles - those that have to do with upholding a modicum of human dignity".[129] It is suggested that state intervention in the territory of another state in order to implement a fundamental purpose of the UN - protection of human rights - is not inconsistent with the Charter.

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[128] Bazyler,supra,note 1 at 619.

[129] Téson, supra,note 1 at 200. Téson after examining some paradigms in state practice concludes that "[t]he problem of the legal status of humanitarian intervention is not a problem of fidelity to international law. Rather, it is one of determination of the law and of proper balance between competing principles". Ibid. [Emphasis in original].

CHAPTER THREE

THE NEW WORLD ORDER, HUMANITARIAN INTERVENTION, AND THE UNITED NATIONS IN THE 1990s

1. Introduction:

The 1990s have witnessed quite profound changes in the international system in a way unimaginable several decades ago. The end of the Cold War, the disintegration of the Soviet Union, and the events leading to and after the Persian Gulf War, drastically changed perceptions of the behaviour of states in the international political system.

It is within this context that some observers, including former President of the United States (U.S.) George Bush, began to talk about the ushering in of a "new world order". The promise of a new world order based on the rule of law, a system in which the world would become a safer and more peaceful place conjures an aspiration in which not only nation-states would be expected to cooperate, but one in which the role of the United Nations (UN) would become an essential element. These momentous events have shown a tremendous potential for a new focus in developing and applying the principles of international law, particularly humanitarian intervention, to the relevance of the present day.

This chapter seeks to discuss the role of the UN in the emerging new world order as it pertains to collective humanitarian intervention. The first part of the Chapter will attempt to discuss briefly what the new world order entails. The second part will examine the role of the UN relating to humanitarian intervention in this new world order.

2. Elements of the New World Order:

The concept of a "new world order" is not new.[1] Aspirations toward a new world order were made in declarations following World Wars I and II. The world order that emerged after both wars, however, turned out to be different from what the victor nations had envisaged. The League of Nations proved almost powerless in the face of aggression by the Axis powers. There was no effective international enforcement institution to liberate, for example, Ethiopia or China, to stop the atrocities perpetrated by Hitler against the Jews, nor to repel his army. In the period following World War II, the divisive politics of the Cold War stifled visions of a UN collective security system and of commitments to uphold fundamental human rights.

The decade of the 1990s has ushered in a unique opportunity with the United States-led coalition, in re-establishing a "new world order" in response to Iraq's aggression against Kuwait. Whilst it may not be possible to identify conclusively all the different usages of the phrase "new world order",[2] an attempt will be made to at least identify its major substantive contents. In an address before a joint session of Congress in September 1990, Bush stated:

> "[o]ut of these troubled times, ... - a new world order - can emerge; a new era - freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace, an era in which the nations of the world, East and West, North and South, can prosper and live in

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[1] For a discussion of the historical roots of the new world order see for example, W.R. Mead, "The Bush Administration and the New World Order" (1991) 8 World Policy Journal 375.

[2] For a more detailed discussion of the concept of a new world order, see C.W. Kegley Jr., "The New Global Order: The Power of Principle in a Pluralistic World" (1992) 6 Ethics and International Affairs 21;T.G. Carpenter, "The New World Disorder" (1991) Foreign Policy 24;A.K. Henrikson, "How Can the Vision of a 'New World Order' be Realized" (1992) 16 Fletcher Forum of World Affairs 63.

> world, East and West, North and South, can prosper and live in harmony".[3]

Elsewhere Bush has described the "new world order" as one "where brutality will go unrewarded and aggression will meet with collective resistance".[4] He further states that it will be a "world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak".[5] The substantive contents of this order, he states, will hinge on "[p]eaceful settlements of disputes, solidarity against aggression, reduced and controlled arsenals and just treatment of peoples".[6]

In his elaboration on the foundations of the new world order Thomas Pickering, the former U.S. permanent representative at the UN stated that it is "a new era of respect for international law, defended by a commitment to collective security".[7] Furthermore he notes that:

> "Underlying all of the factors which led to the success of the world's challenge of Saddam [Hussein], there was an unbeatable partnership. This is a partnership without which there can be no enduring basis for peace and prosperity in the world. What I am speaking about is the partnership between the rule of law and the responsible application of force. It is...that which gives us the right to say no, to say no to aggressors and to

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[3] G.H. Bush, "Toward a New World Order" (1990) 1 U.S. Department of State Dispatch 91, quoted in A.C. Arend, "The United Nations and the New World Order" (1993) 81 Georgetown Law Journal 491 at footnote 4.

[4] Address before a Joint Session of the Congress on the State of the Union, January 29, 1991, Weekly Compilation of Presidential Documents, vol. 27, no.5 (February 4, 1991) at 95. Quoted in D.J. Scheffer, "Use of Force After the Cold War: Panama, Iraq, and the New World Order" in L. Henkin et al., Right versus Might 2nd ed.(New York:Council on Foreign Relations Press, 1991) 109 at 153.

[5] Quoted in Scheffer, ibid.

[6] Quoted in ibid.

[7] Speech by Pickering before the Veterans of Foreign Wars Meeting, Washington D.C., Federal News Service transcript, March 4 1991, at 3, quoted in ibid.

outlaws".[8]

In seeking a new role for the UN the Secretary General, Boutros Boutros Ghali, in his UN Day message on 24 October 1992 declared that:

> "[d]espite the news of wars, hunger, homelessness and disease affecting millions, the world is moving towards a new, more participatory, people-centered way of conducting international affairs....The first truly global era has begun".[9]

In any case, what could be gathered from the various speeches is that the phrase is used in a sense to describe the post-Cold War, post-Gulf War international system. It has been suggested that used this way, the "new world order" is synonymous with the "new international system", and that the word "order" does not have any specific normative content.[10] A "new world order" has emerged because the "old world order" that hitherto existed from 1945-1990 has ceased to exist. Thus, the end of the Cold War, disintegration of the Soviet Union, the fall of communism in Eastern Europe and the UN action in the Gulf War brought into place a new "system" or new "order".[11]

The phrase may also be used to describe a better system for maintaining international order. A "new world order" is emerging because a new system of conflict management is unfolding on the international scene. A system that more assuredly will provide international peace and security than that which existed prior to 1990. This usage of the phrase thus connotes the fact that conflict can now be contained or controlled in

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[8] Ibid.

[9] See, UN Chronicle, 30:1 March 1993.

[10] Arend, supra,note 3 at 492.

[11] Ibid.

a more successful manner.[12]

Three possible scenarios conceivably emerge from this new system for maintaining international order namely: a system of U.S. hegemony, a Great Power concert, and a "New Multilateralism".

First, the new world order may relate to American hegemony. A system of American hegemony became evident during the Gulf War with the U.S. as the dominant power. The U.S. more than any other nation assembled and kept the war coalition together. It also played an active role in seeking the cooperation of the Security Council to adopt unprecedented measures culminating in the adoption of Resolutions 661,[13] 678[14] and others.[15] Given the predominant role played by the U.S. during, and in the

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[12] Ibid. at 493.

[13] U.N.Doc.S/RES/661,(1990).This Resolution imposed sweeping economic and diplomatic sanctions on Iraq.

[14] U.N. Doc. S/RES/678,(1990). This Resolution "[a]uthorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area...". Commenting on this and other resolutions adopted in the heat of the crisis and perhaps under political, military and financial pressure from the U.S., Neff noted:"Beyond the moral depravity caused by Washington's intimate relations with Israel has been the cost of keeping the 'Gulfbuster' coalition together. How extraordinarily manifold these costs are became evident during the past fortnight, as Bush and Baker circled the globe in an extraordinary effort to find support for the UN deadline resolution they ultimately achieved. The concessions Bush was willing to make were quite remarkable, ranging from a highly controversial meeting with Syria's President Assad in Geneva to receiving China's foreign minister, anathema because of the Tiananmen square massacre.... Other Bush concessions involved Baker holding a rare meeting with that arch enemy Cuba, supporting the Soviet Union's successful effort to keep the Baltic states of Estonia, Latvia and Lithuania out of the Paris peace conference in mid-November, preparing to approve new emergency food supplies for Romania, allowing Turkey a 50 per cent increase in its textile sales to the US market, and encouraging Britain to resume diplomatic relations with Syria on 28 November after a four-year break. Nor was that all. The benefits for the Soviet Union are proving bountiful too in reward for its close cooperation so far in the crisis. Saudi Arabia and the Gulf emirates have promised, with US prodding, a $4 billion loan to Moscow, and Bush is now considering waiving laws so that the Soviet Union could receive most favoured nation status in receiving US loans and access to US grain and corn exports". D. Neff, "The Bush Initiative" Middle East International, Dec. 7, 1990, at 3-4. Quoted in S.J. Dallal "International Law and the United Nations' Role in the Gulf Crisis" (1992) 18 Syracuse Journal of international Law and Commerce 111 at 121, footnote 61.

aftermath of the Gulf War, it is conceivable that the "new world order" may be taken to be a system of conflict management under leadership of the U.S.[16] If this is the case, then the international system envisaged in the future will be one maintained under U.S. direction.

Whilst the role played by the U.S.in the Gulf as well as the goals articulated by the American leadership are laudable, skeptics have wondered whether a world order under U.S. guidance is necessarily what people will be predisposed to accept.[17] A major difficulty associated with Bush's formulation is that it makes one leery if one comes to think of it as establishing an international system dominated by the United States as the only remaining superpower. A world ordered around the foreign policy of the U.S. is not desirable.[18] The response to Iraq, to some extent, demonstrates that the U.S. both politically and economically knows it can no longer take unilateral action in those situations. In any case, a more effective international system with a dominant role for a

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[15] Other resolutions in which the U.S. took an active part in initiating were S/Res/660 (Aug.2,1990) which condemned the invasion of Kuwait; S/Res/662 (Aug.9,1990) which condemned the annexation of Kuwait;S/Res/664 (Aug.18,1990) which condemned the taking of foreign nationals; S/Res 665(Aug.25,1990) which permitted the U.S and other countries to enforce the embargo; S/Res/666 (Sept.13,1990) which reaffirmed Iraq's responsibility for the safety and well-being of third state nationals; S/Res/667 (Sept.16,1990) which condemned the closure of diplomatic missions in Kuwait; S/Res/669 (Sept.24,1990) which examined the question of assistance to countries suffering economically from the trade embargo; S/Res/670 (Sept.25,1990) which imposed a ban on air traffic to or from Iraq and Kuwait;S/Res/674 (Oct.29,1990) which declared Iraq responsible for all damage and injuries resulting from its occupation of Kuwait and invited states to prepare claims for financial compensation; and S/Res/677 (Nov.28,1990) which condemned the destruction of Kuwaiti civil records and asked the Secretary-General to preserve population records as of Aug.1,1990.

[16] Krauthammer describes the central role of the U.S. in the Gulf and the demise of the Soviet Union as the world reaching a "unipolar moment". C. Krauthammer, "The Unipolar Moment" (1991) 70 Foreign Affairs 23.

[17] See, B.Urquhart, "The United Nations in 1992:Problems and Opportunities" (1992) 68 International Affairs 311;"Remarks" by L.C. Green, (1991) 85 American Society of International Law Proceedings 563 at 565 (condemning the danger of Pax Americana).

[18] Mead, for example, criticizes the conceptual approach of the Bush administration and argues for a "commercial and not a princely" foreign policy. Supra, note 1 at 419.

strengthened UN is what is needed.

Second, this new system of conflict management may be akin to a kind of Great Power management, as in a concert of the Great Powers.[19] Although the U.S. played the leading role in the Gulf War, it did so with the concurrence and cooperation of other permanent members of the Security Council, namely Britain, France, China and the former Soviet Union, on a matter affecting international peace and security. These states had cooperated on a number of other issues before the Gulf Crisis. Proposals presented by the five permanent members resulted, for example, in the Cambodian settlement,[20] the cessation of the Angolan conflict,[21] and the ceasefire in the Iraq-Iran War.[22] Thus, the new world order could be a system of Great Power management if the permanent members of the Security Council continue to cooperate and take leadership positions in the international system.[23]

Third, it may well be that the new world order refers to a system of "new multilateralism".[24] Under this system the UN will be expected to play a dominant role in conflict management. It will be expected to act expeditiously when confronted with situations that threaten or endanger international peace and security. The independence

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[19] See H. Bull, The Anarchical Society:A Study of Order in World Politics (New York:Columbia University Press,1977) at 225-227.

[20] See "Big Five Agree on UN Role in Cambodia" U.N. Chronicle, June 1990, at 18. A UN-monitored election has been held recently in Cambodia in a bid to return that country to conditions of normalcy.

[21] It should be noted however, that the conflict in Angola has resumed once again after UNITA rebels rejected the results of a UN-monitored election. The Globe and Mail, June 7, 1993 at A20.

[22] Arend, supra, note 3 at 494.

[23] Ibid.

[24] Ibid.

of the UN functioning as a multilateral organization in this regard is important; it must not be seen as an instrument of U.S. foreign policy or the foreign policies of other members of the Security Council. If the Organization is viewed as independent in the performance of its role, it would gain greater legitimacy among the family of nations. States will see it as the proper forum for addressing international conflicts and thus would cooperate with it to that end.[25] This will more likely reduce unilateral means to resolving matters relating to international conflict. Hence there is the need for an enlarged Security Council and revival of the Military Staff Committee.

It cannot be overemphasized that a new world order based on multilateralism under auspices of the UN offers the best hope for a more effective international system. The maintenance of peace, promotion of development, and enforcement of human rights are still goals being sought even as the world is going through new conflicts and growing poverty.

3. The UN and Humanitarian Intervention in the 1990s:

In chapter two, we sought to establish the principle that the institution of humanitarian intervention has survived the UN Charter by reviewing the relevant law of the Charter, and by using paradigms in state practice to show the extent to which the right is supported.

For publicists who deny survival of the principle of humanitarian intervention, (an opposition based largely on political considerations, namely the need to allay fears of small states of abuse by powerful states) it appears there is now a community of power

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[25] See T.M. Franck, The Power of Legitimacy Among Nations (London:Oxford Univ.Press,1990).

made possible by a revived confidence of states in taking multilateral action in defence of human rights. Collective humanitarian intervention for them should be more acceptable, or at least less objectionable.[26]

The international community is increasingly recognizing the interdependence of the preservation of international peace and security and the protection of fundamental human rights. For, many threats to, or breaches of international peace and security turn on issues of human rights. The 1990s have witnessed situations in which egregious violations of human rights have posed a threat to international peace and security. Intra-state conflicts have often caused more widespread human suffering than inter-state conflicts. Their repercussions often affect international peace and security. In this regard the former Secretary General of the UN, Javier Perez de Cuellar, noted:

> "Today, in a growing number of cases, threats to national and international security are no longer as neatly separable as they were before....civil strife takes a heavy toll on human life and has repercussions beyond national borders".[27]

The events of the 1990s have provided a major test for the UN regarding its potentialities and limits as never before in its history. In order to come to grips with these

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[26] But see Q. Wright, "The Legality of Intervention Under the United Nations Charter" (1957) 51 American Society of International Law Proceedings 79 at 85 (who argues "intervention does not gain in legality under customary international law by being collective rather than individual"). Also, concern has been expressed that while the permission of unilateral enforcement poses certain risks of abuse, limiting enforcement measures to those taken under UN auspices pose another risk that no action will be taken at all. See M. Halberstam, "The Copenhagen Document:Intervention in Support of Democracy"(1993) 34 Harvard International Law Journal 163 at 173. Damrosch has even gone further to point out that "[m]ultilateral approval, even Security Council authorization does not necessarily provide the touchstone of legitimacy". See L.F. Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights" in L.F. Damrosch and D.J. Scheffer eds., Law and Force in the New International Order (Boulder:Westview Press, 1991) 215 at 216. Perhaps the concern of abuse is well-founded recalling the past history of the UN's inability to act decisively as in Amin's Uganda. However, given the current enthusiasm with which the UN is playing a major role in enforcement measures, it is unlikely that the Organization will renege in the fulfilment of its duties as and when the situation arises.

[27] Report of the Secretary-General on the Work of the Organization, September 1990, UN Doc. A/45/1, section IV.

challenges, the UN has shown an ability to innovate by taking steps toward the development of collective mechanisms for authorizing intervention in support of human rights.

To this end the UN General Assembly, in December 1991, adopted an extraordinary resolution aimed at effectively strengthening the coordination of the UN's humanitarian assistance in emergencies, as well as pressuring non-consensual governments to permit aid to people in need during civil wars and other internal conflicts.[28]

The favourable climate under which the UN has begun to perform its role more effectively paved the way for a Security Council meeting on 31 January 1992, at the level of Heads of State and Government. Most leaders at that meeting referred to human rights as an issue of concern for the international community.[29] Whilst some were in favour of a more definite role for the Security Council in human rights issues, others cautioned

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[28] G.A.Res.A/RES/46/182(1991).

[29] In stressing the fact that a new era has begun in which governments can no longer hide behind state sovereignty and violate the human rights of their citizens, the UN Secretary General Boutros Boutros-Ghali stated: "[s]tate sovereignty takes a new meaning in this context. Added to its dimension of rights is the dimension of responsibility, both internal and external. Violations of state sovereignty is and will remain an offense against the global order, but its misuse also may undermine human rights and jeopardize a peaceful global life. Civil Wars are no longer civil, and the carnage they inflict will not let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micronationalism that resists healthy economic or political integration can destruct a peaceful global existence.
Nations are too interdependent, national frontiers are too porous, and transnational realities in the spheres of technology and investment on one side and poverty and misery on the other are too dangerous to permit egocentric isolationism...Now that the Cold War has come to an end, we must work to avoid the outbreak or resurgence of new conflicts. The upsurge of nationalities, which induces countries with multiple ethnic groups to divide, constitutes a new challenge to peace and security....Nationalist fever will increase ad infinitum the number of communities that lay claim to sovereignty, for there will always be dissatisfied minorities within those minorities that achieve independence. Peace, first threatened by ethnic conflict and tribal warfare, could then frequently be troubled by border disputes.
A new strategy will have to be adopted by the United Nations in order to respond to the irredentist or pro-autonomy claims of ethnic and cultural communities. It will have to take into account the abundant supply of arms, the aggravation of economic inequalities among different communities, the flow of refugees".
"United Nations Security Council Summit Opening Addresses by Members" U.S. Federal News Service, January 31, 1992, at VM-5-2, 3-4, VM-5-3,1. Quoted in D.J. Scheffer, "Toward a New Doctrine of Humanitarian Intervention" (1992) 23 University of Toledo Law Review 253 at 283, footnote 128.

against intervention in the internal affairs of states.[30] They, however, declared that:

> [t]he absence of war and military conflicts amongst states does not in itself insure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters. The members of the Council pledge their commitment to international law and to the United Nations Charter. All disputes between states should be peacefully resolved in accordance with the provisions of the Charter. The members of the Council reaffirm their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression".[31]

The summit directed the UN Secretary General to report "on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping".[32]

In his report to the Security Council subsequent to the summit, the UN Secretary-General Boutros Boutros-Ghali, has argued for greater institutionalization of the conflict

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[30] In pleading for a cautious role for the Security Council the Foreign Minister of Zimbabwe N.M. Shmuyarira, on behalf of President Mugabe, observed: "[i]n the era we are entering, the Council will be called upon to deal more and more with conflict and humanitarian situations of a domestic nature that could pose threats to international peace and security. However, great care has to be taken to see that these domestic conflicts are not used as a pretext for the intervention of the big powers in the legitimate domestic affairs of small states, or that human rights issues are not used for totally different purposes of destabilizing other governments. There is, therefore, the need to strike a delicate balance between the rights of states, as enshrined in the Charter, and the rights of individuals, as enshrined in the Universal Declaration on Human Rights. Zimbabwe supports very strongly both the Universal Declaration and the Charter on these issues. Zimbabwe is a firm subscriber to the principles in the United Nations Declaration on Human Rights. However, we cannot but express our apprehension about who will decide when to get the Security Council involved in an internal matter and in what manner. In other words, who will judge when a threshold is passed that calls for international action? Who will decide what should be done, how it would be done and by whom? This clearly calls for a careful drawing up and drafting of general principles and guidelines that would guide decisions on when a domestic situation warrants international action, either by the Security Council or by regional organizations. This could be one of the tasks this Council could entrust to the Secretary-General". Quoted in T. van Boven, "The Security Council:The New Frontier" (1992) 48 The Review (International Commission of Jurists) at 12-13.

[31] "Security Council Summit Declaration:"New Risks for Stability and Security", New York Times, Feb.1 1992, at A4, col.1.

[32] Ibid.

management role of the Council. The report argues for conclusion of the military agreements envisaged in Article 43,

re-establishment of the Military Staff Committee, institutionalization of peacekeeping forces, creation of "peace-enforcement" units, and an increased role for the International Court of Justice.[33] The proposals embodied in the Secretary General's report are currently under consideration by the Security Council.[34]

It is now clear that issues relating to intervention for humanitarian purposes are now being seriously addressed by the UN. We shall now examine the practical measures that the UN has taken in this regard through some case studies.

a. Iraq:

Following the Gulf War,[35] it became evident that the Iraqi government was perpetrating atrocities against its Kurdish[36] and Shiite minorities.[37] This development

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[33] See, An Agenda for Peace;Preventive Diplomacy, Peacemaking and Peace-keeping;Report of the Secretary-General, U.N.Doc.A/47/277(1992), at Para.42-54.

[34] Supra,note 9 at 2.

[35] For a discussion of the legal issues relating to the Gulf conflict see, for example, L.C. Green, "Iraq, the U.N. and the Law" (1991) 29 Alberta Law Review 560;"The Gulf 'War',the UN and the Law of Armed Conflict" (1991) 28 Archiv Des Volkerrechts 369; O. Schachter, "United Nations Law in the Gulf" (1991) 85 American Journal of International Law 452.

[36] The failure to intervene for human rights purposes on behalf of the Kurds goes back further than the end of the Gulf War. In the 1980s, the Kurds began a rebellion that was ruthlessly crushed. Starting from 1985, Saddam Hussein's regime engaged in a systematic program of destruction of Kurdish villages, and the use of poison gas against the Kurdish people. Also, there has been no intervention in Turkey's suppression of its Kurds. See L.R. Beres, "Iraqi Crimes and International Law: The Imperative to Punish" (1993) 21 Denver Journal of International Law 335 at 345. For a detailed discussion of the case of the Kurds after the Gulf War see H. Adelman, "Humanitarian Intervention:The Case of the Kurds" (1992) 4 International Journal of Refugee Law 4; S.E. Whitesell, "The Kurdish Crisis: An International Incident Study" (1993) 21 Denver Journal of International Law and Policy 455.

[37] "Trail of Death in Iraq" The Washington Post, March 26,1991. at A1;"New Deaths, Destruction, Surround Ancient City" The Washington Post, March 28,1991 at A31. Beres points out the inability of the U.S. to act on behalf of the Iraqi Kurds and Shiites as lying in geopolitics - the fear of a power vacuum

imposed severe strains on the issue of nonintervention in the internal affairs of states. However, humanitarian concerns led to demands for UN action. Some members of the Security Council were not particularly receptive to proposals for renewed military strikes against Iraq. However, the situation was exacerbated by an exodus of refugees into Turkey and Iran, giving rise to tensions between those countries and Iraq.

In taking account of these developments the Security Council adopted Resolution 688,[38] which condemned Iraq's repression of the Kurds and other groups as a threat to international peace and security. It demanded that "Iraq immediately end this repression" and insisted that it "allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations". It requested the UN Secretary-General to use all the resources at his disposal to address "urgently the critical needs of the refugees and displaced Iraqi population".

The resolution marked for the first time an explicit linkage between human rights violations within a state[39] and a threat to international peace and security.[40] It was also

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in the region and alienation of its allies. The U.S believed the Kurds were seeking the creation of an independent Kurdistan state, which basically would threaten its ally Turkey. As regards the Shiites, they were viewed as pawns of Iran who were seeking to impose a Khomeini-style regime. Beres, ibid., at 344-345.

[38] U.N.Doc.S/RES/688 (1991). Reprinted in (1991) 30 International Legal Materials 858. Iraq had contended during the Security Council debate on the draft of this resolution that it was "a flagrant, illegitimate intervention in Iraq's internal affairs and a violation of Article 2 of the Charter of the United Nations which prohibits intervention in the internal affairs of other states".See Arend, supra,note 3 at 499.

[39] Although there were indeed transboundary repercussions triggered by the mass migration of Kurds and Shiites across Iraq's borders with Turkey and Iran.

[40] The Security Council condemned "the repression of the Iraqi civilian population in many parts of Iraq, including most recently the Kurdish populated areas, the consequences of which threaten international peace and security". Supra,note 38. It has been observed that even though the 1968 resolution concerning Rhodesia identified human rights violations as creating a threat to the peace meriting authoritative Council action, that resolution had not been so clear on this point. In this way the Council was able to threaten Iraq

significant in the sense that the UN had ordered a state to receive humanitarian assistance from international agencies to assist citizens who were victims of their own government's repression.

Although the resolution fell short of ordering renewed use of force, American, British, French, and troops from other countries were deployed into northern Iraq without Iraqi government consent to create a humanitarian enclave for the protection of Iraqi Kurds, claiming their action was consistent with resolution 688.[41]

While the Security Council did not expressly authorize the use of force on behalf of the Iraqi Kurds, there was an implication that force might be used in the future regardless of the fact that neither Iran nor Turkey was on the verge of starting hostilities with Iraq over the Kurds. The resolution, however, effectively stripped the Iraqi government of its right to refuse admission to the humanitarian agencies.[42]

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with sanctions if it did not comply. Thus, Iraq could not disregard it as mere rhetoric given the fact that the Council had previously explicitly authorized the use of force to liberate Kuwait. K.K. Pease and D.P. Forsythe, "Human Rights, Humanitarian Intervention,and World Politics"(1993)15:2 Human Rights Quarterly 290 at 303.

[41] Supra,note 4 at 146-147. The opinion was also held that a reading of resolutions 688 and 678 together gave coalition members authority to use "all necessary means" to secure peace in an area that included the Kurdish region of northern Iraq. Thus Iraq's aggression against Kuwait provided legal grounds to create the protective zone. See M.E. O'Connell, "Continuing Limits on UN Intervention in Civil War" (1992) 67 Indiana Law Journal 903 at 907-908. It should be noted that the UN aid effort in Iraq relied upon allied military intervention in northern Iraq to create "safe havens"; allied threats to respond to any Iraqi air operations in northern Iraq; the deployment of a UN protective force to provide limited protection to UN humanitarian workers and an agreement negotiated with the Iraqi authorities to establish logistics of the humanitarian effort throughout Iraq. Scheffer, supra,note 29, at 268.

[42] As a general rule, UN aid agencies work within sovereign borders only with the consent of the host government. See A.C. Helton, "The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign" (1992) 4 International Journal of Refugee Law 373; R. Rosenstock, Book Review of R. Higgins, United Nations Peacekeeping 1946-1967,(1981)75 American Journal of International Law 714.

b. The Former Yugoslavia:

The conflict in the former Federal Republic of Yugoslavia[43] which began in 1991, has been one in which the Security Council has taken a measured approach towards resolving.[44]

The UN played no role in the initial stages of the conflict. The European Community (EC) which was seized with the situation, tried to mediate the conflict which appeared to be a European matter. After attempts to secure a ceasefire had failed, Britain, France, and Belgium requested the Security Council to become involved, by sending peacekeeping forces and imposing a mandatory oil embargo on Yugoslavia.[45]

In dealing with the situation, the Security Council characterized the conflict in terms of the massive loss of life and the magnitude of human suffering. It expressed concern that continuation of the war constituted a threat to international peace and security. Acting under Chapter VII of the Charter, it decided that all states shall, for the purposes of establishing peace and stability in that country, immediately implement a general and complete embargo on all deliveries of weapons and military equipment.[46]

The UN has taken a wide range of actions involving the former Yugoslavia. These actions have included:the imposition of wide ranging embargo against Serbia and

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[43] Yugoslavia consisted of six republics namely, Slovenia, Croatia, Serbia, Bosnia-Hercegovina, Montenegro, Macedonia and two autonomous regions - Kosovo and Vojvodina. For a discussion of the events leading to, and the international response to Yugoslavia's disintegration, see M. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 American Journal of International Law 569.

[44] Some selected Resolutions pertaining to Yugoslavia are reproduced in "The United Nations and former Yugoslavia: Selected Resolutions" (1992) 4 International Journal of Refugee Law 393.

[45] New York Times, November 14, 1991. at A1 Col.3.

[46] U.N.Doc.S/RES/713(1991).

Montenegro;a ban on military flights over Bosnia-Herzegovina; and the creation of a war crimes investigative body[47] in light of allegations of mass rape, torture, disappearances and 'ethnic cleansing'.[48]

Also, the UN has used its relevant agencies in conjunction with peacekeepers in the delivery of food, medicine, and other humanitarian relief supplies to some three million refugees, displaced persons and affected population.[49] Although Security Council Resolution 819 "recalls that impediments to the delivery of humanitarian assistance constitutes a serious violation of international humanitarian law", in many instances local armed groups have prevented such delivery and attacked the personnel involved.

With no end of the conflict and a political settlement in sight,[50] the Security Council on June 4, 1993 voted to authorize the use of air strikes[51] in Bosnia against

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[47] In addition to the investigative body, Security Council Resolution 808 has called for the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed since the civil conflict began in 1991. See U.N.Doc.S/RES/820 (1993).

[48] Supra,note 9 at 5. See U.N.Doc.S/RES/819(1993);U.N.Doc. S/RES/820 (1993),(both affirming that the practice of "ethnic cleansing" is unlawful and totally unacceptable).

[49] "Statement by Mrs. Sadako Ogata United Nations High Commissioner for Refugees to the Third Committee of the General Assembly (10 November 1992)" (1992) 4:4 International Journal of Refugee Law 541 at 542.

[50] The heads of Serbia and Croatia, the two most powerful of the former Yugoslav Republic, have called for abandonment of the UN plan for ending the civil war in Bosnia. Instead, they seem to favour a plan for the country to be divided into three separate ethnic areas that would form a federal state but with muslims in two landlocked areas. However, the Muslim-dominated government has expressed fear such a division would instead lead to annexation of Serbian and Croatian-controlled territories by Serbia and Croatia. It is also interesting to note that another ceasefire is to go into effect on June 18, 1993. It remains to be seen however whether this is just another fragile one that would be broken sooner or later. New York Times, June 17, 1993 at A3.

[51] The U.S. and some European countries have disagreed on the circumstances under which these strikes would be undertaken. The disagreement hinges on the U.S wanting to use strikes only to protect UN forces, whereas the Europeans favour strikes to protect Muslims under attack from Serbian forces. New York Times, June 15,1993 at A7.

Serbian and Croatian forces, if they attack Muslim enclaves designated by the UN as "safe areas". These "safe havens" however, are not being respected by the Serbs and Croats, who have launched concerted attacks against them,[52] perhaps because no air strikes have been undertaken by the UN. The failure of the UN to offer protection in these safe havens stems from the lack of personnel and the necessary logistics to deter Serbian attacks.[53]

The measures taken by the UN in the former Yugoslavia show its determination to bring the conflict in the region to an end. Meanwhile, it is still continuing its concerted efforts to prevent further atrocities and alleviate the human suffering through its delivery of humanitarian assistance.

c. Somalia:

The civil war in Somalia gained intensity following the ouster of President Siad Barre in January 1991. The war left the country in ruins with no functioning government.[54] It caused more than 300,000 deaths, and another 1.5 million people were in danger of dying due to famine. Almost 4.5 million of the 6 million Somalis were threatened by severe malnutrition and over 700,000 displaced people had sought refuge in neighbouring states.[55]

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[52] See, "Serb Attack Two of U.N.'s 'Safe Areas' in Bosnia" New York Times, June 7,at A6;The Globe and Mail,July 7,1993 at A8.

[53] Senior UN peacekeeping officials estimate that, as many as 25,000 troops backed by artillery and attack helicopters would be required to effectively protect the designated safe havens. P. Lewis, "UN Starts Plans for Bosnia Force Tomorrow" New York Times, June 6, 1993 at 11.

[54] Supra,note 9 at 14.

[55] Ibid.

Given this grim situation, the Security Council adopted Resolution 733 on January 23, 1992. It directed the Secretary General "immediately to undertake the necessary action to increase humanitarian assistance" to the people of Somalia and called upon all parties to cooperate with the Secretary General, and to facilitate the delivery of aid.[56]

In March 1992, the major factions in the civil conflict agreed to a UN-mediated cease-fire which led to establishment of the United Nations Operations in Somalia (UNOSOM) to monitor it.[57] However, delivery of humanitarian aid by the UN and other agencies was greatly hampered by clan warlords who made it almost impossible for aid to get to the people who needed it most.[58]

The deteriorating situation was followed by the unanimous adoption of Security Council Resolution 794 on December 3, 1992.[59] This resolution went beyond a mere insi' :ce on access to humanitarian relief agencies. The Council recognized the "unique" situation in Somalia and declared that it fell : ' r Chapter VII.[60] It determined that "the magnitude of the human tragedy" caused by the conflict and the obstacles being

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[56] U.N.Doc.S/RES/733(1992).

[57] Supra,note 9 at 15.

[58] Attacks were carried out on relief consignments and vehicles, medical and relief facilities impeding delivery of food and medicine essential for survival of the civilian population. The situation was such that the aid agencies employed members of the warring groups to protect the cargoes from theft. These guards, however, turned round to steal the relief supplies.

[59] U.N. Doc. S/RES/794 (1992). This resolution cleared the way for 'Operation Restore Hope' which involved deployment of U.S. troops in Somalia in December 1992. Their purpose was to escort relief convoys in that country so that humanitarian relief operations could continue without disruption by armed gangs.

[60] Article 39 of the Charter states that the Security Council can "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what [legally binding] measures shall be taken...to maintain or restore international peace and security." Under Article 25 of the Charter, member states agree "to accept and carry out" decisions made by the Council with regard to Chapter VII.

created to "the distribution of humanitarian assistance constituted a threat to international peace and security". Furthermore, the Council authorized member states "to use all necessary means" to "create a secure environment" for the delivery of humanitarian assistance. It stated that "impediments to humanitarian relief violated international humanitarian law" and that individuals in Somalia had a right to that assistance. Finally, it stated that anyone interfering with humanitarian assistance "will be held individually responsible in respect of such acts".

This resolution makes a significant inroad into the principle of humanitarian intervention. Unlike resolution 688 which did not explicitly authorize the use of force as regards the Kurds, resolution 794 recognized massive human rights violations amounted to a threat to peace and security, and called for use of "all necessary means" to secure the delivery of humanitarian aid in a chaotic situation. The Council's action is unprecedented to the extent that it clearly specifies the use of collective intervention for humanitarian purposes.[61] Not only does it specify collective intervention for human rights purposes, but it also goes further in enunciating individual responsibility in situations of interference with humanitarian assistance. The resolution sends a strong signal to the international community that the UN would no longer be prevented from interfering on humanitarian grounds in the internal affairs of member states.

While acting under its mandate in Somalia, 23 members of the Pakistani UN peacekeeping force were killed on June 5, 1993.[62] This incident seriously undermined

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[61] The resolution stemmed from the Secretary General's assessment that UNOSOM was not "[an]...adequate response to the tragedy" whose "unique character" was of a "deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response". Supra,note 9 at 13.

[62] This has been the most serious attack on UN peacekeepers since 44 Ghanaian soldiers were killed in UN operations in the Congo (now Zaire) in 1960.

and put into question the role of the UN peacekeeping force and its ability to control an increasingly volatile situation.[63] The Security Council in a unanimous vote called for total disarmament, the arrest and prosecution of those responsible for the killings,[64] although it did not indicate by what conduct and on what charges the culprits will be tried if apprehended. If the UN is engaged in 'conflict' are not the 'enemy' 'prisoners of war'? and, is it legal to impose a price on an enemy leader's head? These are difficult questions that are yet to be resolved.

In an unprecedented turn of events to refurbish the UN's credibility, U.S. forces under UN command on June 12, 1993, carried out retaliatory attacks in the Somalia capital of Mogadishu, in an effort to bring anarchy to an end and restore conditions of normalcy.[65]

This operation perhaps was intended to send a strong message to other areas like Bosnia, Cambodia and Angola, where the UN is involved in peacekeeping and other

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[63] UN officials have blamed the killings on the forces of General Muhammed Farah Aidid one of the Somali warlords. General Aidid was quoted as saying the "attacks were staged to prove his strength and to discredit the UN". New York Times, June 8 1993, at A5. But he also denies any complicity in this attack. In any case, this incident goes to strengthen the need for creation of a UN rapid deployment force which must comprise national military contingents "on call" to the Security Council to be used in situations like Somalia.

[64] New York Times, June 17,1993, A1. See also infra,note 66.

[65] The attacks were mainly carried out on the stronghold of Farah Aidid, the warlord allegedly responsible for the killings. According to the U.S. representative at the UN, Madeleine Albright, the purpose of the attacks by the UN forces "[was] primarily to disarm and restore order; it [was] not to capture a single individual" but added that "[t]here is no question that the capture of those involved would contribute to the overall goal". New York Times,June 15,1993,at A6. It is now clear that the UN is seeking the arrest and prosecution of Aidid and his lieutenants. As pointed out, tough questions about what to do with him once captured remain unanswered, since the arrest and trial of criminals in this situation is completely unchartered territory for the UN. For a discussion of war crimes, crimes against humanity and the prospects for their international enforcement, see L.C. Green, "Group Rights, War Crimes and Crimes against Humanity" (1993) International Journal on Group Rights 27.

humanitarian duties[66] that it can no longer tolerate a situation where its forces are undermined or hampered in their operations. Somalia perhaps portends a chance for the UN to show that it is capable of fulfilling its goal of maintaining world order.

d. Liberia:

The Liberian civil war, which began in December 1989,[67] has witnessed a number of atrocities of disturbing proportions[68] and created a refugee problem in the West African sub-region.

Although the Liberian crisis could easily have been characterized as a situation which posed a threat to the peace as a result of the egregious human rights abuses and the refugee problem, it was not until January 1991 that the Security Council met to discuss the crisis and adopted a resolution.[69] Instead, the Economic Community of West African States (ECOWAS) was left to address the issue. In August 1990, an ECOWAS interventionary force (ECOMOG) was sent into Liberia to broker the peace, stop the atrocities, and to stem the exodus of refugees.

At present, ECOWAS forces are still in the country trying to ensure the cessation

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[66] As noted earlier, despite the problems encountered the UN has, for example, used peacekeepers to try and deliver food and medicine to war victims in the former Yugoslavia thus setting an important moral precedent for future conflicts. It is hoped that tougher action would be taken against local armed groups hampering the relief efforts.

[67] A brief background of the political situation in that country will be instructive. In 1980, Master Sergeant Samuel Doe seized power in a bloody coup, but throughout the 1980s, the Doe regime's legitimacy was constantly challenged. In December 1989, Charles Taylor led a rebel group (the National Patriotic Front of Liberia) which invaded the country, plunging it into a bloody civil war, and it is this group against which international condemnation is primarily directed for its egregious human rights violations.

[68] For a chronology of gruesome crimes committed against civilian populations since the conflict started see "Litany of Atrocities", West Africa, June 14-20, 1993.

[69] Arend, supra,note 3 at 518.

of hostilities. An Interim Government of National Unity has been formed pending elections. The UN has commended ECOWAS for its efforts to restore peace, security and stability to the country. It wants ECOWAS to continue its operations. It has pledged to continue the delivery of humanitarian assistance to the Liberian people, and will be sending 200 monitors to the country.[70]

The UN could have worked out modalities in cooperation with ECOWAS from the onset, which could have prevented a degeneration of the situation in that country - a situation which threatened international peace and security in light of the grave human rights violations and the refugee problem.[71]

It is suggested that the UN should put in place a normative structure to deal with the relationship between global and regional organizations. The Security Council should make clear conditions under which regional intervention would be permissible without its authorization, and the situations under which unauthorized regional action would not be permissible.[72] Questions as to when the UN should address a problem, when a regional body should take up an issue, and under what circumstances both the UN and regional organizations should address a particular issue must be carefully re-examined.[73]

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[70] New African, May,1993, at 14-16.

[71] It is sad to note that despite the presence of ECOWAS forces in that country, atrocities are still being committed. On June 6 1993, over 300 Liberian refugees were slaughtered in a most barbaric manner. The killings have been blamed on rebel leader Charles Taylor's forces. See Globe and Mail, June 7, 1993 at A8.

[72] Supra,note 3 at 529.

[73] Although the Charter provisions allow regional organizations to deal with matters of international conflict, the Security Council is given the final authority. The legal relationship between the UN and regional organizations is provided for under Chapter VIII of the Charter.

e. Haiti:

The UN has taken a rather restrictive approach with regard to its authority to intervene in Haiti.[74] The coup which toppled President Aristide, the country's first democratic leader, and the subsequent widespread violation of human rights by the military rulers was considered by the UN as a domestic jurisdiction issue, which did not constitute a "threat to the peace".[75] Despite the widespread condemnation of the putsch, and efforts by the Organization of American States (OAS) to restore democracy to Haiti, the Security Council only issued a nonbinding statement, being cautious here not to encroach upon domestic jurisdiction.[76]

However, a trade and arms embargo has been imposed against Haiti until its military leaders restore former President Aristide to power. Subsequent to the embargo, a settlement package proposed by UN mediators brought Aristide and General Cedras (the military ruler) together to sign a plan that would restore democracy in Haiti.[77]

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[74] The Haitian crisis arose after the ouster on September 30, 1991 of Haitian President Jean-Bertrand Aristide from power in a coup d'etat. Aristide had been the first President of Haiti to be elected through democratic elections. His removal thus angered other leaders in the region. See "Haiti's Military Assumes Power After Troops Arrest the President" New York Times, Oct.1, 1991 at A1; T.L. Friedman "U.S. Suspends Assistance to Haiti and Refuses to Recognize Junta" New York Times, Oct.2, 1991 at A1.

[75] A report in the New York Times stated: "Haiti's representative at the United Nations expressed disappointment ...over the failure of the Security Council to discuss the coup. The Haitian official, Fritz E. Longchamp, said at a news conference that he was disturbed by the Security Council's reaction, which he described as 'unfair and a denial of Haitian rights'. The president of the Security Council had informed him that a majority of the delegations felt there should not be a meeting on what was seen as 'an internal matter'. Friedman, ibid.

[76] It must be pointed out however, that the UN General Assembly adopted G.A. Res.46/7(1991), which condemned the coup and affirmed "as unacceptable any entity resulting from that illegal situation and demand[ed] the immediate restoration of the legitimate Government of President Jean-Bertrand Aristide, together with the full application of the National Constitution and hence the full observance of human rights in Haiti...".

[77] According to Casimir, Haiti's ambassador to the U.S., the accord "contains elements of democracy, the return of the truly elected President of the Republic [on 30 October, 1993] and the retirement from command of the coup leaders". "Pact Signed to Return Aristide to Power", Globe and Mail, July 5, 1993 at A6. It is quite possible that should the accord fail armed intervention, or at least, insistence upon

It would seem that for now economic sanctions short of forcible intervention are working in compelling the military leaders to relinquish power and restore democratic government in that country.

4. An Assessment:

In light of UN action in the case-studies considered above, it is important for the Organization to determine what established criteria should be applied when faced with situations calling for invocation of the Chapter VII exception governing domestic jurisdiction.

Also, another problem that it has to deal with in seeking to establish a new multilateralism is the conflict between institutionalism and noninstitutionalism.[78] The question here is whether the UN should centralize its mechanisms to confront directly problems of international peace and security, or whether it should merely function by

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allowing humanitarian relief agencies into that country would be the options to fall back on. An intervention of this sort in Haiti may also be characterised by what some publicists refer to as "pro-democratic" intervention. In finding a basis for this kind of intervention, Scheffer argues that "where the United Nations or a regional organization has been instrumental in developing a democratic government...such as has occurred in... Haiti [before the military coup],...there arises a legitimate basis for the United Nations and the regional organization to guarantee the survival of democracy in that nation when it has been overthrown by a military coup...which typically leads to internal violations of the collective human rights of the people." He goes on to state that "we do need to understand the growing possibility that a humanitarian intervention may serve not only the purpose of responding to a humanitarian crisis but also of facilitating restoration of democracy in a state where that form of government previously has been guaranteed by the United Nations or a regional organization. For in most cases it would be the collapse of democracy and the rise of totalitarianism that would lead to human rights atrocities". Scheffer,supra,note 29 at 292. It should, however, be pointed out here that the legality of this kind of intervention is very doubtful. For a detailed examination of "pro-democratic" interventions or interventions against illegitimate regimes see M. Halberstam, supra,note 26; Henkin et al., supra,note 4;I.I. Lukashuk, "The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights" in L. F. Damrosch and D.J. Scheffer eds., Law and Force in the New International Order (1991) at 143-158;T.M. Franck,"Intervention Against Illegitimate Regimes" in ibid., at 159-176;V.Nanda, "Commentary on International Intervention to Promote the Legitimacy of Regimes" in ibid., at 181-184.

[78] Arend, supra,note 3 at 507.

authorizing individual and collective actions by states themselves.[79] A construction of Article 42 of the Charter indicates the Security Council has the authority to take military action to maintain or restore international peace and security.[80] Article 43 provides a procedure according to which all members of the UN "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, facilities and assistance...necessary for the purpose of maintaining international peace and security".[81]

The elaborate institutional framework[82] which the Charter provisions had stipulated for dealing with enforcement actions was not implemented due to the Cold War. During the Gulf War the Security Council, instead of establishing a UN Command, took a decentralized approach to conflict management by authorizing member states to take measures on its behalf. The Security Council did not direct or coordinate the Coalition Forces' operations in any significant manner.[83] The lack of formal institutions led to criticisms of UN action in this case.[84] Russett and Sutterlin have commented on

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[79] Ibid.

[80] See Article 42 of the Charter.

[81] Article 43(1) of the Charter. Article 47(1) makes provision for establishment of a Military Staff Committee the purpose of which is "to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament".

[82] Notably the special agreements which were to have been concluded under Article 43 and the Military Staff Committee.

[83] See S.Lewis,"A Promise Betrayed"(1991) 8 World Policy Journal 539 at 541.

[84] Lewis, for example has stated that:"the United Nations served as an imprimatur of legitimacy for a policy that the United States wanted to follow and either persuaded or coerced everybody else to support. The Security Council thus played fast and loose with the provisions of the U.N. Charter...no use was made of the Military Staff Committee, which under Article 47 is supposed to direct any armed forces at the Security Council's disposal". Ibid., at 539. See also R.C. Johansen, "Lessons for Collective Security"

the undesirability of this approach. They state that:

> "...the approach adopted in the Gulf case is not likely to be viable unless vital interests of one or more major military powers are at risk. For example, the United States might not be interested in deploying substantial forces, even if authorized to do so by the Security Council, to deter or repel an Egyptian attack on Libya".[85]

In order to give the UN greater legitimacy in its attempts to play a significant role, an institutionalized mode of carrying out its actions is needed. Institutionalization will offer a more effective enforcement action without the problems associated with giving responsibility to individual member states.[86] The moral and financial commitment of all member states to make this a reality is strongly needed now.

The decade of the 1990s has brought into focus a number of issues which the UN must try to deal with on a more permanent basis. International and internal conflicts, ethnic and tribal clashes, minor problems, terrorism, environmental, humanitarian, and other emergencies have competed for its attention. In order for the Organization to effectively deal with these problems, it needs to formulate clear goals, lay down definite norms, and either reform or establish new institutions.[87] Not even amidst all the problems it has had to grapple with, there are signs of hope. It has determined that the international effects of internal oppression amounted to a threat to the peace.[88] It has

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(1991) 8 World Policy Journal 561 at 563.

[85] B.Russet and J.S.Sutterlin,"The U.N. in a New World Order" (1992) Foreign Affairs 68 at 77.

[86] Ibid.

[87] Arend, supra,note 3 at 533.

[88] See, for example, Security Council Resolutions 713 and 733 with respect to continuation of the civil wars in the former Yugoslavia and Somalia respectively.

also established UN protection forces to watch over the security of minority enclaves.[89] It has considered modes of securing the supply of humanitarian assistance to populations in distress, even if it means the use of military action to secure those ends within sovereign borders. It is, however, necessary that international action for protection of human rights should be applied consistently in accordance with the Charter.

The task ahead for the UN will be to provide a system for maintaining international peace and security, and to find ways of managing essential global problems. As stated earlier, the capacity to live up to the task by carrying out its functions on a more permanent basis is indispensable in an emergent world order. It remains to be seen how the Organization will perform its role going into the 21st century. The opportunity for reform has presented itself now. The UN cannot and must not let it slip by.

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[89] Even though the former Yugoslavia's ethnic warfare has defied all Security Council efforts to end it, the Security Council is considering the dispatch of troops to guard muslim enclaves in Bosnia. Also, another important precedent has been set with the dispatch of peacekeepers to Macedonia to prevent the spread of war to that country. The Globe and Mail, June 7,1993 at A20.

CHAPTER FOUR

CONCLUSIONS

This study has shown contemporary events on the international scene indicate that norms of sovereig[illegible]nts about non-interference in domestic affairs of states, and the non-use of for[illegible] would seem to be relegated today in favour of greater concern and intervention for the protection of human rights.

The basis for intervention in support of human rights is grounded in the fact that it is the interests of humanity at large that are at stake, and not the interests of any particular state or group of states. However, a central concern emerging from a consideration of the legality of humanitarian intervention in international law relates to pretextual intervention. Realism dictates that states do not always act for purely humanitarian reasons. State practice, particularly in the post-Charter era, such as the Congo, Dominican Republic, Bangladesh, Cambodia, and Ugandan incidents illustrate different aspects of the doctrine. They revealed that while the intervening states had other motives for their actions, nevertheless they pointed to the massive abuse of human rights in the target state as part of their justification.[1] Viewed together they support the

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[1] As far as the motives of the intervenor are concerned, a requirement that the intervenor should be totally disinterested and not motivated by other selfish considerations has been criticised as unrealistic where the decision to intervene falls upon a single state. It has been suggested that only relative disinterestedness of the intervenor in the affairs of the target state should be the criterion. Thus, concurrent considerations of national interest should not, by itself, render illegal an armed intervention so long as the overriding motive of the action is the protection of the most fundamental human rights. See R. Lillich,"Forcible Self-Help by States to Protect Human Rights" (1967) 53 Iowa Law Review 325 at 350;J.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention:Its Current Validity under the U.N. Charter" (1974) 4 California Western International Law Journal 203 at 261;M. Bazyler, "Reexamining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia" (1987) 23 Stanford Journal of International Law 547 at 601-602;F. Hassan, "Realpolitik in International Law:After Tanzania-Ugandan Conflict 'Humanitarian Intervention'Reexamined" 859 at 897;T.E. Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Force:A Legal Survey" (1978) 79 Military Law Review 157 at 187.

"enduring vitality" of the doctrine.[2] Where humanitarian concerns become the predominant reason for intervention, a state's action in that regard would be justified. Furthermore, advances in modern technology should tend to minimise any concerns for pretextual intervention.

In examining state practice in the post-Charter era prior to the 1990s, it was pointed out that unilateral intervention became necessary to redress human rights violations partly because the UN either failed to act timeously or was incapable of acting. It would seem that today, state practice is shifting from a focus on unilateral to multilateral and collective action by or under authority of the UN as shown in Chapter three. It is hoped that this trend will eventually minimise or totally eliminate unilateral state action in future.

A caveat must, however, be added that since one cannot predictably be correct about the elimination of unilateral state intervention from the international system, the need to formulate criteria to guide state action is important. Considerations of humanity are of paramount significance and should be the main driving force behind humanitarian intervention. The parameters of humanitarian intervention should be so confined to an overwhelming and genuine need that its consequences should have a definitely positive effect on human rights in the target state. Also, other reasons for intervention should not include changing the political independence or territorial integrity of the target state. Thus, exceptional and very strong reasons must be the basis for a state invoking the right.

Some scholars have formulated criteria for appraising alleged instances of humanitarian intervention. These deal with substantive and procedural issues and are

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[2] F. Téson, Humanitarian Intervention:An Inquiry into Law and Morality (Ardsley-on-Hudson:Transnational Publishers,1988) 249.

considered either absolute or preferential prerequisites.[3]

The suggested criteria for evaluating the permissibility of intervention for human rights purposes should include the following; first, a state should resort to unilateral use of force only when verifiable[4] and extreme[5] human rights violations[6] exist that "shock the conscience of mankind".[7] It is difficult to put a figure on, or delimit the number of people whose lives must be threatened before use of force is justifiable. The more widespread the abuse, the easier it is to document and confirm its existence. It is sufficient to point out that the use of force, if it becomes necessary, should be proportionate to the nature and extent of the human rights violations.[8]

Second, the use of force should only take place when the UN or other relevant regional organizations fail to fully address and prevent extreme human rights abuses to such an extent that the humanitarian need is overwhelming and immediate action is needed.[9]

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[3] See sources cited in supra,note 1. See also V. Nanda, "The United States' Action in the 1965 Dominican Crisis:Impact on World Order" (1966) Denver Law Journal 439 at 475.

[4] J.N. Moore, "The Control of Foreign Intervention in Internal Conflict" (1969) 9 Virginia Journal of International Law 209 at 264. Moore proposes that an immediate full reporting to the Security Council and the appropriate regional organization is one criterion for humanitarian intervention. The reporting must include the reasons for the intervention, i.e. the human rights abuses, and thus they must have been verifiable.

[5] Lillich notes that "[f]orcible self-help...is permissible only when a substantial deprivation of human rights values has occurred or is threatened". Lillich, supra, note 1 at 348; See also, Fonteyne,supra,note 1 at 259-260.

[6] Humanitarian intervention should be limited only to situations where there is a threat to, or deprivation of the most fundamental human rights, such as the right to life and freedom from torture. Lillich,ibid.;supra,note 4 at 264.

[7] H. Lauterpacht, ed., Oppenheim's International Law (8th ed. 1955) at 312.

[8] Lillich, supra,note 1 at 348-349;

[9] Fonteyne, supra,note 1 at 264-265.

Third, the right of non-forcible humanitarian intervention by international aid agencies should arise when the following criteria are met: a) where man-made or natural disasters place large numbers of people at risk in terms of adequate food or shelter, or acts of internal aggression lead to mass killings or casualties among the civilian population; b) where the local government is not capable of meeting or is unwilling to meet the humanitarian needs arising from the disaster or act of internal aggression; c) where the local government does not seek to forcibly prevent and therefore acquiesces in a non-forcible humanitarian intervention within its borders; and la[illegible] d) where the Security Council authorizes the intervention, and insists that the local government cooperate either with UN officials or other humanitarian aid agencies, in the distribution of relief supplies.[10] It should be added that where action short of military force would be or have proven to be ineffective, the Security Council should in that situation consider authorizing use of military force to achieve the humanitarian aims of the operation.[11]

It appears that a new standard of intolerance for human suffering and human atrocities has taken hold and translated into a new community of power made possible by the proactive role of the Security Council in human rights issues. The Council has clearly determined the connection between human rights violations within sovereign borders and threats to international peace and security. It remains to be seen how this connection would be consistently applied in future in authorizing intervention in support of human rights.

In sum, an appraisal of the doctrinal writing and state practice reveal that the

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[10] D.J. Scheffer, "Toward A Modern Doctrine of Humanitarian Intervention" (1992) 23 University of Toledo Law Review 253 at 288.

[11] Ibid.

institution of humanitarian intervention, whether undertaken unilaterally or collectively, exists in international law. A proper construction of the relevant UN Charter provisions, the ever-expanding body of international instruments on human rights, coupled with recent Security Council resolutions and action in support of humanitarian relief efforts, support the legality of the right of intervention for human rights purposes in international law.

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