JUSTIFICATIONS FOR THE USE OF FORCE IN THE POST COLD WAR ERA

Dissertation submitted for the Degree of
LL.M (International Law)

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9-8-2010

MS

341.584
REJ

1 - Intervention (international law) - cases

2 - Aggression (international law)

LLM

TH-4385

REJ

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It is certified that we have read the thesis submitted by Rehman Ullah Registration No. 8FSL/LLMIL/F04 entitled ***"Justifications for the use of force in the Post Cold War Era"*** as a partial fulfillment for the award of Degree of LL.M (International Law). We have evaluated the thesis and found it to the requirement in its scope and quality for the award of the Degree.

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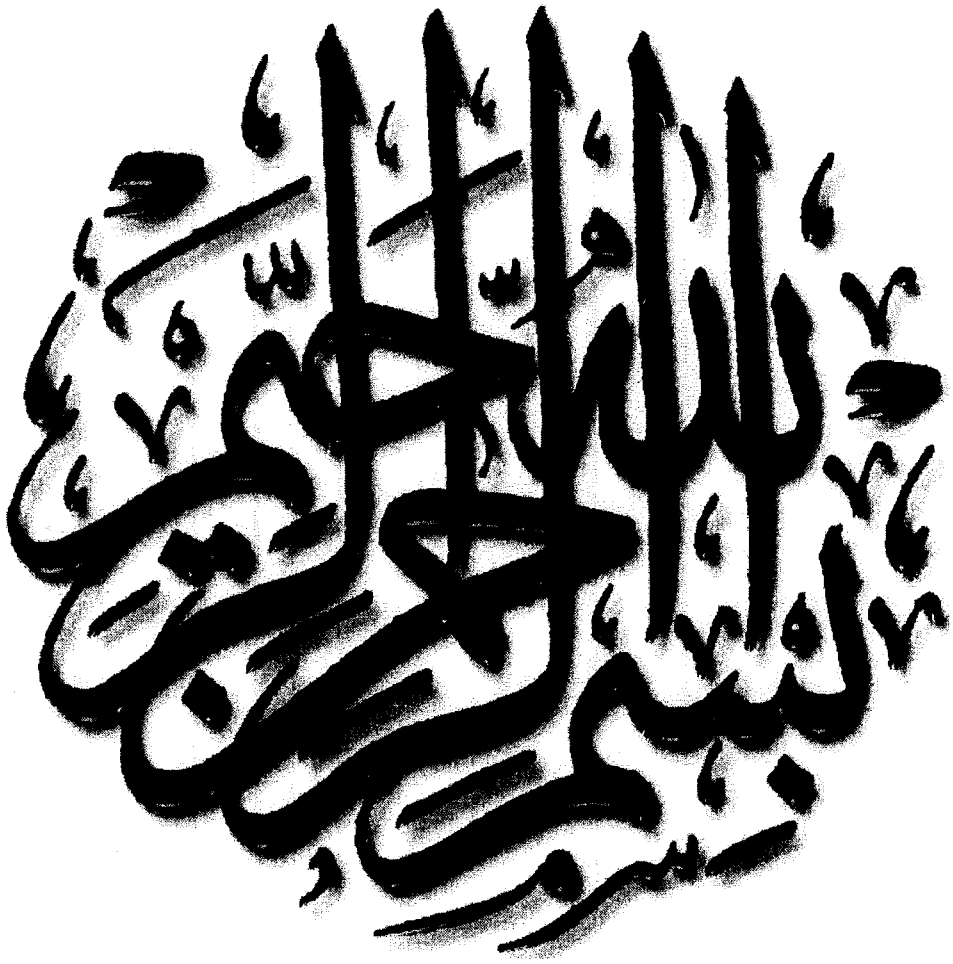

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List of Abbreviation

AJIL	American Journal of International Law
Chapter VII	Chapter VII of the United Nations Charter
ECOWAS	Economic Community of West African States
GA	General Assembly of the United Nations
ICJ	International Court of Justice
ILC	International Law commission
KLA	Kosovo Liberation Army
NAM	Non-Aligned Movement
OAU	Organization of African Unity
PDPA	Peoples Democratic Party Afghanistan
SC	Security Council of the United Nations
SJIL	Singapore Journal of International Law
UK	United Kingdom
UN	United Nations
UNAMIC	United Nations Advance Mission in Cambodia
USA	United States of America
UNTAC	United Nations Transitional Authority in Cambodia
WW II	World War II

DEDICATION

Dedicated to My Father Mian Abdullah (Late)

"O' my Lord! Do mercy on both of them (my parents) as they did on me when I was a child!"

(Amin)

ACKNOWLEDGEMENT

I am deeply indebted to my supervisor, Professor Muhammad Munir for bigheartedly providing all possible supervision. His experience in research had been precious a asset.

I would also like to acknowledge the honorable Dean and Professors of the Faculty of Shariah and Law, International Islamic University, Islamabad for providing all necessary facilities, which made my studies possible here.

Special thanks to my brothers for providing all possible support and guidance. Without their support and guidance, I could never thought of entering into the mesmerizing world of war of words. I am also thankful to my loving and caring nephew Asif Ali Shah, who helped me a lot in providing materials and other possible help in completing my thesis.

Rehman Ullah

ABSTRACT

The law relating to the use of force has greatly changed since the end of Second World War, and again in the new situations facing the world following the end of Cold War. New institutions have come into existence, old ones have faded away and a correspondingly vast amount of academic literature has pored forth on this arguably the most important area of international law.

Article 2(3) and 2(4) of the United Nations' Charter provides a framework within which right of a state of use of force is regulated. Desire to save succeeding generations from the evil of war led to an effort not only to restrain use of force in the formal sense but also to prohibit any threat or use of force. Article 2(3) places states under a positive duty to settle their International disputes by peaceful means in such a manner that international peace, justice and security are not endangered. Article 2(4) imposes negative obligation not to use force:

"All members shall refrain in their international relations from the threat or use of force against the political independence and territorial integrity of any state, or in any other way inconsistent with the purposes of the United Nations."

Unfortunately, however, this important area of international law is also one of the most troublesome. While every state agrees that the use of force is generally prohibited, there is a considerable disagreement over the precise circumstances in which it may lawfully be used.

"Justifications for the use of force in the post cold war era" is a hot debate under international law. States under various circumstances, time and again resorted to use of force without prior Security Council's authorization. These acts of intervention of intervening states have some times encouraged by the members of the international community and some time discouraged by it. My main focus is on the core issues, such as

issues, such as Intervention for the protection of nationals and property abroad, intervention by invitation and humanitarian intervention.

Historical background of the use of force has been dived in two parts, Pre-Charter law on the use of force and Charter law pertaining to the use of force. The Pre–Charter law on the use of force was subjected to certain legal limitation. Another important issue is Charter law pertaining to the use of force where emphasis has been given on the UN Charter and Security Council and General Assembly Resolutions.

The Charter law pertaining to the use of force prohibits the use of force by member states. But there are circumstances other than exceptions where states may legally resorts to use of force with out prior Security Council's authorization. Use of force for the protection of national and property abroad has also been legalized in certain situations where the nationals and property of the intervening states are in danger and the host state unable or unwilling to protect the same. But the intervening state must confine itself only to the protection of nationals and property abroad.

Customary state practice allowed states to invite other states, in circumstances where there was internal instability in the inviter state. The intervening states intervene in the inviter state to the extent to provide facilities the host state where it was appropriate. Even the intervening state, if necessary, use force for the settlement of internal instability. This practice of states continued and acquired a position that use of force through invitation of the host state becomes legally lawful.

The question of humanitarian intervention is not a new introductory issue in the contemporary International law. States have often claimed that they have resorted to humanitarian intervention and that therefore, their actions are compatible with international law, assuming that the humanitarian motives justify acts of force. There is still no consensus in the international legal doctrine on the unlawfulness of forcible humanitarian intervention.

The rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting Human Rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore, not a use of force inconsistent with the purpose of the United Nations.

Finally, a conclusion is drawn that intervention and use of force for the protection of nationals or property abroad or intervention by invitation or humanitarian intervention legal but subject to limited use of force. States may legally intervene without prior Security Council's authorization in cases of extreme necessity.

INTRODUCTION

The law on the use of force by states is not a new introductory chapter in the study of International Law, but its evolution is connected with the emergence of the concept of state. History reveals that human beings have suffered at the hands of one another; there have been efforts to impose restrictions and ban on the recourse to force. These efforts the evidence of which can be found in the writings of ancient religions and can be traced through scholarly writings and customary international law.

The concept of just and un - just war, which can be traced back to the Jus Fetiale, the body of law existed in ancient Rome, from the days of emperors until the late republican era. These ideas continued to be accepted for along time. War was regarded as a means of obtaining reparation for a prior illegal act committed by the other side.

At the close of the Middle Ages, concurrently with the growth of the nation states, modern international law came into being. The fathers of International Law were jurists and scholars in the sixteenth and seventeenth centuries that developed the modern international law. The major consequence that their developments had for the law relating to the recourse to war was to supplant the just war concept as the predominant legal approach of Jus ad Bellum. Now the states were sovereign, they had a 'sovereign' right to go to war. In short, even though there might have been certain moral limitations on the recourse to war, legal doctrine came to accept the right of state to go to war whenever it so desired. There was a regime of self-help. The only real qualification of this right to institute war that was accepted by states during this period was the requirement that war be declared. Hence a state simply declared war, and it was lawful.

Even though recourse to war was essentially unrestricted, a distinction was made between a full-blown war and the use of force 'short of war'. A use of force short of war was a quick action that did not involve major commitment of forces. It took place in the absence of a declaration of war and was thus regulated by the international law of peace. Typical use of force short of war includes 'reprisals and self-defense' actions.

In the Twentieth century, League of Nations provided ban on the use of force. Under the Covenant of League of Nations, an elaborate set of procedures was established to restrict the recourse to force. In the same era, the Kellogg Briand Pact, following these abortive attempts to impose additional restrictions on the just ad bellum yet another effort was made to regulate the right of states to go to war.

Desire to save succeeding generations from the evil of war led to an effort not only to restrain use of force in the formal sense but also to prohibit any threat or use of force. Article 2(3) places states under a positive duty to settle their International disputes by peaceful means in such a manner that international peace; justice and security are not endangered. Article 2(4) imposes negative obligation not to use force" All members shall refrain in their international relations from the threat or use of force against the political independence and territorial integrity of any state, or in any other way inconsistent with the purposes of the United Nations.

Member states of the international community have always been discouraged the use of force by other states. Only in certain circumstance it has allowed. But mainly the use of force by states has been discouraged. Certain legal limits have been prescribed where there was a necessity of use of force. But generally the legal limitation, shows that use of force for settlement of inter-state disputes or other disputes has been used for specific issues only. From the early time, the community discourages the use of force in general, but allows it in cases of necessity and certain exceptions to use of force apparently allowed.

The significance of the research is to define the use of force:

Firstly; the legality of use of force for the protection of nationals and property abroad

Secondly; legal status of the use of force by states by virtue of an invitation by the government of the inviter.

Thirdly; is any intervention by foreign states always based on some collateral political Agenda? And

Finally; is the humanitarian intervention similar to protection of nationals abroad?

Although to some extent, work has been done in respect of use of force for the protection of nationals and property abroad, use of force on the basis of intervention by invitation and humanitarian intervention. But still the problem in respect of use of force for specific issues are baffling one and a sort of serious attention is required to suggest possible solution to the said International problem which resultantly threatens the global peace and security as contrary to the aims and objectives of the United Nations.

The core issues discussed in the dissertation are:

1. Protection of nationals and property abroad
2. Intervention by invitation, and
3. Humanitarian intervention

Use of force for the protection of nationals and property abroad is one of the main topics of this dissertation, and shall be discussed in detail in the next chapter. Here a little explanation is to be given as to clarify that states practice has shown that a state can legally intervene in another state where there is a threat to the lives or property of the nationals of the intervening state.

Examples of Israeli attack on Entebbe 1976, the American Iranian hostages rescue attempt 1980, the American intervention in Grenada 1983. American defence of this right in the Entebbe raid: "There is a well-established right to use limited force for the protection of one's own nationals from any imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right flowing from the right of self-defence is limited to use such force as is necessary and appropriate to protect threatened nationals from injury".

To characterize such cases as self-defence is to nullify the requirement that action in self-defence must be in response to "armed attack". Besides, the conditions laid down in the Caroline case must be met to justify it. This doctrine has been an instrument of colonial interventions.

Intervention by invitation is also the main area of research of this dissertation, but a little introduction is necessary. During the Cold War era, there were several instances when states used force under the guise that territorial sovereign invited for help. This claim was endorsed by the international community in some cases and rejected in others. There exist two norms: general ban on the use of force and the other is state's territorial sovereignty. This may be discussed in detail in the next chapter.

According to traditional law of the Charter, all the above rights are prohibited, except that in very limited circumstances, attempts to rescue citizens in immediate danger of life of limb may not be prohibited by article 2(4). The terms of Charter and risk of abuse are the chief arguments in favor of traditional view. In circumstances where the justification for use of force is clear and easy to prove and where Charter is capable of

more than one interpretation, then with universal support further exceptions to the arts 51 and 53 may be added. Thus the right of States to aid people under the colonial or racist regime in a war of national liberation can how is added to the traditional exceptions. The Courts judgment in the Nicaragua v. U.S case suggests, by way of obiter, that the use of force for the purpose of promoting a war of national liberation is an exception.

Humanitarian intervention is also another core issue and has been discussed in the dissertation, and shall be discussed in detail. Commentators have founded the doctrine on the 'overriding need to act on humanitarian values'. This would open the way for many exceptions to the general prohibition on the use of force, and it has already been suggested that the preservation of democracy may be such an 'overriding need'. The doctrine not well received as potential for abuse exists. The human rights ethos and recent development in the human rights system have conceptually and legally places humanitarian intervention as a valid ground for the use of force. There exists a hot debate among scholars regarding the legality of humanitarian intervention, but the development of human rights system have pave way to such intervention.

Chapter 1

USE OF FORCE

1.1 Pre - Charter Law on the Use of Force

Introduction

History reveals that human beings have suffered at the hands of one another; there have been efforts to impose restrictions and ban on the recourse to force. These efforts the evidence of which can be found in the writings of ancient religions and can be traced through scholarly writings and customary international law. Many international agreements, prior to the UN Charter, have imposed restrictions on recourse to force. But in spite of these efforts sates resorted to force and history witnessed many times the use of force by states. To be able to proceed further, we need to consult Pre – Charter law on the use of force. This may be discussed in the following sub headings:

1.1.1 The Just War Doctrine

The distinction between Just and un just war can be traced back to the jus fetiale. This body of law existed in ancient Rome, from the days of the emperors until the late republican era. The Fetiales were a college of priests charged with a number of duties, some of which pertained to the inception of war.[1]

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[1] Yoram Dinstein, *War, Aggression and Self – Defence*, (3rd Ed. Cambridge University Press, 2001), p.59.

Cicero stated that it might be gathered from the code of fetiale that no war is considered just, unless it is preceded by an official demand for satisfaction or warning, and a formal declaration may be made.[2] It follows that those two indispensable conditions of a procedural nature had to be met before the commencement of hostilities. The first and the foremost requisite was that a demand be addressed to the opponent, insisting on satisfaction for the grievance caused to Rome, with a fixed time allowed for a proper response. The second condition was that a formal declaration of war had to be issued. The framework for recourse to force is also found in sacred writings of the ancient religions. St. Augustine of Hippo developed this doctrine in the Fifth century when Christianity had already become the official religion of the Roman Empire, for instance, the concept of Holy war. According to this concept, recourse to force was to be deemed morally permissible when it was divinely ordained. For many centuries Western European attitudes towards the legality of war were dominated by the teaching of the Roman Catholic Church. One of the first theologians to write on the subject was St Augustine (354 – 430 AD), who said:

Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains.[3]

He promulgated the classical theory of just war, in his various writings. Augustine's thoughts concerning just war may be summarized in five points:[4]

1. War must have just cause (including the failure of another state to act justly towards the inhabitants thus allowing certain wars of aggression.
2. Wars must be motivated by the cause of justice rather than a desire to inflict harm, wreak, vengeance, gain power etc;

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[2] Cicero, De Re Publica, Book iii, quoted in Dinstein, Yoram, Ibid

[3] M. Akehurst, A Modern Introduction to International Law, (5th Ed. George Allen and Unwin Ltd London, 1984), p. 216.

[4] http://www.lemennicier.bwm-mediasoft.com/col_docs/doc_63_fr.html. (Last visited 5/25/2006

3. War must be waged by a legitimate authority (i.e., state)
4. War must be last resort; and
5. War must be conducted justly.

These ideas continued to be accepted for a long time. War was regarded as a means of obtaining reparation for a prior illegal act committed by the other side. In addition, war against unbelievers and heretics were sometimes regarded as being commended by God.

The issue of the just and unjust war continued to be discussed and reformulated in the middle Ages. Augustine's formulation continued to be the classic statement of the theory, though medieval writers tended to stress that Just wars should be war of defence.

St. Thomas Aquinas propounded that for war to be just it had to fulfill three conditions:[5]

1. The war had not to be conducted privately, but under the authority of a prince.
2. There had to be just cause for the war, and
3. It was not enough to have a just cause from an objective viewpoint, but it was necessary to have the right intention to promote good and avoid evil.

The issue of just and un just war remained the same in the middle ages. Although Hugo Grotius known as the father of International law (1583- 1645) and other writers of the late middle ages and early modern times attempted to distinguish between the Just and Un just war.[6] To some extent, the doctrine of just and un just war developed in this era.

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[5] www.socialjustice.catholic.org.au/Content/pdf/the_struggle_to_develop_a_just_war_tradition_in_the_west.pdf (Last visited on 5/25/2006)

[6] D. W. Greig, International Law (2nd ed. Butterworths, London, 1976), p.867

1.1.2 Positivist Period

At the close of the Middle Ages, concurrently with the growth of the nation states, modern international law came into being. The fathers of International Law were jurists and scholars in the sixteenth and seventeenth centuries that developed the modern international law. The major consequence that their developments had for the law relating to the recourse to war was to supplant the just war concept as the predominant legal approach of *Jus ad Bellum.* Now the states were sovereign, they had a 'sovereign' right to go to war. In short, even though there might have been certain moral limitations on the recourse to war, legal doctrine came to accept the right of state to go to war whenever it so desired[7]. There was a regime of self-help. The only real qualification of this right to institute war that was accepted by states during this period was the requirement that war be declared. Hence a state simply declared war, and it was lawful.

Even though recourse to war was essentially unrestricted, a distinction was made between a full-blown war and the use of force 'short of war'. A use of force short of war was a quick action that did not involve major commitment of forces. It took place in the absence of a declaration of war and was thus regulated by the international law of peace[8]. Typical use of force short of war includes 'reprisals and self-defense' actions[9].

1.1.2.1 The League Of Nations (1919)

In 1914, a system of self-help became obvious when the First World War began. The Great War was absolutely a war unlike any the world had experienced. Delegates to the Paris Peace Conference assembled in the Palace of Versailles in the spring of 1919, one of their primary aims was to ensure that such a war should never again occur.

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[7] A. C. Arend, and Robert J. Beck, International Law and the Use of Force, (Routledge London 1993), p. 17.

[8] Ibid.

[9] Reprisal is an action that a state undertakes to redress an injury suffered during time of peace. Similarly here refers to a protective action aimed at another use of force short of war. It differs from a reprisal in that its purpose is not retaliatory but defensive. See for detail. Bowett. D., Reprisals Involving Recourse to Armed 66 (1972) AJIL,1. And for self-defense see: Greig D. W., International Law pp.876-900

At the end of war, different views relating to the causes of Great War developed. Some of them argued that it had resulted from accidental cause, while most of the statesmen felt that war was not caused due to aggression of any one state, but rather that it resulted from a series of miscalculations and misinterpretation, exacerbated by the lack of procedural limitations on the recourse to war. As to the consequence of this belief, the delegates to the Paris conference sought to establish a new global organization and thus League of Nations was established, aimed to provide necessary procedural checks to prevent such wars.

Under the Covenant of League of Nations, an elaborate set of procedures was established to restrict the recourse to force. First, under Article 12 of the covenant of League of Nations, members pledged to submit their disputes to arbitration or judicial settlement or to enquiry by the League of Nations' Council. Second, Article 15 provided that if such a dispute was submitted to the League Council, and a report was adopted unanimously by the members of the council, the disputant were under an obligation not to go to war with any party to the dispute which complies with the recommendations of report. Third, Article 12 provided that the parties agreed in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report of the Council[10]. The Covenant, in other words, imposed a 'cooling-off' period[11].

The procedural checks of the League of Nations Covenant were the only definitive restraints on the recourse to war. Nonetheless, alongside those requirements were provisions of the covenant that seemed to be more restrictive of the right of states to use force.

Soon after the Organization Started holding meetings, several other attempts were made to clarify and refine the *Jus ad-bellum*. These included the Draft Treaty on Mutual Assistance 1923, and Protocol for Pacific settlement of International Disputes 1924. But

[10] For detail see: Avalon Project the Covenant of League of Nations, Yale School of Law, 1996
[11] A. C. Arend, and Robert J. Beck, International Law and the Use of Force, p. 20.

unfortunately the protocol did not enter into force, as it failed to receive the number of ratifications necessary to enter into force.

1.1.2.2 The Kellogg-Briand Pact

Following these abortive attempts to impose additional restrictions on the *just ad bellum* yet another effort was made to regulate the right of states to go to war. This was the treaty providing for on the Renunciation of War as an Instrument of National Policy, often referred to as the Pact of Paris or the Kellogg-Briand Pact. It was signed on August 27, 1928 and entered into force on July 24, 1929.

Under the Kellogg-Briand Pact, the signatories declared in the names of their respective peoples that they condemn recourse to war for the solution of their international controversies, and renounced it as an instrument of national policy in their relations with one another.[12] They further agreed that the settlement or solution of all disputes or conflicts of whatever nature of whatever origin they may be, which may arise among them, should never be sought except by peaceful means[13]. Hence, unlike the League of Nations Covenant, which permitted the recourse to war in certain circumstances, the Kellogg-Briand Pact outlawed the resort to war entirely. The Pact drew a legal distinction between aggressions on the one hand and self-defense and force authorized by a universal international organization on the other hand.

From the above discussion we may summarize that during the just war period, there was a sense that recourse to war was permissible if there was just cause. During the positivist period, the just war doctrine began to lose support. With the principle of sovereignty now under girding the system, states began to articulate a belief that they had a sovereign right to go to war. In the Covenant of League of Nations, a series of procedural checks were established to restrict the resort to war. There existed some gaps

[12] 942 L. N.T.S., The Kellogg-Briand Pact, Article 1
[13] Ibid, Article 2

in League system; subsequent efforts were made to fill these gaps. The most important of these efforts was the Kellogg-Briand Pact. War as an instrument of national policy was outlawed. The only exception to this prohibition that was generally accepted by states were self-defense and war authorized by the League of Nations.

1.2 Charter Law Pertaining to Use of Force

"To save succeeding generation from the scourge of war, which twice in [their] life time [had] brought untold sorrow to mankind,"[14] In 1945, the delegates of forty-nine states met in San Francisco to draft the Charter of the United Nations. When the UN Charter was written, it established an organization that was given a host of specific tasks, the most important of which was the maintenance of international peace and security. But the Charter was not only an institution- creating document; it was also a norm-creating document. It set forth specific rules intended to regulate the behavior of states, especially with respect to the use of force.[15]

The most important provision of the United Nations charter on the use of force is article 2, paragraph 4, and chapter 1. Article2 (4) of the United Nations Charter providers:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner in consistent with the purposes of the United Nations.[17]

This is one of the central obligations of the United Nations Charter and in term, it stipulates a general prohibition of the unilateral use of force. Since 1945, the principle of Article 2(4) has been reaffirmed many times by the General Assembly Resolution such as

[14] Preamble of UN Charter, available at http//www.un.org/aboutun/charter/ last visited 5/25/2006
[15] A. C. Arend, and Robert J. Beck, Ibid, p. 29
[17] Article 2(4) of United Nations Charter

Decleration on the Inadmissibility of Intervention in the Domestic Affairs of State,[18] General Assembly Resolution on the Definition of Aggression.[19]

But this ban on the use of force is not absolute. These are certain exceptions to the said provision of the Charter. These exceptions are mentioned in Article 51 of the charter. There have developed two schools of thoughts on the issue that led to different interpretation of the ban on the use of force by states and exceptions thereto. These schools are known as (1) The Permissive School and (2) The Restrictive School.

According to Permissive School, article 2(4) puts two conditions on the threat or use of force namely, that it should not be against the territorial integrity or political independence of a state, and that it should not be in manner inconsistent with the purpose of the United Nations on the other hand, Restrictionist School believe that the Charter did usher in a new era and that for all practical purposes it is the Charter that now governs the conduct of states. According to this school, there is a comprehensive ban on the use of force in the shape of article 2(4) of the United Nations Charter. It contends that the only exceptions that are explicitly mentioned in the Charter or exceptions that are universally accepted as 'new' customs are valid. This debate remained academically also. Writers and Scholars remained in war of words.

By article 2(4), the United Nations' charter setout its principal rule. It requires all states to refrain from the threat or use of force not just to renounce war but all other forms of inter-state violence.

This commitment is balanced, however, by the Charter's equally fundamental promise to provide an effective system of collective measures to protect states against violator of the peace.[20] Article 39 of the United Nations charter authorizes the Security Council to determine the existence of any threat to the peace, breach of the peace, or act

[18] G.A Res. 2131(XX) of 1965
[19] G.A Res. 3314 (XXIX) of 1974
[20] Thomas M. Frank, When, *if ever, may States Deploy Military Force without Prior Security Council Authorization?* SJICL (2000) 4, p. 326.

of aggression. Article 25 requires all members of the United Nations to accept and carry out those decisions. Article 42 of the said Charter empowers the Security Council to make recommendation, or decide what measures shall be taken to maintain or restore international peace and security. This further authorizes the council, if milder remedies fail to take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.

From the above discussion, we conclude that the United Nations Charter is framed to maintain international peace and security. Article 2 (4) of the charter imposes negative obligation not to use force. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other way inconsistent with the purpose of the United Nations. Article 43 of the Charter form an important part of the system of collective security. This Article was never acted upon and that is why the system failed. Hence States feel compelled to resort to self-help.

Members of progressive positive developments took place since drafting of the United Nations Charter, paramount of which are declaration on Friendly Relations of 1970 and Resolution on Definition of Aggression 1974. Both seek to clarify the key principles and doctrines involved in the concept of use of force. The Charter law is a comprehensive law on the use of force, and restraint states from the use of force subject to certain exceptions.

1.3 Exceptions to the Use of Force

Despite from the very beginning, communities and later on, modern states often tried to eradicate the evils of wars, various steps were taken in different scenario to restrict and outlaw war. The Just war doctrine emphsis for just cause. Religions in various times did well, but the concept of 'Holy War' did not end. Here, concepts developed regarding the legality of wars.

In 1945, at San Fransaco, a new international organisation came into existance the United Nations. It provided a general ban on the use of force but subject to certain exceptions.These may be discuss in the following headings:

1. UN Charter Exceptions
2. Exceptions other than Charter

1.3.1 UN Charter Exceptions

The Charter of the United Nations in its article 2, paragraph 4, imposes ban on, and prohibits the use of force by states. But this general prohibition is subjects to certain Charter exceptions. These exceptions are:

1. Self-defence
2. Chapter VII action by the Security Council and other provision of the Charter

1.3.1.1 Self-Defence

The traditional customary rules on self-defence derive from an early diplomatic incident between the United States and the United Kingdom over the killing of some US citizens engaged in an attack on Canada, then a British colony. The so-called *Caroline* case1837, established that there had to exist "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation,' and furthermore that any action taken must be proportional, "since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." These statements by the US Secretary of State Mr. Webster to the British authorities are accepted as an accurate description of the customary right of self-defence.

The Charter of the United Nations in its article 51, provides for the right of self-defence as an exception to the general prohibition on the use of force. It provides explicitly for the right of self-defence. It provides:

> Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in 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.[20]

Thus there is still a right of self-defence under customary international law, as the International Court of Justice (ICJ) affirmed in the Nicaragua case on the use of force. Some commentators believe that the effect of Article 51 is only to preserve this right when an armed attack occurs, and that other acts of self-defence are banned by article 2(4). The more widely-held opinion is that article 51 acknowledges this general right, and proceeds to lay down procedures for the specific situation when an armed attack does occur. Under the latter interpretation, the legitimate use of self-defence in situations when an armed attack has not actually occurred is still permitted. It is also to be noted that not every act of violence will constitute an armed attack. The ICJ has tried to clarify, in the Nicaragua case, what level of force is necessary to qualify as an armed attack. It also appears that an attack by irregular forces or non-state actors can justify self-defence, as in the apparent endorsement by the Security Council of the use of military action by the United States following the Terorist attacks of September 11, 2001.[21]

1.3.1.2 Pre-emptive Force

There is a limited right of pre-emptive self-defence under customary law. Its continuing permissibility under the Charter hinges on the interpretation of articles 2(4), 43 and 51. If it permits self-defence only when an armed attack has occurred, then there can be no right to pre-emptive self defence. However, few observers really think that a

[20] Article 51 of UN Charter

[21] www.wikipedia.org/wiki/use_of_force_by_states (last visited on 5/29/2006)

state must wait or remain vigilant for an armed attack to actually begin before taking action. They preferred interpretation is either that the article preserves in general the right to self-defence, or to accept a more flexible definition of "armed attack." Under this latter flexible definition, some have tried to draw a distinction between the banned use of "anticipatory" self-defence, which takes place when an attack is merely possible or foreseeable, and a permitted "interventionary" self-defence, which takes place when an armed attack is imminent and inevitable. It seems probable that, whatever interpretational route is used to justify the conclusion, the right to use pre-emptive armed force in the face of an imminent attack is preserved.[22]

1.3.1.3 Chapter VII and Other Provisions of the Charter

With regard to the second exception to the Charter ban on armed force, Chapter VII constitutes the very heart of the global system of collective security. According to its provisions, the Security Council, after having determined that a threat to the peace, breach of the peace, or act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the Member States. In actual UN practice, it is now common for such enforcement action to be carried out on the basis of a mandate to, or more frequently an authorization of, states which are willing to participate, either individually or in *ad hoc* coalitions or acting through regional or other international organizations, among them prominently NATO. While the implementation of Chapter VII through a "franchising system" of this kind creates numerous problems of its own, it is universally accepted that a Security Council authorization granted under Chapter VII establishes a sufficient basis for the legality of the use of armed force employed in conformity with the respective Council Resolution(s). Conversely, any threat or use of force that is neither justified as self-defence against an armed attack nor authorized by the Security Council must be regarded as a violation of the UN Charter.[23]

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[22] Ibid.

[23] http://www.ejil.org/journal/Vol10/No1/ab1-1.html (last visited 5/29/2006)

Chapter VIII of the UN Charter (Regional arrangements) completes the legal regime thus devised. Hence, according to Article 53, para. 1 of the United Nations Charter:

> [T]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.

The UN Secretary-General's 1992 "Agenda for Peace" emphasized the desirability, indeed necessity, of this mechanism of support. The provision then continues:

> But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council [with the now obsolete exception of the employment of the "enemy-state-clauses"].[24]

This provision, too, has been subjected to considerable strains, particularly during the Cold War. One especially dubious example is the view that the failure of the Council to disapprove regional military action amounts to (tacit) authorization. In view of the veto power of the permanent Council members, this is a specious argument. On the other hand an interpretation of Article 53 para. 1 does in good faith leave room for the possibility of implicit as well as *ex-post-facto* authorization.

1.3.2 Exceptions Other Than UN Charter

The Security Council paralysis because of veto and the failure of States to whole-heartedly embrace the concept of the peaceful settlement of disputes, has led to the use of force by states in pursuance of their cause. Different doctrines have been propounded to justify use of force some of which are: right to intervene to protect nationals and property abroad; the right to humanitarian intervention; anticipatory right of self-defence; war on

[24] Boutros-Ghali, an Agenda for Peace (1992) SC Doc. S/24111, 17 June 1992.

terrorism and right of colonial peoples to wage a war of national liberation and to receive outside support.

1.3.2.1 Protection of Nationals and Property Abroad

This is one of the main topics of this dissertation, and shall be discussed in detail in the next chapter. Here a little explanation is to be given as to clarify that states practice has shown that a state can legally intervene in another state where there is a threat to the lives or property of the nationals of the intervening state.

Examples of Israeli attack on Entebbe 1976, the American Iranian hostages rescue attempt 1980, the American intervention in Grenada 1983. American defence of this right in the Entebbe raid: "There is a well-established right to use limited force for the protection of one's own nationals from any imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right flowing from the right of self-defence is limited to use such force as is necessary and appropriate to protect threatened nationals from injury".

To characterize such cases as self-defence is to nullify the requirement that action in self-defence must be in response to "armed attack". Besides, the conditions laid down in the Caroline case[25] must be met to justify it. This doctrine has been an instrument of colonial interventions.

1.3.2.2 Humanitarian Intervention

This is also one of the main topics of this dissertation, and shall be discussed in detail. Commentators have founded the doctrine on the 'overriding need to act on humanitarian values'. This would open the way for many exceptions to the general prohibition on the use of force, and it has already been suggested that the preservation of democracy may be such an 'overriding need'. The doctrine not well received as potential for

[25] For detail see: D. J. Harris, Cases and Materials on International Law, p. 921.

abuse exists. The human rights ethos and recent development in the human rights system have conceptually and legally placed humanitarian intervention as a valid ground for the use of force. There exists a hot debate among scholars regarding the legality of humanitarian intervention, but the development of human rights system have pave way to such intervention.

1.3.2.3 Self-Determination

People under the colonial or racist regime's right to use force to free themselves and to seek support from other States. Strong trend reflected in the General Assembly resolutions towards legitimizing military action in support of colonial peoples. Writers have also produced strong textual arguments drawn from article 2(4) to justify such action. For instance Virally – an eminent International law Scholar has argued that on the basis of resolution 2625 [26] that the use of armed force against administering power cannot be an attack on the latter's territorial integrity or political independence. And such action would be consistent with the self-determination of peoples, a purpose of the UN enshrined in art 1(2).

1.3.2.4 War on Terrorism

Another area of using force without the explicit approval of the UN Charter is use of force to combat terrorism. When we say that a particular state is independent we attribute to that state a number of rights, powers, & privileges at international law. Correlative to these rights, etc. there are duties and obligations binding other states, which enter into relations with it. A state, inter alias, has the duty to abstain & prevent agents and subjects from committing acts constituting a violation of another state's independence or territorial supremacy. An illustration of this duty is the obligation on a state to prevent within its borders political terrorist activities directed against foreign states. Such a duty was expressed in article 4 of the Draft Declaration on the Rights and Duties of States.

[26] GA/Res/ 2625 (XXV) (1970)

prepared by the ILC in 1949 and in wider and more general terms in the 1970 Declaration on Principles of Friendly Relations and Co-operation.

The subject of terrorism was raised as long ago as the year 1934 in connection with the assassination at Marseilles by certain terrorists of the Yugoslav monarch --King Alexander. Yugoslavia formally accused the Hungarian government before the League of tacitly conniving in the assassination.

Arising out of this dispute, the League ultimately promoted in November 1937 of a Convention for the Repression of International Terrorism. However this Convention did not come into force. The UN General Assembly in December 1972 established an ad hoc 35-member committee on terrorism, which considered various drafts and proposals. One major difficulty, inter alia, concerned the search for a formula to define the term `terrorism'.

At present the international community has accepted terrorism as a threat to global peace and security. The term 'terrorism' has now been defined. On March 17, 2005 a UN penal describe terrorism as any act *"intended to cause death or serious bodily harm to civilians or non- combatants with the purpose of intimidating a population or compiling a government or an international organization to do or to abstain from doing any act"*[27] Any acts of terrorism amounts to a threat to peace and security, though the primary aim of the United Nations Organization is to maintain international peace and security. States under such doctrine may legally use force to combat terrorism.

1.3.2.5 Intervention by Invitation

This is also the main area of research of this dissertation, but a little introduction is necessary. During the Cold War era, there were several instances when states used force under the guise that territorial sovereign invited for help. This claim was endorsed

[27] http://www.unodc.org/unodc/terrorism_definitions.htm (Last time visited on 05/30/06)

by the international community in some cases and rejected in others.[28] There exist two norms: general ban on the use of force and the other is state's territorial sovereignty. This may be discussed in detail in the next chapter.

According to traditional law of the Charter, all the above rights are prohibited, except that in very limited circumstances attempts to rescue citizens in immediate danger of life of limb may not be prohibited by article 2(4). The terms of Charter and risk of abuse are the chief arguments in favor of traditional view. In circumstances where the justification for use of force is clear and easy to prove and where Charter is capable of more than one interpretation, then with universal support further exceptions to the arts 51 and 53 may be added. Thus the right of States to aid people under the colonial or racist regime in a war of national liberation can how is added to the traditional exceptions. The Courts judgment in the Nicaragua v. U.S case suggests, by way of obiter, that the use of force for the purpose of promoting a war of national liberation is an exception. [29]

[28] M. Mushtaq Ahmad, Use of Force for the Right of Self- Determination in International Law and Shariah, A Comparative Study, LL.M thesis, UP (2004) Faculty of Shariah and Law, International Islamic University, Islamabad, p. 65.

[29] Nicaragua VS US, ICJ Rep; 1986, p. 14

Chapter 2

SPECIFIC ISSUES OF SELF-DEFENCE

1.1 Protection Of Nationals And Property Abroad

Introduction

The use of force to protect nationals and property in a foreign state has frequently been used by various states since the Second World War. Sates always claimed that they have the right of self – defence to protect their nationals and property in a foreign state, and invoked self – defence as at least a partial justification for their action,[2] although, the Charter provisions do not specifically provides for the use of force to protect nationals and property abroad.

States practice has shown that such right existed prior to the United Nations Charter. United States of America claimed several times the use of force and justified it on the basis that self – defence extend to the protection of nationals abroad. Customary international law allowed use of force for the protection of nationals and property abroad only if the following conditions are fulfilled:

1. That the host state must be unable or unwilling to protect nationals.
2. That the nationals must be in serious and immediate danger of life threatening harm.
3. Force must be the lost resort.

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[2] Christine Grey, International Law and the Use of Force, (Oxford University Press 2000), p. 109.

4. The intervening state may use limited force as is reasonably necessary and must vacate the territory of the 'host' state as soon as practicable.[3]

Since the entry into force of the United Nations Charter, states used force for the protection of nationals and property abroad. For instance, United Kingdom and France used force for the protection of property in Suez crisis in 1956. United kingdom claimed that state property might be protected in this way. Similarly Israeli claim of justification for the use of force at Entebbe airport, the United states of America actions in Tehran 1980, Grenada 1983 and in Panama 1989 are examples cited in every treatise on the protection of nationals and property abroad. These states justified their actions on the basis that the right of self – defence extends to the protection of national and property abroad.S

Recently, when the United States of America launched an invasion of Panama, in a special press briefing given that day, Secretary of State James Baker emphasized that the 'leading objective' of the US military action had been to protect American lives.[4]

The governments of several Western states on various occasion express the views that article 2(4) of the Charter of the United Nations does not prohibit the use of force in order to rescue a state's own nationals whose lives or health are endangered in a foreign state, provided that the later is not able or not willing to provide the required protection.[5]

As discussed above, secretary of state James Backer in Panama case emphasized that so there were other objectives as well! The US military action had been to protect American lives. Earlier to his statement, American president Bush (senior) had tersely explained the rationale for his decision to use force. General Manuel Noriega declared his dictatorship to be in a state of war with the United States and publicly threatened the lives

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[3] Martin Dixon, A Text book of International Law (hereinafter international law,(Blackstone Press, London 2000), pp. 307 – 8.
[4] Nanda, The Validity of US Intervention In Panama under International Law, 84 AJIL (1990), p. 494.
[5] Bruno Simma, (ed) the Charter of United Nations – A Commentary,(oxford University press, Oxford 1995), p.124.

of American in Panama.[6] Forces under the command of military dictator shot and killed an unarmed American serviceman, wounded another, arrested and brutally beat a third American serviceman and then brutally interrogated his wife, threatening her with sexual abuse. That,' said the president, was enough.' [7] It was time to act.

Since the UN Charter came into force, similar actions have been advanced by many governments in support of military incursions across the globe. But is the protection of nationals' and property's justification for intervention legally sound, particularly given that it is not explicitly provided for by the United Nations Charter?

Nature of the Problem

How properly to define intervention,' especially that undertaken to protect to protect nationals and property abroad has been a source of great scholarly debate and misunderstanding. Does any interference whatsoever in another state's internal affairs constitute intervention? If a state uses non – military but nevertheless coercive means to protect its nationals abroad should that action be considered intervention? To what extent must its nationals and property be at risk before a state can credibly advance a protection of nationals and property rationale for intervention? For the purpose of this work, intervention for the protection of nationals and property may be defined as, ' the use of force by a state to remove its own nationals and protect its property from another state where the lives and property are in danger'.

The definition given above, excludes any use of force done with the consent of the target state. For example, American nationals in Combodia were in danger and the Cambodian government granted its permission to the United States to remove them forcibly.[8] It also excludes any state action taken pursuant to a recommendation or

[6] A. C Arend, and, Robert J. Beck, International law and the use of force, (Routledge London 1993), p.93.
[7] See for detail: Tom J. farer, Panama: Beyond the Charter Paradigm, 84 AJIL (1990), p. 503.
[8] A. C. Arend, and Robert J. Beck, International law and the use of force, p. 94.

decision of a competent organ of the United Nations.[9] For instance, the Security Council may authorize a state or states to take military action to protect nationals abroad.

There has been a lot of debate on the validity and legality of the use of force to protect nationals and property abroad. on nearly more than twenty occasions since the close of World War II, states have threatened to use force for the protection of their nationals,' have actually used force for such purposes, or might arguably have had grounds to do so. Similarly on many occasions force has been used by states to protect its property abroad.[10]

That the use of force to protect nationals and property abroad existed in the pre – Charter law [11] is not disputed. What is not agreed upon, is however, and is that whether such right as to protect nationals and property abroad still exists? To reach to the conclusion and to dig out answer to the raised question, we must have to consult case study on the said issue, as states practice played an important role in the development of International Law.

2.2 Case Study

The main purpose of the case study is to reach to the conclusion whether use of force for the protection of nationals and property abroad is legal? If legal, to what extent force may be used? Either state in such a situation, may resort to force with out resorting to the Security Council? To answer these questions, we must study cases concerning use of force for the protection of nationals and property abroad.

[9] Ibid.
[10] See for detailed case study: Weisburd A. Mark, Use of force: The Practice of states since world War II, (Pennsylvania State University Press 1997)
[11] See for detail: chapter 1 of this dissertation.

2.2.1 US Rescue Operation In Iran1980

Among the most prominent post – 1945 attempts to use force solely for the protection of nationals was undertaken by the United States on April 24, 1980. The long – drawn – out crisis over US diplomatic and counselor hostages in Iran began on November 4, 1979, when a mob of militant students surrounded the US embassy in Tehran.[12].

On November 4, 1979, in the wake of the Iranian Revolution, several hundred students had stormed the US embassy in Tehran and taken numerous hostages, some of whom they released on Nov; 13, 1979. It was not clear whether the militant students in Tehran were acting on their own initiative or under the authority of the country's leaders, or whether the Iranian religious and secular leaders were in full agreement at various stages. US President Jimmy Carter in Washington often received conflicting advice from Vance – US Secretary of State, who believed that the problem had to be solved without the use of military force, and from Carter's national security advisor, Zbigniew Brzezinski, who favored tough military action either to rescue the hostages or to punish Iran.[13] With the endorsement of Ayatullah Khomeini, the remaining US citizens had remained captive despite various non – military initiatives by the US government.[14]

On November 9, the United States issued to the UN Security Council a brief factual report of the incident and asked the Council to 'urgently consider what might be done to secure the release of the … personnel being held'.[15] The President of the Council, following private consultations with Council members, issued a statement:

1 Expressing profound concern at the detention of American personnel;

2 Emphasizing the inviolability of the diplomatic personnel and establishments, in accordance with internationally accepted norms;

3 Urging 'in the strongest terms' the release of the personnel being held; and

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[12] Sydney D. Baily, The UN Security Council and the Human Rights, (St. Martin Press New York 1994), p. 98.
[13] Ibid.
[14] A. C. Arend, and R. J. Beck, International law and the use of force, p. 100.
[15] Sydney, D. Baily, ibid, p. 99.

4 Urging the Secretary – General to use his good offices in attaining the objective.[16]

The tension increased. Negotiations were in progress, but there were no fruitful results. On November 25, 1979, the Secretary - General, with the unanimous support of members of the Council, asked that the Security Council should be convened urgently, citing his power under the rarely – used Article 99 of the UN Charter, which allows him to bring to the attention of the Council ' any matter which in his opinion may threaten the maintenance of international peace and security'.[17]

The US request to the International Court of Justice received prompt attention. On December 15, the Court unanimously ordered Iran, as a provisional measure, to release all US hostages immediately and afford them full protection, and to restore diplomatic and consular premises in Tehran to US control. The two governments were ordered not to aggravate the tension nor render the dispute more difficult of solution.[18]

On December 22, Secretary – General Waldheim reported to the Security Council in writing that his contact with the parties had produced no progress but that he would continue his efforts.[19]

On April 7, 1980, the United States at last broke diplomatic relations with Iran and unilaterally imposed economic sanctions, and ten days later, further unilateral US coercive measures were announced. By then, President Carter had authorized the rescue mission.[20] While the United States dubbed its effort 'a rescue operation, not a military action, Iran called it a blatant act of invasion,' though it did not apprise the Security Council of the matter.[21] Perhaps not surprisingly, the reaction of other states varied:

[16] Ibid.
[17] Ibid.
[18] The full text of the Court's order was issued as a document of Security Council, S/13697, dated Dec; 19,1979
[19] Sydney D. Baily, ibid, p.100.
[20] Ibid, p. 103
[21] New York Times, April 26,1980: p. A10.

several pronounced themselves in favor of the lawfulness of the action, while others declared it legally impermissible.[22]

The International Court of Justice in it judgment on May 24, 1980, it conceded that the US might 'have had understandable feelings of frustration at Iran's long – continued detention of the hostages.' Nevertheless, the Court could not 'fail to express its concern in regard to the United States 'incursion into Iran.' Given its timing, the American operation was 'of a kind calculated to undermine respect for the judicial process in international relations.[23]

2.2.2 United States Bombing Of Libya 1986

Tension between United States of America and Libya escalated in the spring of 1986, and there were a number of provocative acts by both countries in the Gulf of Sirte, off the Libyan coast.[24] On April 5, 1986, a bomb exploded in a Berin nightclub (La Belle), killing one US soldier and a young Turkish woman and injuring over 100 other people. The United States, believing that it had ' evidence of direct Libyan involment', bombed Tripoli, using aircraft based in Britain and aircraft from carriers in the Mediterranean, killing 37 people.[25]

United States, after using force against Libya, claimed and justified to be acting under the self – defence provisions of the UN Charter. This action was disapproved of, France and Spain refusing over flying rights to the United Kingdom – based aircraft. Britain agreed to the operation so long as it was directed against the targets involved in the conduct and support of terrorism, and the British Ambassador told the Security Council that Libya had provided the provisional IRA with money and weapons.[26]

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[22] Ronzitti N., *Rescuing Nationals Abroad through Military Coercion and Intervention on the Grounds of Humanity* in, A, C. Arend, and, R, J Beck., International law and the use of force, p. 94.
[23] See for detailed Judgment: Henever, N, Kaufman, (Ed) Diplomacy in a Dangerous World: Protection for Diplomats under International Law, (Westview Press, 1986), pp.73 – 153.
[24] SCOR, supplement for January to March 1986, pp.149 –51.
[25] Sydney D. Baily, The UN Security Council and Human Rights, (St. Martin press New York, 1994) p.108.
[26] Ibid.

During these hot days, debates started in the Security Council. Nine meetings of the Security Council were held on the request of the Libya and other Third World countries, one meeting being suspended for a short while because of the Security alert. [27]

A draft resolution sponsored by five Third World countries would have condemned both the US attack and 'all terrorist activities whether perpetuated by individuals, groups of states', but this was vetoed by Britain, France and the United States.[28]

2.2.3 Rescue At Entebbe 1976

One of the most spectacular acts of counter – terrorism took place at Entebbe in Uganda in 1976. An Air-France passenger aircraft, AF139, with some 250 passengers and a crew of 12, was hijacked over Corfu by agents of the Popular Front for the Liberation of Palestine. The aircraft stopped at Benghazi in Libya, where one Israeli passenger, a nurse, feigned illness and was allowed to disembark.

. Although the Israeli government had not sought prior permission from Ugandan authorities to do so, its commandoes nevertheless freed the hostages, whose lives had explicitly been threatened, and killed their captors.[29] In the process the Israeli troops also destroyed about ten Ugandan military aircrafts and killed some Ugandan soldiers.[30]

Israel not only relied on the larger right of self defense; it also contended that the ban on the use of force (article 2 (4)) is not comprehensive, thus favoring the permissive interpretation. During the subsequent Security Council debate, Israel contended that its actions at Entebbe had been permissible 'self–defence.' When a local state was unwilling or unable to do so, Israel asserted, a state might use force to protect its nationals abroad.

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[27] Ibid.
[28] SCOR, supplement for April to June 1986, pp.22 – 6, 36 – 7.
[29] A. C. Arend, and R. J. Beck, International law and the use of force, p. 99.
[30] Ibid.

[31] While Britain seemed uncharacteristically to equivocate on the protection of nationals ' question,[32] the United States explicitly supported the Israeli views.[33] Meanwhile, Italy, France and Japan discussed the question of law introduced by Israel but failed to reach a conclusion.[34] A large number of other states, however, were sharply critical of the Israeli action, labeling it an 'aggression' and an excessive use of force. Although the 1976 Israeli action was similar in many regards to other previous use of force to protect nationals, it differed in one significant respect: nationals had not voluntarily entered the jurisdiction of the foreign state.[35] Rather, Israeli citizens had been brought to Uganda against their wills.

2.2.4 Suez Crises 1956 (Protection of Property Abroad)

The chain of events leading to the attack began when, in July 1956, the United States and the United Kingdom each withdrew offers they had made to Egypt to pay the foreign exchange costs of the dam Egypt planned to build at Aswan.[36] President Jamal Abdul Nasser's government responded to these actions by nationalizing the Suez Canal Company on July 26, 1956, with compensation for the shareholders of the company.[37] The United Kingdom and France almost immediately began planning joint military action in response.

The motives of the two states were different. The French government strongly but incorrectly believed that Egypt was the key prop of the Algerian rebellion and was glad of the excuse to attack it.[38] The motives of the United Kingdom were more complex. It was very dependent on the Canal and believed that it simply could not afford to see it in Egyptian hands. Moreover, it felt that its prestige, and therefore its position in the Arab

[31] S/PV. 1939: 51- 55.
[32] S/PV. 1940: 48.
[33] S/PV. 1941: 31.
[34] S/PV. 1942: 28 – 30; S/PV. 1943: 28 – 31.
[35] A. C. Arend, and R. J Beck., International law and the use of force, p. 99.
[36] Hugh Thomas, Suez, (Harper and Row, New York, 1967), pp.17, 21-25.
[37] Ibid, p.26.
[38] Ibid, p.47.

world, was at risk. The British government faced strong internal and external political pressure against backing down, and Anthony Eden, the Prime Minister, felt the need personally to stand up to Nasser, based on his experience of dealing with the European dictators of the 1930s.[39]

Over the next several months' efforts were made to avert the use of force, but by October 16 the British government was convinced that this approach was fruitless. Essentially the British and French governments believed that they could not maintain their states' standing in the world, particularly the third world, without forcing – and being seen to force Egypt to back down.[40]

France and the United Kingdom were not only states interested in making war on Egypt. Israel also had a number of reasons to attack its neighbor. The armistice agreements concluded in 1949 after the first Arab – Israeli War had not led to peace treaties. On the contrary, relations between the two sides had deteriorated. Egypt had effectively closed the Suez Canal to Israel, maintaining that policy in defiance of a 1951 Security Council resolution.[41] It subsequently closed the Straits of Tiran to Israeli shipping and aircraft.

The international reaction to this spiral of violence was ineffectual, being limited to what amounted to exhortations to peaceful behavior by the Security Council. The situation was further complicated by Egypt's October 1955 decision to obtain a relatively large quantity of armored vehicles, cannon, and military aircraft from Czechoslovakia. The quantity of arms involved was large enough to destroy the military balance in the region. Israel assumed that the arms would be used against it, though there was disagreement within its security establishment as to how quickly Egypt would act.[42] In these circumstances Israel began to contemplate a preemptive war against Egypt.

[39] Ibid, p.32-38.
[40] Ibid, p.95, 101.
[41] United Nations Yearbook 1954,(Columbia University Press NY,1955), pp. 62- 64.
[42] Z Schiff, A History of the Israeli Army, (Macmillan 1985), pp.88 – 89.

As the French had considered a strike against Egypt, they also conceived the idea of cooperating with Israel in the their attack. They eventually convinced the British to accept the idea as Britain and France finalized their plans for a forcible response to Nasser's seizure of the Canal Company. Cooperation with the British and French offered Israel the air support it would need to advance into the Sinai, while providing the Europeans with a pretext for attacking Egypt: protecting the Canal from the combatants. The three powers formally agreed to proceed on October 26, 1956.[43]

Israel commenced its attack on Egypt on October 29. On October 30, as prearranged the United Kingdom and France delivered an ultimatum to Egypt and Israel, demanding that each state withdraw its forces to a distance of ten miles from the Suez Canal and that British and French troops were a considerable distance from the Canal and thus unaffected by the ultimatum; Egypt did not withdraw, believing that Britain and France were bluffing.[44]

On the same day, the United Kingdom and France vetoed in the Security Council separate American and Soviet resolutions calling on all members to refrain from the use of force in the area, for Israel's withdrawal from Egyptian territory and for a cease-fire. Egypt had claimed to be the victim of aggression, and most members of the Security Council agreed with the objective of halting the fighting and obtaining an Israeli withdrawal. However, Israel had defended its invasion as a defensive reaction to the frequent attacks on tits territory by guerillas based in Egypt. France explained its veto by reference to Egypt's policy of seeking to annihilate Israel, Egypt's support of the Algerian rebels, and Egypt's seizure of the Canal.[45]

On October 31, upon expiration of the ultimatum, British and French aircraft began bombing Egyptian airfields.[46] The UN General Assembly, called into emergency session by a successful Yugoslav invocation of the "Uniting for Peace" Resolution. In

[43] Hugh Thomas, Suez, pp. 88, 108 – 114.

[44] Ibid, p. 128.
[45] United Nations Yearbook 1956,(Columbia University Press NY 1957), pp. 25- 27.
[46] Hugh Thomas, Suez, p.129.

1950, the General Assembly passed a hallmark resolution known as "Uniting for Peace Resolution"[47]

By this Resolution the General Assembly declared that it also had some responsibilities, as well as authority, to protect and restore international peace. It declared that if Veto of a permanent member becomes a hurdle in the performance of the Council then the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measure, including in the cases of breach of international peace or act of aggression, the use of armed force when necessary, to restore international peace.' This, however, could not lead to the use of force against aggressor as that was deemed the prerogative of the Council, although it did succeed in bringing the matter to open debate in the Assembly and thus putting political pressure on the wrongdoers.[48]

On November 2, overwhelming approved an American resolution, calling for cease fire and other steps to deal with the crisis. On November 4 the assembly approved a Canadian resolution calling for the establishment of an emergency force to secure and supervise the cessation of hostilities. Israel had secured all its objectives by November 5, and was anxious to accept the UN cease-fire, but was prevailed upon by the French, at the request of the British, not to do so; these two powers had not yet landed troops and could hardly claim to be sending in their forces to separate combatants if there was no combat. By November 6, however, British and French troops were ashore, and those states accepted the cease-fire without having secured the entire Canal.[49] The Canadian resolution had called for the establishment of an international force to protect the Canal, and Britain made clear in accepting the cease-fire that it was relying on the creation of such of force.[50]

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[47] GA/ Res/ 377(V) (1950) For detail see: Cases and Materials on International Law

[48] M. Mushtaq Ahmad, Use of Force for the Right of Self- Determination in International Law and Shariah, A Comparative Study, LL.M thesis, UP (2004) Faculty of Shariah and Law, International Islamic University, Islamabad, p. 58.

[49] Hugh Thomas, Suez, pp. 141 – 44.

[50] Kessing's Contemporary Archives, vol; 10(Nov; 17 – 24, 1956), at 15302.

The British had decided to accept the cease-fire for several reasons. First, the intervention was no longer credible since the fighting had stopped. Further, Israel remained anxious to accept the cease-fire. Also, the Soviet Union had sent notes to Israel, France and the United Kingdom threatening nuclear war if the fighting did not stop.[51]

The French preferred to continue the operation but agreed to the cease-fire when the British informed them that the United Kingdom was accepting the cease-fire regardless of the French attitude. In any case, it would have been difficult of the French to act independently given the integration of their forces with the British.[52]

Over the next several months' further maneuvers took place regarding the withdrawal of British, French and Israeli forces from Egypt. The British and French dragged their heels. Britain, however, was in difficult financial straits as a result of the crisis; when the United States agreed to aid Britain financially and with shipments of oil upon receiving assurances of a British withdrawal, the assurances were forthcoming. An announcement of withdrawal was made on December 3, and it was complete by December 22.[53] Israeli withdrawal was harder to arrange.

November 7 night however, the General Assembly overwhelmingly adopted a resolution calling for the withdrawal of all foreign forces from Egypt. Furthermore, the United States threatened Israel with the loss of all aid, with UN sanctions, and with expulsion from the United Nations if it did not withdraw.[54] Ben-Gurion, who was also very concerned about the threats made by the Soviet Union, thereupon reversed course, stating on November 8 that Israel would withdraw "upon the conclusion of satisfactory arrangements with the United Nations.[55]

The following were the main event in the said case:

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[51] A. Mark Weisberg, Use of Force: The Practice of Stats since World War II, p.31.
[52] Hugh Thomas, Suez, pp. 147 – 48.
[53] For detail see: Hugh Thomas, , Suez, pp. 424 – 31
[54] Donald Neff, Warrior at Suez, (Simon and Schuster, NY, 1981), p.416.
[55] Ibid, p.416.

1. That the World Bank approved funds for building Aswan Dam.
2. That the US offered Egypt to become a member of the proposed defense organization (MEDO).
3. That after refusal of Egypt, the World Bank stopped funding Egypt on the instance of US and UK
4. That in response Jamal nationalized Suez' while lease was granted to UK and France till 1969.

As the foregoing indicates, third-party reaction to the attack on Egypt was crucial to the outcome of the Suez crisis. The actions of the United States the threats of the Soviet Union particularly for Israel. Ion Jordan and Syria mobilized and Iraq dispatched troops to Jordan. Saudi Arabia and Syria broke diplomatic relations with Britain and France, and Jordan and Iraq serve ties with France.

The Sudan closed its airports to the United Kingdom and to France, and Nepal warned Britain against using Gurkha soldiers – recruited from Nepal – in the fighting. Aside from the states engaging in what might be called sanctioning activity, Denmark, Colombia, India, Norway, Sweden, Yugoslavia and Canada all contributed troops to the UN force that was created to facilitate the cease-fire.[56]

The Suez crisis was cross-border invasion by Israel, Britain, and France Israel justified its action on the basis of self-defense, Britain and France claimed to be doing no more than protecting the Canal.

2.3 Legality Of The Use Of Force For The Protection Of Nationals And Property Abroad

As far as the legality of the use of force for the protection of nationals and property is concern, there are two different schools of thoughts. A number of prominent scholors have argued that intervention to protect nationals and property abroad is legally

[56] Ibid, p.422.

permissible.[57] While many of the legal scholars argue that the use of force for the protection of nationals and property abroad is not permissible. Before going to discuss the legality of use of force for the protection of nationals and property abroad, it is useful to consider both the theories.

2.3.1 Restrictionist Theory

This theory is based upon three basic tenets. The advocates of this theory hold that the principal goal of the UN system is the maintenance of international peace and security. Second, it maintains that the UN has a monopoly on the legitimate recourse to force – except self – defence. And finally, it asserts that if states were allowed to employ force for any purpose other than individual or collective self – defence,; they would merely be provided with a ready legal pretext for geopolitical intervention.[58]

The advocates of this theory argues that before UN charter's came into force, customary international law allowed states to use force for the protection of nationals and property abroad. But they argue that it this right has frequently been abused. As the intervening states invoked it to justify military actions taken strictly for *Realpolitik* purposes.[59] In order to address this problem, the restrictionist submit, the framer of the UN Charter deliberately circumcised the state's authority to use force.[60]

The second main argument advanced by restrictionists is that article 2(4) of the UN Charter clearly indicates a general prohibition on the use of force by states.[61] No state is permitted to threaten or use force 'against the territorial integrity or political independence of any state, or in any manner inconsistent with the purpose of the UN

[57] M. Ronzitte, Rescuing Nationals abroad through Military Coercion and Intervention on the Ground of Humanity, p.1.
[58] I. Brownlie, thoughts on Kind- Hearted Gunman, in Lillich, R.,(ed.) Humanitarian Intervention and United Nations, University of Virginia Press, 1973), p. 487.
[59] T. M Frank, and Rodley, N., After Bangladesh: the Law of Humanitarian Intervention, AJIL 1973, p. 275.
[60] A.C. Arend, and R. J. Beck, International law and the use of force, p. 106.
[61] Brownlie I, International Law and The Use of Force by States, (Oxford: Clarendon Press, 1963), p.273.

Charter. Article 51, which provides for individual or collective self – defence,' constitute merely a narrow exception to the general prohibition of article 2 (4) of the UN Charter.[62]

The UN Charter prohibition, a French restrictionist Viraly suggests, has 'the broadest range it is possible to imagine.' [63]

An armed attack upon 'nationals abroad' must be legally distinguished, say restrictionists, from one upon 'sovereign territory.' While unfortunate, an attack upon nationals does not justify a self – defence response by their state of nationality. Hence, any state use of force solely to protect its nationals is *per se* illegal, if perhaps 'more or less condonable.[64]

The restrictionists also invoke the principle of non – intervention, 'which is supported by two General Assembly Resolutions[65] and by positions set out in debate by various UN member states. Restrictionists recognize, however, that while the actions of the General Assembly may help to indicate or to clarify state views, they nonetheless have no binding legal effect.[66]

2.3.2 Counter – Restrictionist Theory

Four basic and fundamental arguments have been advanced by the counter – restrictionists for the legality of the use of force to protect nationals and property abroad.

They argue that such intervention is legally permissible, many contend that the pre – charter customary rule which permitted such intervention has either survived or been revived in the Charter period.

[62] Ibid. p.271.
[63] A.C. Arend and R. J. Beck., International Law and the Use of Force, p. 106.
[64] W. Friedmann, Conference Proceedings, In Lillich. R., (ed.) Ibid,p. 115.
[65] See for detail: G. A. Res: 2131. (1965)
[66] Arend A.C. and Beck R. J., Ibid.

According to Derek Bowett, a reading of the *travaux preparatoires* of the Charter indicate that the UN system's framers intended to 'preserve the pre – existing, customary right of self defence,' [67]

An analysis of the Charter practice, Bowett suggests, demonstrates sufficiently 'that some states do still maintain the right to use force abroad in the protection of national abroad.[68] Both the text of the United Nations Charter and practice of states of states during the Charter period indicate, therefore, that the pre – Charter law has revived.

Other legal scholars have argued that such intervention has been revived in the Charter period. In their views, the founders of the UN mistakenly assumed that 'self – help' would no longer be necessary since an authoritative international organization (could now) provide the police facilities for enforcement of international rights.[69] Michael Reisman Richard Lillich, and other scholars submit, the UN enforcement mechanisms have been confounded at virtually every turn by dissension among the Security Council's permanent membership. Article 2(4)'s prohibition on the threat or use of force, they assert, must hence be conditioned on the United Nation's capacity to respond effectively. When the UN fails to do so, customary law revives and states may intervene for such protection.[70]

Another argument advanced by the counter - restrictionists is the interpretation of article 51 of the UN Charter. They argue that the right of self – defence extend to the protection of nationals abroad. They further submits that an injury to a national in a foreign state which is unwilling or unable to grant him minimum standards of justice and protection' is legally tantamount to an injury to the national's home state.' Such an injury

[67] Bowett, the Use of Force For the Protection of Nationals abroad, in Cassesse, A., The Current Legal Regulations of the Use of Force, (1986), p. 49.
[68] Ibid, p. 41.
[69] Reisman M., Nullity and Revision, p. 848 (1971) in Arend A.C. and Beck R, J., Ibid, p. 107.
[70] Reisman M., and McDougl Arend A.C. and Beck R. J., Ibid, at, Humanitarian Intervention to Protect Ibos in Lillich, R., (ed), ibid. 178.

represents a breach of the legal duty to national's state,' and thus, justifies the use of force by the aggrieved state.[71]

Article 51's legal effect is not to create this right of self – defence, therefore, but explicitly to recognize its (pre – Charter) existence.[72]

Another argument in support of the legality of such intervention is that article 2(4) provides that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United nations. Several prominent scholars suggest that there may be the use of force, which does not infringe upon the long – term territorial integrity and political independence of states, and which are not inconsistent with the UN's purpose.[73] They argue that any short – term military intervention undertaken exclusively for such purpose be legally permissible.

Finally the counter – restrictionists argue that UN Charter has two main purposes: the maintenance of international peace and security; and second, the protection of human rights.

Human rights deprivations, Reisman and McDougal contend, might well represent a 'threat to the peace,' thereby prompting the Security Council's chapter VII jurisdiction.[74] If the Security Council failed to act under such circumstances 'the cumulative effect of article 1, 55, and 56 (would be) to establish the legality of unilateral self – help. Individual states could therefore, intervene, for there exists 'a coordinate responsibility for the active protection of human rights: members may act jointly with the Organization … or signally or collectively.'[75]

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[71] A. C. Arend, and R. J. Beck,, ibid, p.108.
[72] L. M. Goodrich., E. Hambro and A, P. Siman, Charter of the United Nations (3rd ed.), (New York: Columbia University Press, 1969), p. 344.
[73] J. Stone, Aggression and World Order (London, 1963), p. 43.
[74] M. Riesman and Mc Dougl. Ibid, p. 174.
[75] A. C. Arend, and R. J. Beck,, ibid, p.108.

2.3.3 Legal Assessment Of Such Use Of Force

As far as the question of legality of use of force for the protection of nationals and property is concern, in the light of the above-mentioned theory, it is easy to assess the legality of such use of force. Is the use of armed forces by a state to remove its nationals from another state where their lives or properties are in actual or imminent peril' permissible under the contemporary *jus ad bellum?*

In order to answer this questions! it is useful to recall both the practice of the states since 1945 and the arguments advanced by international legal scholarships.

As we have seen, most scholars – including Professor Akehurst, Brownlie, Thomas M Frank and Ronzitti etc., accept the 'restrictionist theory', which hold that such intervention is impermissible.

On the other hand, a number of prominent scholars – including Professor Bowett, R. Lillich, McDougal, Moore, Reisman, Stone and Waldcock – argue that a right to intervene for the protection does exist.[76]

As far as states practice is concerned, sates have claimed and justified their actions on the basis that protection of nationals and property abroad is a customary right of self-defence. Israel's action at Entebbe is an example quoted in case law above, is one of the best example in support of legality such use of force. United States while commenting on the Israel's action, 'Israel's action in rescuing the hostages necessarily involved a temporary breach in the territorial integrity of the Uganda... However, there is a well-established right to use limited force for the protection of one's nationals.[77]

It is not disputed that such right of intervention did not existed in the pre Charter's state practice. In the light of the authority control' test of a putative norm of international law, it is difficult to hold that a rule exists prohibiting such intervention.

[76] M. Akehurst, The Use of Force to Protect Nationals abroad, International Relations 5: 3 (1977).
[77] SCOR, Supplement for July to September1976, pp.3 – 8.

Since 1945, there have been relatively many examples for such intervention. There have been states whose interests (have been) specially effected. In such circumstances, states cannot ignore in any legal assessment of the state practice. Their actions suggest that the restrictionist 'norm' is neither authoritative nor controlling. In extreme circumstances, such limited use of force without resorting to Security Council, hence, is justified under international law.

2.4 Intervention By Invitation

Customary state practice allowed states to invite other states, in circumstances where there was internal instability in the inviter state. The intervening states intervene in the inviter state to the extent to provide facilities the host state where it was appropriate. Even the intervening state, if necessary, use force for the settlement of internal instability. This practice of states continued and acquired a position that use of force through invitation of the host state becomes legally lawful.

After World War-II, United Nations came into existence its charter prohibited use of force except in two circumstances:

1. Self defense, where actual armed attack occurs.
2. Collective measures as the Security Council direct.

There started debates among the legal Scholars regarding the validity of the use of force by invitation. According to Martin Dixon, such intervention is that one state may request the deployment of another state's military forces in its territory.[76] The question arises whether under the contemporary international law, a head of the head of the state or government is authorized to invite foreign intervention where in the host state, and there is unrest? And what is the legal status of such intervention.

This debate regarding the validity and legality started just after the UN Charter's came in to force.

[76] Martin Dixon, International Law, p.287.

But commentators, differed in their opinions, divided in two groups as to the legality of such use of force. Two different explanations have been given to the general prohibition on the use of force. According to some scholars, such intervention is legally permissible while other argues that under the Charter regime, such intervention is not permissible. Since the UN Charter, such intervention has taken place many times. And most recently, during the Cold War era, there were several instances when a state used force under the guise that the territorial sovereign invited her for help. This claim was endorsed by the international community in some cases and rejected in others. Some of the legal scholars, while broadly explaining the general prohibition on the use of force, allow this customary practice. Since the came into force of the UN Charter, the intervening state justified their action that the y have legally intervened by the invitation of the host state.

There are two main principles going parallel; the first principle is the general prohibition and comprehensive ban on the use of force by states coupled with the obligation of non – interference in the internal affairs of other state. The other principle is of territorial sovereignty, which, means in situation of internal disorder, the competent authorities of a state can take help from other state(s), which may be in the form of the use of force. In some of these principles do not clash, as when a state uses force with the permission or even invitation of the legitimate government of a state. It is not interference or intervention.[77] For instance, Soviet Union intervention in Afghanistan1979, Czechoslovakia 1967, and US deployment of troops in Saudia Arabia to protect her from Iraq, etc.,

Neither does the prohibition on force extend to use of force with the consent of the host State but the individual or body granting the consent must be competent to do so under the host's constitution. Such intervention on request for maintenance of law and order within

[77] M. Mushtaq Ahmad, Use of force for the right of Self- determination under International law and Shariah: a comparative study. UP (LL.M thesis, IIU Islamabad, 2004), p. 65.

its borders. Such intervention is legal if the intervening State does not seek to compel a change in course of action of the host State threatening its political independence.

However, should civil unrest turn into civil war, then use of force on behalf entitled to recognition. Nevertheless, in the case of an illegal intervention on behalf of one contending factor, other States are legally entitled to offer assistance to the unsupported party.

Since the UN Charter, many states claimed and justified intervention on the basis of invitation where the host state suffering from internal unrest. If the conflict is limited, then it will not be characterized as a civil war but merely a domestic unrest, and so help will be permissible.[78]

To reach to the conclusion, we need to consult states practice since the inception of the UN Charter. This will help us in determining the legality of the intervention by invitation whether such use of force by the intervening state without prior Security Council is legal? If yes to what extent.

2.5 Case Study

To analysis the doctrine of intervention by invitation, we need to study relevant case concerning intervention by invitation. The following cases are helpful in reaching the conclusion that whether state may legally intervene without prior Security Council's authorization?

Czechoslovakia (1967)

On January 6, 1968 Alexander Dubcek replaced Antonin Novotny as the First Secretary of the Communist Party of Czechoslovakia. Over the next several months that

[78] Christine Grey, International Law and the Use of Force, (Oxford University Press, 2000), p.57.

party relaxed its hold on Czechoslovakia, permitting greater individual freedom and reviving the authority of the government against that of the party. On a number of matters policy did not change. Both party and state officials affirmed their loyalty to the Soviet Union and the Warsaw pact on numerous occasions. The party did argue, however in favor of its right to a "national way to socialism". Further, the more open public climate permitted persons not in government to advance more radical ideas – an independent foreign, for example or a defense strategy focused on Czechoslovakia's needs.[79]

Despite the Czech's/Slovaks unequivocal affirmation of their ties to the Warsaw Pact, other members of that alliance, most especially the Soviet Union, became increasingly uneasy as 1968 advanced. The leaders of the Czechoslovak party met with the leaders of the other Pact parties twice during the period between January and August, apparently seeking to reassure those leaders; the leaders of the other parties apparently insisted that the Czechoslovak party reassert its leading role, resume control of mass media, close certain clubs, and end press attacks on the Soviet Union and other parties. This culminated in an August 1968, letter from the Presidium of the Communist Party of the Soviet Union to the Presidium of the Presidium of the Czechoslovak party complaining of the latter's failure to meet what the Soviet party saw as its obligations.[80]

The Soviets claimed that they acted part because of the imminence of the party congress at which the Czechoslovak party was planning to adopt a new statute institutionalizing its liberalized domestic institutions, as well as because of the failures mentioned in the August 17 letter. But beyond these motives there is reason to believe that the Soviet Union feared that internal changes in Czechoslovakia could lead ultimately to a weakening of the Warsaw Pact and to the position of the Communist party within Czechoslovakia and also that the ideas taking hold in Czechoslovakia could spill over into the other Eastern European states, or into the Soviet Union itself.[81] In any case,

[79] For detail see: Skilling H Gordon, Czechoslovakia's interrupted Revolution (Princeton University Press 1976) pp. 180-192, 617-50.
[80] Ibid, pp.292-330, 650-675.
[81] Ibid, pp. 718-30.

the Soviet Union defended its action – after first making and then abandoning a claim that the intervention had followed Czechoslovak request assistance.[82]

Hungary the resolution evoked abstentions from Algeria. Pakistan, and India. The Pakistani representative explained his vote by reference to his not having received instructions from his government. India affirmatively decided to abstain, however, agreeing on the importance of the withdrawal of foreign troops from Czechoslovakia but being unwilling to condemn the invasion.[83] Algeria's abstention was motivated by the perceived double standard employed by Western states, contrasting their concern for Czechoslovakia with their reaction to events in the Middle East and Vietnam. A resolution expressing humanitarian concern for Czechoslovak leaders was not pressed to a vote.

Soviet Union/Afghanistan (1979-1989)

In April 1978, the government of Afghanistan was overthrown in a coup lied by the People's Democratic Party of Afghanistan (PDPA), a Marxist-Leninist party. The PDPA's leader, Noor Mohammed Taraki, became president in the new government. That government soon drew opposition from rural Afghans, who formed the majority of the population and who were composed overwhelmingly of devout Muslims. Suspicion that the new government would be anti-Islamic led to the outbreak of a guerilla rebellion in June 1978. Over the next year opposition to the government grew and a number of different guerilla groups were formed. The government received military advisors and increasing aid from the Soviet Union. Which had not placed much reliance on the PDPA prior of the new government and by the Soviet presence on its doorstep? This latter factor also led China to aid the guerillas.[84]

[82] A. Mark Weisburd, Use of Force: The Practice of States since World War II, (The Pennsylvania State University Press, 1997), p. 225.
[83] Ibid.
[84] A. Mark Weisburd, Use of Force: The Practice of States Since World War II, p.44.

By the fall of 1979 the war was going increasingly badly of the PDPA government. Its troops were defecting to the rebels in great numbers, and its efforts at social and economic reform aroused great resentment. The government nonetheless plunged ahead with its program, relying on harshness to establish its control. Most prominent among the party leaders who supported this policy was Hafizullah Amin, the defense minister. In the fall of 1979 a power struggle between Amin and Taraki ended with Taraki's murder and Amin's assumption of the presidency. This development led the Soviet Union to begin planning to intervene. The Soviets had convinced that Amin's harsh policies could only lead to the defeat of his government, which could in turn lead to the emergence of a government unfriendly to the Soviet Union in a state on the Soviet border. To avoid this eventuality the Soviet Union began moving troops into Afghanistan on December 19, 1979. An effort to arrest Amin on December 27 led to his death. Later that day, Babrik Karmal, leader proclaimed in a radio broadcast his seizure of power and a request for Soviet assistance.[85]

Over the next seven years the Soviet Union found itself entangled in a frustrating guerilla war. Soviet troops and the Afghan army were unable to defeat the opponents of the PDPA, collectively known as the mujaheddin, despite the use of such tactics as Afghan air force bombing of Afghan refugee camps in Pakistan. Finally, in December 1986, Mikhail Gorbachev, by this time leader of the Soviet Union, informed Najibullah, who had replaced Karmal as president of Afghanistan, that the Soviet Union would be withdrawing its troops and that the PDPA government would have to resist the mujaheddin alone. In early 1988 the Soviet Union indicated that it would begin withdrawing its troops that year. This led to the conclusion of an April 14, 1988, agreement at UN-mediated talks, ostensibly between Pakistan and Afghanistan but involving the Soviet Union and the United States as well. Under that pact Afghanistan and Pakistan agreed on mutual noninterference in one another's internal affairs. The United States and the Soviet Union agreed to guarantee the pact – but also acknowledge that the United States had the right to continue providing arms to the mujaheddin if the Soviet Union continued t aid the Afghan government. The Soviet Union further

[85] Ibid, p. 45.

undertook withdraw its troops form Afghanistan. Its withdrawal was complete in February 1989.[86]

The Soviet withdrawal did not end the war. The PDPA held its own for some time. In late 1990, however, the United States and Soviet Union each agreed to suspend provision of arms to the side it was supporting. Continued UN efforts to mediate between the Afghan combatants failed and the Afghan government, crippled by defections of military units, finally collapsed in April 1992. The rebel groups installed a government, but there have been much fighting among them ever since.[87]

2.6 Legal Status of the Use of Force by Virtue of an Invitation by the Government of the Inviter.

As we have studied above that intervention by invitation is allowed under the guise of customary international law. From the above mentioned cases it is clear that: I) in the case of Czechoslovakia (1967) requested Soviet Union for intervention. II) In case of Afghanistan, Babrik Karmal – the then Leader of the People Democratic party of Afghanistan, invited Soviet Union where there was internal unrest in the state. In both these cases, Soviet Union remained for a long period, and therefore, her presence in both states for such a long time did not establish sound example for such intervention. But it did not block the way of such intervention.

As far as the legality of the intervention by invitation is concerned, one possible approach to the question of permissibility of foreign intervention in civil conflict is what John Norton Moore has referred to as the 'traditional' norm.[88] This traditional rule seems to have emerged under customary international law prior to the ratification of the United Nations Charter. Although legal scholars differ on this precise contour of the norm, its main points can be summarized as follows:

[86] Ibid.
[87] Ibid.
[88] Moore quoted in A. C. Arend, and Robert. J. Beck, *International law and the use of force*, p.84.

1. It is permissible to provide assistance to widely recognized government, as its request while there is low – intensity strife or an insurgency.
2. If the civil strife rise to the level of belligerency, an outside state can still lawfully provide assistance to the widely recognized government, but the outside state loses neutrality in the conflict.
3. It is impermissible for an outside state to aid the rebels prior to the recognition of belligerency. Once a belligerence is reached, an outside state may aid the rebels, but the out side state will lose neutrality in the conflict.

Since the UN Charter, many states claimed and justified intervention on the basis of invitation where the host state suffering from internal unrest. If the conflict is limited, then it will not be characterized as a civil war but merely a domestic unrest, and so help will be permissible.[89]

Neither does the prohibition on force extend to use of force with the consent of the host State but the individual or body granting the consent must be competent to do so under the host's constitution. This is not against the norms of the UN Charter. As the Charter does not explicitly provides for the prohibition on such intervention. A sovereign state may legally invite another state to the extent to use limited force without prior Security Council's authorization.

[89] G. Christine, International Law and the se of Force, p.57.

Chapter 3

HUMANITARIAN INTERVENTION

3.1 The doctrine of Humanitarian Intervention

a. Introduction

The question of humanitarian intervention is not a new introductory issue in the contemporary international law. It can be traced back in recognizably modern form to the sixteenth and seventeenth centuries, and particular, to the writing of Victoria, Gentili and Grotius. It emerged as a part of a wider process, which saw the early development of the modern international law at the time of the break up of the Christendom, the voyages of discovery and beginning of European overseas empires, and the evolution of the early modern state. In the centuries that followed, a number of other conceptual developments took place which have cumulatively served to define the issue in the form in which we find it to day, above all, the articulation of the principle of non-intervention in the Eighteenth century, and the assertion of the principles of popular sovereignty and self-determination from the time of the American and French Revolutions. The debate was fully joined in the Nineteenth century, particularly in the relation to the intervention by Western Powers in the collapsing Ottoman Empire, and re-emerged unresolved in the Twentieth century.

Since 1945, the Charter of the United Nations has provided the legal-political framework.[3]

The Charter provided general prohibition on the use of force by states under article 2(4). It provides:

> "All members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

But in spite the Charter law prohibiting the use of force, states have often resorted to wars and use of force without resorting to Security Council, and latter on justified such use of force on various grounds. The international Court of Justice in *Carfo Channel Case, 1949*[4] has confirmed this general prohibition on the use of force. The two main exceptions to this general prohibition are: The right of state to use force in self defense or collective self defense under article 51 of the UN Charter, and the right of security council under article 42 to authorize the use of force "to maintain or restore international peace and security."

States have often claimed that they have resorted to humanitarian intervention and that therefore, their actions are compatible with international law, assuming that the humanitarian motives justify acts of force.[5] There is still no consensus in the international legal doctrine on the unlawfulness of forcible humanitarian intervention

[3] O. Ramsbotham, *Humanitarian Intervention: the Contemporary Debate*, in Williamson, R., (Ed) Some Corner of Foreign Field (New York: Palgrave, 1998), p.62.
[4] ICJ Rep; 1949, p. 4.
[5] I.D. Delupis, The Law of War (Cambridge University Press, 1987), p. 79.

[6] that is the use of armed force for the prevention or discontinuation of massive violations of human rights in a foreign state.[7]

Lauterpacht's rationale for humanitarian intervention is that ultimately, peace is more endangered by tyrannical contempt's for human rights than by attempts to assert, through intervention, the sanctity of human personality.[8] A substantial body of opinion and of practice has thus supported the view that when a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of the mankind, intervention in the interest of humanity is legally permissible.[9] Thus the new development is the hardest to access. Undoubtedly, however, a new ethos has begun to develop that challenges traditional Westphalian notion of sovereignty. The usual account of intervention and the Westphalia order identifies strict rules of non --intervention and respect for the right of sovereignty: these rules de- legitimate humanitarian action.[10]

However, Weiss acknowledges a fundamental but subtle change in the political attitude towards the concepts of sovereignty and domestic jurisdiction. He notes that:

> "The concept of domestic jurisdiction has changed in substance, if not in law...[T]he two dominant norms of world politics during the cold war- namely, that boarders were sacrosanct and that secession was unthinkable – no

[6] A. Pauer, *Die humanitare intervention* (1985) quoted in Simma, Bruno, (Ed) The Charter of the United Nations – A Commentary (Oxford University Press, 1995), p.123.
[7] K. Hailbronner, *Die Grenzen des volkerrecht lichen Gewaltverbots*. Quoted in Simma, Bruno, (Ed) The Charter of United Nations – A Commentary, p.123.
[8] H. Lauterpacht., *International Law and Human Rights*. quoted in Harris, D. J., Cases and Materials on International Law, (London: Sweet & Maxwell, 2004) p.947.
[9] D. G. Harris, ibid.
[10] Chris Brown, Humanitarian Intervention and International Political Theory, Mosely, A and Norman, R., (Ed) Human Rights and military intervention, (Ashgate Publishing Ltd. 2002) p.153.

longer generate the almost universal enthusiasm and acceptance that they once did. The automatic and almost reverential respect for non – intervention in the internal affairs of states has made way for more subtle interpretation according to which, on occasion, the rights of individuals take precedence over the right of repressive governments and the sovereign states they represent." [11]

Before the Second World War, justification for penalizing a state, which treated its citizens barbarically, was possible, if at all only on moral grounds, since 1948, all the members of the United Nations have committed themselves to the common standard of achievement defined by the Universal Declaration of Human Rights (preamble) and many have further bound themselves by treaty to regional convention which entail bringing their own domestic legislation into line with an internationally agreed code of law. It follows that, as more as nations accede to these conventions by treaty, infringements by any of them of the fundamental human rights of their citizens can be controlled and if any necessary prevented by action of another countries, which cannot be criticized as intervention in the matters, which are essentially within the domestic jurisdiction of the offending state. These violations of human rights may result catastrophe. This may also constitute a threat to peace, which is a valid ground for collective use of force. The UN system already tolerates, ultimately cooperates with, and may even commend military action by states when such action is taken to avert a demonstrable catastrophe. What kind of catastrophe? Is relatively easily answered in principle, the principle being derived from actual response of the UN system to such uses of unauthorized forces.[12] The system has responded benevolently to the use of un- authorized force solely for the purpose of

[11] Thomas Weiss, Military Civilian interaction: Intervening in Humanitarian Crises, (Rowman & Littlefield Publisher Inc., Lanham, Maryland 1999) p.21.

[12] Thomas, M Frank, Military Force without Prior Security Council authorization? (Singapore Journal of International and Cooperative Law, 2000) p.373.

preventing a major humanitarian catastrophe. What is meant by the system responding benevolently? It means either specific consent or salient acquiescence.[13] At the international level, then states are shielded against intervention only if they only satisfy internally the "principle of justice" otherwise; intervention is permitted according to Rawls against unjust states.[14]

b. Definition and explanation to the Doctrine of Humanitarian Intervention:

As discussed earlier, humanitarian intervention is not a new chapter in the contemporary international law, but traced back to the sixteenth century. At different scenarios, attempts have been made by scholars and jurists to define humanitarian intervention. The purpose of defining it, we may be able to answer various questions relating to the purpose of the study. Scholars and Jurists have defined humanitarian intervention through different angles, but we must confine ourselves to the legal definition, as recent international relations literature defines humanitarian intervention as a range of actions including humanitarian assistance and forcible military intervention. Martin Dixon defines humanitarian intervention in the following words:

> "Under the doctrine of humanitarian intervention it is alleged that one state (state A) may use force in the territory of another state (state B) in order to protect the human rights of individuals in state B, usually being the nationals of state B." [15]

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[13] Ibid.
[14] J. Rawls, A Theory of Justice (1971) quoted in Tsagorias, N., Humanitarian intervention after Kosovo and Legal Discourse: Self Deception or Self Consciousness, (13 Leiden Journal of International Law, 2000), p.21.
[15] Martin Dixon, International Law, (Blackstone Press Ltd., 2000) p.291.

Similarly in the context of international law, Murphy has defined the doctrine of humanitarian intervention in these words:

> "Threat or use of force by states, group of states or international organization primarily for the purpose of protecting the nationals of the target state from wide spread deprivations of internationally recognized human rights." [16]

According to him, the latter phrase is a broad formulation "used to capture the myriad of conditions that might arise where human rights on a large scale are jeopardy" and includes acts committed by state and non- state actors.[17]

From the above definition, it is clear that where a state violates the universally accepted human rights of its own nationals, other state, group of state of international organization, may use force for the purpose of protecting the rights of the nationals of the target state. But here a question arise- whether the intervening state violates the norms of sovereignty ensured by article 2(7) of the UN Charter? What underlies the humanitarian intervention debate is a perceived tension between value of ensuring respect for fundamental human rights and the supremacy and primacy of the norm of sovereignty and non- intervention which are consider ed the important factors in the maintenance of peace and international security. These values are setout in the United Nations Charter as fundamental purpose of the United Nations. However, while there are mechanisms within the Charter for the protection and enforcement of peace and international security (i.e., article 2(4) and chapter vii of the United Nations Charter) there are no equivalent provisions or mechanisms in the Charter for the protection of human rights.[18] But the Western part of the World, has given much emphasis on the

[16] Sean D. Murphy, Humanitarian intervention: The United Nations in an Evolving World Order, (University of Pennsylvania Press, Philadelphia, 1996), p.11- 12.
[17] Ibid. P.18.
[18] Frederick Peterson, The Façade of Humanitarian Intervention for Human Rights in a Community of a Sovereign Nations, (Arizona Journal of International and Comparative Law, 1998) p .872.

individual in current human rights doctrine. It has put forward by many western states and academics that the development of international human rights norms and international humanitarian law has modified the traditional concept of sovereignty. Thus, it has been suggested that human rights can no longer be considered a purely domestic concern and the concept of sovereignty cannot be used by the governments to shield themselves from responsibility for gross violation of human rights, or from shirking their obligations with respect to the protection and treatment of civilians in situations of inter-state.

A "right to humanitarian intervention" was mooted at San Francisco,[19] and is much discussed in the legal literature.[20] However, no such right made its way into the UN Charter. Even though its text does reaffirm faith in fundamental human rights, it does not make provision for using force to implement that commitment.[21]

Has this been modified by state practice? Initially, a distinction must be made between Security Council authorized collective humanitarian intervention and interventions by state, group of states acting at their own discretion. Although the Charter text does not specifically authorize the Council to apply chapter vii's system of collective measure to prevent gross violation of humanitarian law and human rights, in practice, it has been done so occasionally:[22]for example by authorizing members to use coercive measures to counter apartheid in South Africa, and revoke Rhodesia's racially motivated Unilateral Declaration of Independence (UDI), as well

[19] Thamos M. Frank, Recourse to Force, p. 47.
[20] For detail see: Christine G, International Law and the Use of Force, (Oxford University Press, 2000). A. C. Arend. and Robert J. Beck., International law and the use of force, (London: Routledge, 1993). Harris D. J., Cases and Material on International Law, (Sweet &Maxwell, 2004), Moseley, A., and Norman, R., (Ed) Human Rights and Military Intervention, (2002), Frank, Thamos, M., Recourse to Force. (Cambridge University Press. 2002).
[21] Ibid, P136.
[22] Ibid.

as to help and egregious ethnic conflicts in Federal republic of Yugoslavia, Somalia and Kosovo and reverse a Haitian military coup that sought to undo a UN- supervised democratic election.[23]

It is much more difficult conceptually to justify in Charter terms the use of force by one or several states without prior Security Council authorization, even when such action is taken to enforce human rights and humanitarian value. There are two schools of thought on the legality of unilateral humanitarian intervention. Those who argue in favor of unilateral humanitarian intervention maintain that the evolution of international human rights law and the Charter have had revolutionary effect on the international legal system. It is individual, not a state, that lies at the center of international law, states receive their legitimacy from the will of the people. Hence sovereignty is not an inherent right of state but, rather, derives from individual rights. Thus, when sovereignty comes in conflict with Human Rights, the latter must prevail. Farnando Teson – a prominent proponent of the legal right to unilateral humanitarian intervention, argues as follows:

> The rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting Human Rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state

[23] See for detail: S.C Res.232 of Dec; 16.1966 (Rhodesia), S.C Res. 418 of Nov; 4, 1977 (South Africa), S.C Res.713 of Sep; 25.1991(Yugoslavia), S.C Res.794 of Dec; 3.1992(Somalia), S.C Res.940of Jul: 31.1994(Haiti), S.C Res.1160 of Mar; 13.1998 (Kosovo).

sovereignty. Force used in defense of fundamental human rights is therefore, not a use of force inconsistent with the purpose of the United Nations.[24]

The underlying assumption is that human rights constitute self – evident truth and a natural law, which has primacy over any notion of state sovereignty or positive international law.

On the other hand, those who argue against the right of unilateral humanitarian intervention do so from a positivist perspective. These writers maintain that, based on the accepted rules of treaty interpretation – textual analysis and as examination of the Charter – article 2(4) was meant to be a watertight prohibition against the use of force.[25] Thus, while respect for human rights is considered important to a just international legal order, it is argued that neither the Charter, current state practice nor scholarly opinion conclusively supports the view that there is a right of unilateral – unauthorized intervention to stop or prevent widespread deprivation of internationally recognized human rights.[26]

Finally we conclude that a pragmatic range of a systematic response to unilateral use of force, depending more on the circumstances than on strictly construed text. This patterned practice suggests either a graduated reinterpretation by the United Nations itself of article 2(4) of the UN Charter or the evolution of a subsidiary adjectival international law of mitigation, one that may formally continue to assert the illegality of stat recourse to force but which, in ascertainable circumstances, mitigates the consequences of such wrongful acts by imposing no, or

[24] F. Teson, Humanitarian Intervention: An Inquiry into law and Morality, (2nd ed., New York: Transnational Publisher Inc.,) p.173 – 74.
[25] Sean D. Murphay. Humanitarian intervention: The United Nations in an Evolving world Order, p.71 -75.
[26] Ibid. p. 356 ff.

only nominal, consequences on state which, by their admittedly wrongful intervention, have demonstrably prevented the occurrence of some greater wrong.[27]

3.2 Case Study

Since the entry into force of the United Nations Charter, states have taken a number of military actions, which they have either justified on general humanitarian ground or explicitly characterized as humanitarian intervention.[28] States have taken actions, which they have not dubbed "humanitarian intervention" themselves, but which other states or scholarly observers have done so.

In this section, we have to study the relevant cases based on humanitarian intervention, and will examine four instances of states' use of force in overtly or implicitly humanitarian intervention.

These are as under:

a. The Indian intervention in East Pakistan, 1971
b. The Tanzanian intervention in Ugenda, 1978 – 79
c. The Vietnam intervention in combodia, 1978 – 79
d. France, United Kingdom and United States intervention in Iraq, 1991 – 1993
e. NATO's Intervention In Yugoslavia (the Kosovo case) 1999

In these cases, an individual state and group of states (in case of Iraq) used force without prior Security Council authorization. The calibrated response of the UN system to these initiations may give some indication of the way the principle organ

[27] Thamos M. Frank, Recourse to Force, (Cambridge University Press, 2002) p.139.
[28] A. C. Arend, and Robert J. Beck, International law and the use of force, p.144.

have sought, in interpreting the Charter, to reconcile its systematic – but not always congruent – desiderata of peace and justice.[29]

Here, we have to discuss the facts and the circumstances in which the states entered into the target states on the basis of humanitarian intervention. What steps the Security Council and the General Assembly in respect of use of force by the intervening states have been taken.

a. The Indian Intervention In East Pakistan

In December 1971, India's forces invaded East Pakistan and thereby facilitated that province's secession from Pakistan. New Delhi acted after its neighbor had used severe military repression for nine months in its efforts to end a civil insurrection. Already in April, the Indian government had advised the United Nations that the scale of human suffering in East Pakistan had grown to the point where it ceased to be a matter only of domestic concern. New Delhi's representative spoke of gross violation of the basic human rights by the Pakistan's military amounting to genocide, with the object of stifling the democratically expressed wishes of a people. During the period, an estimated 8 millions of East Pakistanis fled to India in response to the draconian measures taken against them.[30] The UN Secretary General, confirming the extent of the human disaster, warned of the intolerable burden on India's resources.

Pakistan's representative denied allegations of his country's culpability, although admitting that several million East Bengalis had fled to India. He rejected that theory which, he said, had been invented by India, that an influx of refugees

[29] Thamos M Frank, Recourse to Force, p.139.
[30] 1971, U.N.Y.B, p.137.

constituted aggression against the country that haboured them, nothing, rather, that under international law it was India's duty to ensure that these refugees did not use their encampments to subvert law and order in Pakistan.[31]

When large – scale fighting erupted between India and Pakistan on 3rd December 1971, the Secretary - General informed the Security Council, under article 99 of the Charter, that the situation constituted a threat to international peace and security.

The Indian representative told the members "there is neither normalcy nor peace in East Pakistan and as a result, we have suffered aggression after aggression." He spoke of Pakistan's " campaign of genocide"[32] and as 120,000 Indian troops poured in, announced his country's recognition of an independent People's Republic of Bangla Desh. Rejecting the charge that India's actions violated Pakistani sovereignty and territorial integrity; he argued that these were not the only norms of the Charter system. "I wonder why we should by shy of speaking of human rights," he said "what happened to the convention on genocide? What happened to the principle of self – determination?"[33] New Delhi's representative invoked the justification of humanitarian necessity. "No country in the world can remain unconcerned." "Inaction and silence in the face of this human tragedy could be interpreted by all those who suffer as helpless, if not indifference, of the outside world."[34]

Pakistan, with more than half its population in revolt, insisted that despite the flow of refugees into Indian Territory "there was no warrant for India's claim that the

[31] Ibid. p.140.
[32] S.C.O.R (xxvi), 1606th Meeting, Dec: 4, 1971, p. 16.
[33] S.C.O.R (xxvi), 1608th Meeting, Dec: 6, 1971, p. 27.
[34] G.A.O.R (xxvi), 2003rd Plen Meeting, Dec: 7, 1971, p. 156.

invasion of Pakistan was justified by recourse to the right of self – defense.[35] He instated that the matter was internal.[36] China, agreeing, called for censure of India and demanded the immediate withdrawal of the invading forces,[37] a position initially supported by the United States, which condemned intervention by India "across its boarders in the affairs of another member state in violation of the UN Charter. United Kingdom and France, however, took a more conciliatory tone, arguing that the Indian invasion and Pakistani repression of its East Bengali population could only be considered together: that addressing one without the other ignored their intimate connection and saw bound to fail. On Dec: 4,a US resolution calling on the governments of India and Pakistan for an immediate cessation of hostilities and an immediate withdrawal of armed personnel present on the territory of the other – obviously aimed at India – received 11 votes with 2 opposed and with UK and France abstaining. All third world members of the council voted in its favor, a strong rejection of the justification offered by India, even though the resolution was vetoed by the Soviet Union.[38]

When the debate re – emerged in the General Assembly, India argued that the dumping of millions of Pakistani refugees on its territory constituted a form of civil aggression that damaged India as surely as if it had been a military assault. "Not only did 10 million refugees come to us as a result," India representative told the Assembly. "but our security was ... threatened, our social and economic fabric endangered and international tension increased. There was hardly any response from

[35] S.C.O.R (xxvi). 1606th Meeting, Dec: 4, 1971, p. 9.
[36] Ibid. p. 10.
[37] China Draft Resolution, of Dec: 5, 1971. (But it was not adopted)
[38] S.C.O.R (xxvi). 1606th Meeting, Dec: 4, 1971, p. 19, 21-2, 33

the international community which seemed paralyzed and did not take any action to prevent the massive extinction of human rights and genocide." [39]

On December 7, the Assembly, by a lop – sided majority of 104 to 14 with 10 abstention decided that the hostilities constituted "an immediate threat to international peace and security" and called for "withdrawal of ...armed forces... Notably, however, the resolution did not accuse India aggression, as Pakistan and its ally, China, had demanded. It also recognized "the need to deal appropriately at a subsequent stage, within the frame work of the Charter of UN, with the issues that have given rise to the hostilities.[40] Although couched in the Charter's prohibition on unilateral use of force and other humanitarian and human rights requisites of the Charter.[41] What kind of precedent had been set by the success of India's action, and should its outcome be endorsed by the UN system? On the one hand, there was little doubt that democratic India had put a welcome stop to a terrible carnage in East Pakistan. On the other hand, India's motives were not exactly above suspicion. The dismemberment of Pakistan and the carving out of anew state deeply reliant on it did undoubtedly serve India's most important national security concerns and strengthened its dominance of the subcontinent.

b. Tanzanian Intervention In Uganda

Another unilateral intervention took place by Tanzania in Uganda. On April 11, 1979, forces from the Ugandan Nation Liberation Front (UNLF) entered Uganda's capital city of Kampala and formed a provisional government there headed by

[39] G.A.O.R (xxvi), 2003rd Plen Meeting, Dec: 7, 1971, p. 15.
[40] G.A.Res. (xxvi), 2793 of Dec: 7. 1971.
[41] Thamos M. Frank., Recourse to Force, p.142.

Professor Yusuk Lule. The rebel action, accomplished only with the direct participation of Tanzanian troops, ended eight years of dictatorship by agenda's president, Idi Amin. Under the Amin regime, perhaps more than three lacks Ugandan citizens had been killed, and many other after having suffered grisly torture.

Field Marshal, characteristically, did not go into that good night. On February 14,1979, he complained to the United Nations that Tanzanian troops had attacked and occupied 350 squire miles of Ugandan territory. The Organization treated this communication with supreme indifference.[42] One day later, Libya, Amin's principal supporter, wrote a letter to the UN Secretary General that the dispute between Tanzania and Uganda must be solve amicably. The representative wrote "we hope that you will act quickly to end this dispute, guided by the principle that no state has the right to overthrow the regime of another by forceful or any other means."[43]

No response as required, was given - either from the Secretary General or Security Council. Desultory efforts at Organization of African Unity (OAU) median came to naught, as Tanzania demanded that Uganda first be censured for aggression. As the combined forces of the Tanzanian army, accompanied by Ugandan exiles, continued their advance on Kampala, Idi Amin renewed his call for UN "good offices."[44] But the Secretary General and Security Council, avoided studiously addressing Uganda's complaint.[45] Time passed and the situation turned from bad to worst.

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[42] Ibid. p. 143.
[43] Latter dated Feb: 15, 1979 from the Libyan Jamahurya to the Secretary General of the United Nations available at www.africa.upenn.edu/babik03.html. (Last visited:08/08/2006)
[44] Good offices mean that a third party brings the parties to the dispute together to negotiate. History furnished many examples of good offices. See also Hague convention No: 1 of 1899/1907, which contained elaborate provision on good offices.
[45] Ibid. p. 144.

Undoubtedly, Idi Amin must appreciate this case in the context of an unusually widespread contempt for the extravagant human rights abuse. It foolhardy military provocations against Tanzania not only reinforced the bad image of a regime that had strayed for beyond the bounds of tolerable governmental behavior, but also provided a legal cover of sorts for Tanzania's response, although the proportionately of Tanzania's countermeasure occupying all the Uganda is at least problematic.[46]

The truth of the matter, however, is simpler. With few exceptions, states had concluded that it was time for Amin to go, citing both his atrocities against his own people and bellicosity towards his Tanzanian neighbor. Although, Tanzanian intervention in Uganda was not to occupy the Ugandan territory, as it was apparent to the international community that Tanzania had no territorial ambitions. The last Tanzanian troops withdrew in May 1981, after the new Ugandan government had restored order.[47]

This crisis is noteworthy not only for the lack of outrage expressed by states on behalf of the Charter's violated principles but also for the way the system expressed its assent in salience. The Secretary General ignored Uganda and Libya's call for UN to take notice. The Security Council passed over in salience the several efforts to have it convened. It is also notable that Tanzania, to the extent it made any efforts to justify its use of force, relied on a right of self defense against the Ugandan aggression, and not on the Amin's egregious offences against humanitarian law and human rights, even though "self defense" under article 51 of UN Charter could not possibly justify the disproportionate Tanzanian reaction to a relatively minor boarder

[46] Ibid.
[47] Ibid. p.145.

provocation. Finally concluding that Amin's action in Uganda constituted an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life.

c. Vietnam Intervention in Kampuchea (Combodia)

In April of 1975, after years of civil war, Khmar Rouge forces led by Pol Pot finally wrested governmental control of Combodia from Lon Nol. The new government began a program of comprehensive economic and administrative reorganization. During the program's savage course, excess of every kind took place. Killed million of people and destroyed the economy. They also instigated incursion into neighboring Vietnam.[48]

On December 25, 1978, Vietnamese forces invaded Kampuchea, bringing to power a small group of exiles, headed by Heng Samrin, who had broken with the khmar Rouge. At the UN, Kampuchea's representative charged Vietnam with "acts of aggression" and the USSR with "supplying the invaders with military adviser and equipment."[49] But the 3rd world reaction to Vietnam's intervention in Combodia was not positive one. China charged that Hanoi was seeking to annex its neighbor.

Prince Norodom Silanouk, invited to speak for the ousted regime, told the Council: my country is the victim of a large – scale act of flagrant aggression by the Socialist Republic of Vietnam... in *de facto* military alliance with USSR... he concluded, "is purely a war of aggression, annexation, colonization and regional

[48] Tworth, G. Klin, *Vietnam intervention in Combodia in International law19 (1989)* quoted in Frank, Thamos, M., Recourse to Force, P.146.
[49] Ibid.

hegemonism..." launched by the "Hitlerite armed forces" of Vietnam and its Soviet sponsor.[50]

In reply, the Vietnam representative argued that his country was acting in self-defense in a "boarder war started by Pol Pot Ieng Sary clique against Vietnam" but that the overthrow of Khmar rouge had been the achievement not of Vietnamese military invasion but of the revolutionary war of the Kampuchean people. He offered some details of Khmer Rogue atrocities, concluding that the country "became a living hell.[51]

The public debate continued. All Western and almost all non – aligned governments focused exclusively on the "peace" and "legality" issues raised by Hanoi's violation of its neighbor's state sovereignty, ignoring the justice and legitimacy issues raised by the Khmer Rouge's abuses of its citizens' human rights. Many badly insisted that the deplorable human rights record of the ousted Kampuchean regime in no way justified resort to force by the outsider. Portugal engaged in an even more sweeping restatement of the principle on non – use of force. Even the UK took essentially the same absolutist position. US ambassador Young, was almost alone in treating the crises as one in which moral imperatives needed to be carefully weighed and balanced against the constraints of the international legal order.

While insisting that the Council demand the withdrawal of Hanoi's forces, Young did not ignore the UN responsibility to deal with the human rights.[52] What can

[50] S.C.O.R (xxxiv) 2108th Meeting, January 11,1979. p.7-8.
[51] S.C.O.R (xxxiv) 2108th Meeting, January 11,1979. p.13.
[52] S.C.O.R (xxxiv) 2110th Meeting, January 13,1979. P.7 – 8, for detail see: S.C.O.R (xxxiv) 2109th Meeting, January 2,1979, S.C.O.R (xxxiv) 2110th Meeting, January 13,1979, S.C.O.R (xxxiv) 2111th Meeting, January 15,1979.

one deduce from all this? Was it necessary for humanity to suffer the death of million Cambodians to reinforce the legal principle of non – intervention?

The UN system seemed incapable of producing an answer to the conundrum, treating it as an irresolvable conflict between values of peace and justice. On Jan: 15, the conclusion of the heated debate, the Security Council voted on a resolution introduced by the 7 non-aligned members. This resolution only indirectly condemned the Vietnamese invasion. It was vetoed by Soviet Union.

The question re – emerged in the Assembly, which was faced with rival delegations: one representing the Khmer Rogue regime, now relegated to fighting in boarder areas near Thailand, and the other sent by the new regime of a renamed Cambodia. By a vote of 6 to 3, the Assembly Credentials Committee accepted the credentials of the former and rejected the latter, a decision upheld in the Assembly's plenary session by a vote of 71 to 35, with 34 abstentions.[53] Most of the states that voted in favor of the report indicated that, despite their awareness of the deplorable record of the Khmer Rogue, they sew no justification for the acceptance of the credentials of a regime installed through external intervention.[54]

The Assembly adopted the essentials of the draft resolution Soviet Union had vetoed in the Security Council the previous January. As a sop to the values it was subordinating to, the resolution added "that the people of Kampuchea should be enable to choose democratically their own government, without outside interference, subversion or coercion.[55]

[53] G. A. Res. 34/2A of Sep: 21, 1979
[54] 1979, U.N.Y.B p. 292.
[55] G. A. Res. 34/22 of Nov14, 1979

Several factors specific to the Cambodian episode probably helped shape the system 's response. One was the extent to which the Vietnamese invasion was seen to serve geographical rather than humanitarian purposes. Vietnam clearly failed to prove convincingly either of the two elements of its case: that it was, in fact, merely responding in self – defense to an armed attack, or that it was using force solely to avert a humanitarian catastrophe. If Hanoi had acted in self –defense, its response was seen evidently to fail the legal test of proportionality. As for averting a human tragedy in Combodia that alas, had already happened, without Vietnamese protest, until such concern came to suit other purposes. One also detects a widespread and deep reluctance by governments to endorse humanitarian intervention openly, even while they do pay attention to humanitarian concerns in calibrating their reaction to each instance.

d. France, U.S and U.K Intervention in Iraq (1991)

In the wake of Iraq's 1991 defeat by operation Desert Strom, its Shiite population in the south and the predominantly Kurdish area of the north rose in revolt. The response from Baghdad was severe. Within days, hundred of thousands Kurds fled towards the Turkish boarder. Initially the Security Council did nothing. Few days later, the Security Council passed Resolution 688, which expressed grave concern at the "repression of the Iraqi civilian population ...including most recently in Kurdish – populated areas, which led to a massive flow of refugees towards and cross international frontier and to cross – boarder incursions, which threaten international peace and security.

regime. However, no state gave humanitarian intervention as the legal justification for intervention.[63] The Iraqi intervention, while demonstrating that the rhetoric of humanitarian intervention remains strong as a moral argument, provides, if anything, evidence that the states did not think humanitarian intervention was a sufficiently strong or viable legal argument in relation to Iraq. However, while the US, during this period, choose rather to flaunt its power-based realpolitik, the UK did attempt to establish modest legal parameters justifying humanitarian interventions when undertaken without specific Security Council authorization.[64]

c. NATO Intervention in Yugoslavia:

The NATO action in Kosovo in 1999 marked a further development and revealed a fundamental split as to the legality of humanitarian intervention.[65]

The crisis started when Serb President Slobodan Milosevic rescinded the province's autonomous status, granted in 1974 by President Tito. The following year, Milosevic dissolved Kosovo's regional government and revoked the official status of the Albanian language used by 90 percent of the population. Albanian Kosovors reacted by creating an unofficial parallel system of schools, laws, judiciary and taxation.[66]

By 1997, however this non-violent response began to fray as inter ethnic violence raged elsewhere in the former Yugoslavia. In the same year large scale of students' protests in Pristina, the capital, were harshly suppressed and an underground

[63] See various statements by US, UK and Australia: US: http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html; UK: http://www.number-10.gov.uk/output/Page3287.asp; Australia: http://www.pm.gov.au/iraq/displayNewsContent.cfm?refx=96 (last visited 08/11/2006)
[64] Thamos M. Frank, Recourse to Force, p.155.

[65] Editorial Comments: NATO's Kosovo's Intervention', 93 AJIL (1999) P. 824-60.
[66] Thomas M. Frank, Recourse to Force,(Cambridge University Press 2002), P. 164.

Kosovo Liberation Army (KLA) began operating. In March1998, fifty Kosovors were killed in the Drenica area. Terrified civilians fled to mountains.[67]

On March 31, the Security Council condemned the use of excessive force by Serbian police against peaceful demonstrators in Kosovo.[68] The resolution expressed "support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self administration. Acting under Chapter VII of the UN Charter, the Council re-imposed the recently suspended arms embargo on Yugoslavia.[69] The same situation remained for couple of months. There reported many causalities. There reported massacre of the Kosovo's Albanian civilians including women, children in village Racak.[70]

In mid March, Yugoslavia rejected an agreement proposed by the Contact Group (France, Germany, Italy, UK and US) at Rambouillet.[71] The agreement would have provided Kosovo with greater autonomy, required the withdrawal of Yugoslavia troops and deployed international peacekeepers.

On March 24, 1999 NATO forces began their air strikes. Simultaneously, Yugoslav troops began a well-planned campaign of ethnic cleansing. By then, more than 600,000 Kosovors had fled into neighboring states and an additional 850,000 persons were internally displaced.[72]

As NATO attacks got underway, the Russian ambassador demanded the convening of the Security Council.[73] The debate started in the Security Council. The debate demonstrated that there were three difference states approaches to the attack. The first camp (states including NATO States, Arab and other Islamic Nations) defended the NATO action as necessary response to the extreme humanitarian devastation. In the second camp were the Russian, Chinese, Namibian and India, who considered NATO to be in flagrant violation of the UN Charter. The third scamp

[67] Ibid.
[68] S/RES/1160 of March 31, 1998
[69] Ibid.
[70] Thomas M. Frank, Recourse to Force, (Cambridge University Press 2002), P. 165.
[71] Ibid.
[72] Ibid.
[73] S/1999/320, March 24, 1999

consisted of few states which sought to have in both ways. These states included Malaysia and Gabon etc.

During this harsh period, the Security Council in Resolution 1244,[74] endorsed the agreement proposed earlier, and endorsed it general principle by demanding full cooperation of the Yugoslavia by immediate withdrawal from Kosovo of its military police and paramilitary forces. The same Resolution authorized deployment of a UN international civil and security presence with civil responsibilities alongside NATO and Russian security forces.[75]

To sum up NATO intervention in Yugoslavia, we may conclude that NATO had never questioned the political independence of the territorial integrity and solidarity of the Yugoslavia, as this was not an intervention directed against the territorial integrity of the Yugoslavia. Such intervention was intended to save the massacre, gross violation of human rights and to save a population in danger and so it was compatible with article 2(4) of the UN Charter, which only prohibits those interventions directed against the territorial and political independence of another state.

3.3 Is Humanitarian Intervention Similar to the Protection of Nationals Abroad?

Humanitarian intervention is a ground of intervention in which the intervening state enters the target state to protect the citizens of the target state, where there is a widespread deprivation of the fundamental human rights, as history witnessed in the cases of Uganda and Combodia etc. there were widespread deprivation of human rights and hundred of thousands of people were killed and tortured by the cruelties and atrocities of their leaders. As rightly observed by G. Klintworth – quoted in Professor Frank, "During their four years rule, Kampuchea's governing Khmer Rogue, backed by China, emptied Cambodia's cities, killed a million people and

[74] S/Res/1244 of June 10, 1999
[75] Ibid.

destroyed the economy.[76] So the intervening state intervenes in the target state to protect the fundamental human rights of the citizens of the target state. State has used force for the protection of and promoting of fundamental human rights of the citizens of the target state. An action – humanitarian intervention must satisfy the following conditions:

1) There must be within the target state an immediate and extensive threat to fundamental human rights, particularly a widespread loss of human lives.

2) The purpose of intervention must be limited to protecting fundamental human rights within the target state.

As far as intervention to protect nationals abroad is concern, states have claims that they have the right to protect its own nationals abroad under the customary right of self – defence and may use force to rescue its nationals in a foreign state. Apart from the case study mentioned above in 2.2, intervention in Lebonan (1958), Congo (1960), Dominican Republic (1965), Grenada (1983) and Panama (1989) have been claimed by states for the protection of its own nationals abroad. Under this doctrine, as discussed above, customary international law allowed use of force for the protection of nationals abroad only if the following conditions were fulfilled:

1. That the host state must be unable or unwilling to protect the nationals of a foreign country.

2. That there exists an immediate and serious danger of life – threatening harm.

3. Force must be the weapon of last resort.

[76] W. G. Klint, *Vietnam intervention in Cambodia in international law 19(1989)* quoted in Frank, Ibid, p.146.

4. The acting state may use only such force as is reasonably necessary and must vacate the territory of the host state as soon as practicable.[77]

Now, coming to the main point that is humanitarian intervention similar to the protection of nationals abroad? There remained international law scholars' debate regarding the issue of similarity between humanitarian intervention and protection of nationals' abroad. As discussed above, both the interventions are different in their nature. According to Oliver Ramsbotham, "humanitarian intervention referred to the human rights of threatened populations (not the rescue of the nationals abroad)."[78]

As we have studied in chapter 2 article 2.1, that intervention to protect nationals abroad involves the state protection of its own nationals abroad. In contradiction, humanitarian intervention involves the protection of nationals of another state from inhuman and cruel treatment within their state, typically by their own government.

Protection of nationals abroad have been considered as a right of self defence under the customary law, while humanitarian intervention is consider an independent ground of intervention for the protection of the fundamental human rights of the citizens of the target state -- where there is widespread violation of human rights. There is, in case of humanitarian intervention, the force is used against the government of the target state without her consent. There is a threat of widespread loss of human life. This immediate and extensive threat to fundamental human rights constitutes threat to international peace and security. On the other hand, in case of protection of nationals abroad, the intervening state intervene in the host state, where the host state -- as mentioned above, is unable or unwilling to protect the nationals of

[77] Martin Dixon, International law, p. 307.
[78] O. Ramsbotham, *Humanitarian intervention: The Contemporary debate*, in Williamson, R., (Edt) Some Corner of Foreign Field, p. 63.

the intervening state. But the intervening state use limited force confined to the rescue of its own nationals as discussed in Entebbe rescue operation.

From the above discussion it is evident that there exist distinction between two sets of intervention. Both have been claimed several times after the incorporation of the UN Charter, and state justified these giving and advancing international law points. Finally conclude that humanitarian intervention is different from the protection of nationals abroad. International scholarships also agreed that intervention is a broad term and there are various grounds of intervention as rightly pointed out by L. N Tandon and S.K.Kapoor.[79] So cutting long story short, humanitarian intervention is not similar to the protection of nationals abroad and there exist distinction among the two -- humanitarian intervention and protection of nationals abroad.

3.5 Legality of Humanitarian Intervention

As for as the legality of the humanitarian intervention is concern their two schools of thoughts and their developed theories:

a. Restrictionists theory
b. Counter Restrictionists

There are scholars who argue that state may lawfully undertake humanitarian intervention while other argues that humanitarian intervention is not permissible.

A. Restrictionists

The advocates of the restrictionist theory argue that the fundamental object of UN system is the maintenance of internal peace and security. Second, it holds that except in clear cases of self-defence. The UN has monopoly on the legitimate

[79] For more detail see:, L. N. Tandon and S.K. Kapoor, International law, (Mansoor Book House, revised ed., 2004) pp. 217 – 231.

recourse to force. Third it contends that if states were permitted to recourse to force for any purpose other than individual or collective self-defence, they would merely be provided with a ready pretext of geopolitical intervention.[80] Article 2(4) and 51 of the UN charter play central roles in the restrictionist rendition of the UN charter jus ad bellum. According to them, article 2(4) clearly indicates general prohibition on the use of force by state, and article 51 represent only a narrow exception to the general prohibition on the use of force. By term of these two charter provisions, therefore, humanitarian intervention has been rendered legally impermissible.[81] Because it does not involve individual or collective self-defense or security. It is possible that two interests can be served at once; if humanitarian interests are served, it is immaterial whether the self-interest is also present may even be the motive one could site the Gulf war and numerous other examples as indicative of this. It is further suggested that it is somewhat naïve ever to expect nations to risk troops, electoral wrath, money and resources in a situation where their interests are not involved.

Council enforcement (chapter VII of UN charter) the restrictionist also argue that humanitarian intervention constitute a proscribed use of force against the territorial integrity and political independence of a state. They also involve the principle of non-intervention, which is supported by General Assembly Resolutions.[82]

B. Counter Restrictionists

In support of legality of humanitarian intervention, the counter restrictionist advances three basic arguments: 1) protection of human rights 2) the revival of customary right of humanitarian intervention and 3) permissible use of force below

[80] N. Ronzitti. Rescuing Nationals abroad through military coercion and intervention on the Ground of Humanity. In Arend A.C., and Beck, R. J. International Law and the Use of Force, p. 131.
[81] For detail see: Brownlie, I., International Law and the use of force by state, p. 339-341.
[82] See GA Res 2131 (1965) and GA Res 265 (1970)

the article 2(4) threshold. These need a little bit detail. According to counter restrictionist, UN system has two main purposes maintenance of international peace and security, and second, the protection of human rights. They argue and typically cite the developing corpus of international human rights law as well as UN charter's preamble and article 1,55 and 56. Under article 1(3) they suggest promoting and encouraging respect for human rights is set out as a fundamental purpose of the United Nations.[83] Similarly, article 55 of the UN charter points to the UN objective of promoting human rights observance, while article 56 authorizes joint and separate action by members in cooperation with the organization for the achievement of the purpose set out in article 55.[84] According to Reisman and McDongal, human rights deprivations might well represent a threat to the peace, thereby prompting the Security Council's chapter VII jurisdiction.[85]

Another plea advanced by the counter restrictionist is the revival of customary right of Humanitarian intervention. They argue that states often were permitted to engage in humanitarian intervention in the period after 1945. This customary right was legitimately exercised to protect human rights. It was not invoked as a bogus rationale to support *Realpolitik* action, as restrictionist assest.[86] The UN founders, counter restrictionist argue, assumed that self-help would no longer be necessary since an authorative international organization could now provide the police facilities for enforcement of international rights. Unfortunately for the international system, suggest professors Lillich, Teson and Reisman, the UN enforcement mechanisms have been consistently confounded by discord among the Security Council's

[83] Reisman and Mc Dongal, Humanitarian intervention to protect the Ibos, Lillich R., (Ed) Humanitarian intervention and the United Nations. (Charlottesville: University of Virginia Press, 1973), p.185.
[84] Article 55 of UN Charter
[85] Reisman and McDongal, Ibid. p. 174-75.
[86] Ibid. p. 179.

permanent membership. Article 2(4)'s prohibition of the threat or use of force, they assert, must consequently be conditioned on the UN's capacity to respond effectively. When the United Nations fails to do so, customary law revives and states may involve the right of humanitarian intervention.[87] Third argument advanced in support of legality of humanitarian intervention, the counter restrictionist relies upon rather narrow and literal reading of article 2(4) of UN charter.[88] Several scholars suggests that there may be uses of force that do not infringe upon the long term territorial integrity and political independence of states and that are not inconsistent with the United Nations purposes[89] Reisman and McDongal Contend

> "Since a humanitarian intervention seek neither a territorial change nor a challenges to the political independence of the state involved and is not only not inconsistent with the purposes of the UN but is rather in conformity with the most fundamental norms of the Charter, it is distortion to argue that it is precluded by article 2(4).[88]"

These views have been supported by and a similar opinion has offered by professor Stone.[89]

C. Legal assessment

From the above discussion we may conclude the legal status of humanitarian intervention. Absent of Security Council authorization is 'the use of force by state/states to protect the widespread violation of human rights of the citizens of the target state there' permissible under the contemporary jus ad bellum? To be able to

[87] R. Lillich. (Ed) Humanitarian Intervention and the United Nations, p. 495.
[88] Ronzitti. N. Ibid. p.1.
[89] F. Teson. Humanitarian intervention 5 (1988) in Arend, A. C., Beck, R. J., Ibid. p. 134.
[88] Reisman and McDongal Ibid. 177.
[89] See: J. Stone, Aggression and world order: p. 43, 95-96.

answer this question, we must recall both the restrictionist and counter restrictionist arguments. At present, Human Rights have been given much and more importance. In comparison with sovereignty, human rights must be given much and more weight. If we look at the recognized definition of state, if has four elements; 1) Territory 2) Population 3) Government and 4) Capacity to enter into legal relations. Now for what purpose state is constituted? In simple words the answer is administration of justice. According to different scholars – restrictionists and counter restrictionists, the issue regarding the legality of humanitarian intervention is the clash of sovereignty of state and Human Rights but according to the counter restrictionists view, human rights - at present time, prevail over state sovereignty. The based their arguments on the UN Charter. They argue that the main purpose of the United Nations is the maintenance of international peace and security, and secondly, the protection of human rights.[90]

On various occasion, the Security Council determined that there was a threat to the peace even if the situation was internal. In 1968, chapter VII was applied against the Ian Smith regime in what was the southern Rhodesia. More recently, the Council has adopted chapter VII resolution for Somalia (1992), Haiti (1994) and Eastern Zaire (1996) and determined that the widespread human rights abuse can amount to a threat to international peace.[91] The evolution of international human rights law and the Charter have had a revolutionary effect on the international legal system. From a deontological moral perspective, it is the individual, and not the state, that lies at the center of international law. States receive their legitimacy from the will of the people. Hence sovereignty is not an inherent right of state but, rather, derives

[90] A. C. Arend., and R. J. Beck., international law and the use of force, p.132.
[91] www.chathamhouse.org.uk/documents/ (last visited on 08/16/2006)

from individual rights. Thus, when sovereignty comes into conflict with human rights, the latter must prevail. Fernando Teson -- an eminent scholar, argue as follows:

> The human rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful on the assumption that those states minimally observe individual rights. The UN purpose of promoting and protecting human rights found in article 1(3) and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore, not a use of force inconsistent with the purposes of the UN.[92]

The limited but the growing recognition of the possibility of intervention on humanitarian grounds is the first crack in the arguments used to support the principle of non-intervention. Recently, UN Secretary General has shown a preference for such intervention over sovereignty, based on his strong view that the purpose of the international system to protect the rights of individual rather than states in these circumstances.[93]

Thus concluding that the use of force for the humanitarian purposes, whether it is authorized or un authorized by the security council, must comply with the principles of international law applicable in armed conflict and in particular the rules of international humanitarian law.

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[92] F. Teson., Humanitarian intervention: an inquiry into law and morality, p.173-4.
[93] UN Doc. A/ 54/ 2000 available at www.un.org/millennium/ (last visited on 08/16/2006)

CONCLUSION

The prohibition on the use of force is not a new debate in the contemporary international law, but linked with the emergence of state system. This may not be an exaggeration to say that prohibition on use of force is from the very beginning where city system established. But there existed certain exceptions to the prohibition on the use of force. Just and unjust war doctrine developed. This doctrine remained for long-time and still legal scholars admit the just war doctrine as it is based on just cause.

During various periods, various Treaties, Conventions and Pacts have prohibited use of force, for instance, the Covenant of League of Nations, Kellogg Briand Pact, and later on the Charter of the United Nations. But these also provided for certain exceptions to the prohibition on the use of force. The Charter of the United Nations provide for general prohibition on the use of force, but this general prohibition is subject to two main exceptions:

1. Self – defence.
2. Chapter VII action by the Security Council and other provision of the Charter.

As far as use of force for the protection of nationals and property abroad is concern, there remained a debate among legal scholars on the validity of the use of force for the protection of nationals and property abroad.

But according to the views of the counter- restrictionists, the use of force for the protection of nationals and property abroad is valid. Since the insertion of the UN Charter, States practice has shown that on different occasion, it had justified that protection of nationals and property abroad is under the guise of sef defence.

After a through study and analysis of materials concerning the above mentioned issues, we reach to the conclusion that limited use of force is allowed without prior Security Council authorization in case where there is an eminent threat to the lives and properties of the nationals of the intervening state, and the host state either unwilling or unable to protect the same. The case study mention above shows that rescue operation at Entebbe is a best instance of such intervention. To legalize an intervention for the protection of nationals and property abroad the following conditions must be fulfilled:

1. The intervening state must confine her only to the protection of nationals and property abroad, in case where the host state is unable or unwilling to protect the same.
2. The intervening state must use limited and short-term force necessary to the protection of nationals and property abroad.
3. The use of force, in extreme necessity. Where delay results serious causalities to the lives and property of the intervening state.
4. Force must be the lost resort.

Intervention to protect nationals and property abroad is also claimed, under the guise of self-defence. State justified it that they have customary right of self-defence to protect its nationals and property abroad. In the present era, with the development of

modern international law, it must accommodate such intervention where no express provisions are, prohibiting use of force. According to traditional law of the Charter, use of force is prohibited, except that in very limited circumstances attempts to rescue citizens in immediate danger of life of limb may not be prohibited by article 2 (4) of the Charter of the United Nations.

Finally concluding that intervention to protect nationals and property abroad is the inherent right of state to protect its own citizens and property abroad. It is not disputed that such right of intervention did not existed in the pre – Charter's state practice. In the light of the authority control test of a putative norm of international law, it is difficult to hold that a rule exists prohibiting such intervention.

The development in various field of life, the world changed into global village. New challenges faced by the international community needed to be organised. The UN charter banned the use of force in general, but except self defence and chapter VII security council's authorization.

This is also an admitted fact that states may have relations with other states for various reasons. Such as econonical development, technological development and in many other aspects of state' development. States are given recognation for the reson that it should build relations with other states. Now where there is an internal unrest, and such unrest does not for the right of self determination, then the authorized and constitutional head of the state or government may invite a foreign state to the extent to use limited force so as to eridicate the unrest or internal instability. This is not violation of the norrms of the Charter of the United Nations, as Sovereign has the right to invite foreign state for

such legal purpose. Similarly, in the present senreio, terrorism is a threat to the international peace and security, where a state is unable to control and prosecute them, than in such asituation intervention by invitation is valid without resorting to Security Council.

Use of force by states coupled with the obligation of non – interference in another core issue of the thesis is intervention by invitation. There also remained a debate among scholars regarding the validity of the intervention by invitation. The main issue of dispute are two opposite norm and principle going parallel; the first principle is the general prohibition and comprehensive ban on the internal affairs of other state. The other principle is of territorial sovereignty, which, means in situation of internal disorder, the competent authorities of a state can take help from other state(s), which may be in the form of the use of force. In some of these principles do not clash, as when a state uses force with the permission or even invitation of the legitimate government of a state. It is not interference or intervention.

Nations states system is built for the purpose of international peace and security and also to have its relations with other member states for co- operation with each other. For instance, economical cooperation. Now applying the same in case of internal disorder. If the Legitimate sovereign of the state authorized under constitution of the state concern, invite foreign state to extent to use limited force to remove internal instability, is legal with out resorting to Security Council. But it must be conditioned with, that the intervening state shall not interfere in matters, which are against the norms of the UN system.

The ICJ in the 1986 *Nicaragua* case rejected the notion of the use of force to ensure the protection of human rights: "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring the respect for human rights as are provided for in the conventions themselves... In any event... the use of force could not be the appropriate method to monitor or ensure such respect."

The ICJ did however provide that if provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs of a state, it must be "limited to the purposes hallowed in practice, namely to prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being without discrimination to all in need." Further it should be "linked as closely as possible under the circumstances to the UN Charter in order to further gain legitimacy."

International law, however, is not static, but develops through customary international law. In this manner new rules and prohibitions may develop as well as exceptions to existing rules. The development of customary international law however requires consistent State Practice as well as the belief by States that the actions are lawful or required by law (opinio juris).

Some states (at certain times) and international lawyers have argued that self-defence and Security Council-authorized enforcement under Chapter VII of the UN Charter are not the only legitimate exceptions to the UN Charter's prohibition on the use of force, but that new customary exceptions exist. A number have argued for an

additional right of "humanitarian intervention", claiming state practice represents an emerging customary law exception, which has emerged since the end of the cold war.

State practice has been neither widespread nor consistent in support of the right of humanitarian intervention. Only ECOWAS intervention in Liberia in 1990 and the initial patrolling of the "No-fly-zones" in Northern Iraq by the USA and France in 1992 were unambiguously humanitarian in their stated aims. The humanitarian intervention argument has been used in other instances, but as one of a number of legal arguments, or as a purely moral justification when other legal justifications were provided.

During the cold war period the prominent justifications for unauthorized uses of force were the rescue of nationals and self-defence. Invocation of humanitarian claims in certain episodes might have been appropriate, such as India's incursion into East Pakistan following the massacres in 1971, Tanzania's intervention in Idi Amin's Uganda throughout the 1970s, and Vietnam's intervention into Pol Pot's Cambodia in the late 1970s, however, intervening states chose to justify interventions on the grounds of self-defence and not on the grounds of humanitarian intervention.

Interpretations of the UN Charter tend to vary in the light of the question of humanitarian intervention. Greenwood argues that an interpretation of international law which would "forbid intervention to prevent something as terrible as the holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based." He justified this on the basis of

the importance of human rights, arguing that State rights should not have priority over human rights, and that modern international law does not exclude humanitarian intervention under certain circumstances.

Professor Riesman argues similarly that the obligation to save lives takes precedence. He argues that when enforcement by military means is required, it should be the responsibility of the Security Council acting under the Charter, but that when the Council cannot act, the legal requirement continues to be to save lives.

The General Assembly, while not having the power to authorize an intervention, has some powers relevant to this debate. Article 10 of the Charter gives a general responsibility to the UN General Assembly with regard to any matter within the scope of UN authority. Article 11 gives the General Assembly a "fallback responsibility" to make recommendations regarding the maintenance of international peace and security. However, under Article 12, it is constrained from making such recommendations (though not specifically from considering the matter) "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter ... unless the Security Council so requests."

As such, if an item is not on the Security Council Agenda the General Assembly may discuss the matter. If it is on the Agenda a procedural vote of the Security Council may refer the matter to the General Assembly. This requires nine members voting affirmatively, but is not subject to the veto. Further, it appears that Article 12 has eroded somewhat so that if a Security Council Resolution is blocked by a veto the General

Assembly will make recommendations, so long as these do not directly contradict the Security Council.

The *Uniting for Peace Resolution* provides that the General Assembly may make a *recommendation* for the use of force when the Security Council is incapable of acting due to veto. While this is not the necessary Security Council authorization required for use of force under Article 2(4) of the charter, it certainly has a moral value, and may with the evolution of customary international law, come to have a legal value.

Finally concluding that intervention for the above mentioned purposes are legal subject to limited use of force. States may legally intervene without prior Security Council's authorization, in cases of extreme necessity.

Bibliography

Books and Articles

1. Ahmad, Mushtaq, M, *Use of Force for the Right of Self- Determination in International Law and Shariah, A Comparative Study,* LL.M thesis, (2006) Faculty of Shariah and Law, International Islamic University, Islamabad.

2. Akehurst, M., *A Modern Introduction to International Law*, 5th ed. George Allen and Unwin Ltd, London, 1984.

3. Arend, A, C., and Beck, R, J., International Law and the Recourse of Force, in Ku, Charlotte and Diehl, Paul, F., (Ed) *International law: Classic and Contemporary Reading,* Lynne Rienner publisher 1998.

4. Arend, A, C., and Beck, Robert, J., *International Law and the Use of Force,* London: Routledge 1993.

5. Baily, Sydney, D., *the UN Security Council and Human Rights*, New York: St. Martin1994.

6. Bowett, *the Use of Force For the Protection of Nationals abroad*, in Cassesse, A., The Current Legal Regulations of the Use of Force, 1986.

7. Brown, Chris, Humanitarian InterventSion and International Political Theory, Mosely, A and Norman, R., (Ed) *Human Rights and military Intervention*, Ashgate Publishing Ltd. 2002.

8. Brownlie, I., *International Law and The Use of Force by States*, Oxford: Clarendon Press, 1963.

9. Brownlie, I., thoughts on Kind- Hearted Gunman, in Lillich, R., (ed.) *Humanitarian Intervention and United Nations,* University of Virginia Press, 1973.

10. D, Bowett, Reprisals Involving Recourse to Armed, 66 (1972) AJIL, 1.

11. Delupis, I, D., *The Law Of War*, Cambridge University Press, 1987.

12. Dinstein, Yoram, *War, Aggression and Self – Defence*, 3rd ed. Cambridge University Press, 2001.

13. Dixon, Martin, *A Text book of International Law*, London: Blackstone Press, 2000.

14. Farer, Tom, J., Panama: *Beyond the Charter Paradigm*, 84 AJIL (1990).

15. Fennimore, Martha, *constructing Norms of Humanitarian intervention*, Katzenstein, Peter, (ed) *the Culture of National Security*, New York: Columbia University Press, 1966.

16. Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality,* Dobbs Ferry, New York: Transnational Publishers, Inc., 1988.

17. Frank, T, M., and Rodley, N., *After Bangladesh: the Law of Humanitarian Intervention,* AJIL 1973.

18. Frank, Thomas, M., *Military Force without Prior Security Council authorization?* Singapore Journal of International and Cooperative Law, 2000.

19. Friedmann, W., *"The Changing Structure of International Law"*. New York: Columbia University Press, 1964.

20. Friedmann, W., Conference Proceedings, In Lillich. R., *Humanitarian Intervention and United Nations*, University of Virginia Press, 1973.

21. Goodrich L. M., *"Charter of the United Nations: Commentary and Documents"* Columbia University Press, 1969.

22. Greig, D, W., *International Law* 2nd ed. London: Butterworths, 1976.

23. Grey, Christine, *International Law and the Use of Force*, Oxford University Press 2000.

24. Grieg, D, W., *International Law*, 2nd ed. London: Butterworths, 1976.

25. Hailbronner, K., Die Grenzen des volkerrecht lichen Gewaltverbots. Quoted in Simma, Bruno, (Ed) *The Charter of United Nations -- A Commentary.*

26. Hargrove, J., *"The Nicaragua Judgment and the future of the Law of Force and Self-Defense.* (1987) 81 AJIL 135.

27. Harris J., (Ed) *"The Politics of Humanitarian Intervention"* London: Save the Children, 1995.

28. Harris, D, J., *Cases and Material on International Law,* 6th ed. London: Sweet & Maxwell, 2004.

29. Hevener, Natalie, Kaufman, (Ed) *Diplomacy in a Dangerous World: Protection for diplomats Under International Law,* London: Westview Press, 1986.

30. *Keesing's Contemp. Arch: 29669* (1979).

31. Kessing's Contemporary Archives, vol; 10,Nov; 17 – 24, 1956

32. Klin Tworth, G., *Vietnam intervention in Combodia in International law19 (1989).*

33. Ku, Charlotte, and Diehl, P, F., (Ed) *International Law: Classic and Contemporary Reading,* Lynne Rienner Publisher Inc., 1998.

34. Lauterpacht, H., International Law and Human Rights, quoted in Harris, D, J., *Cases and Materials on International Law*, London: Sweet & Maxwell, 2004.

35. Levi W., "*Law and Politics in the International Society*" Vol. 32, London: Sage Publications, 1976.

36. Levi, W., *Contemporary International Law: A Concise Introduction,* 2nd ed. West view Press, 1991.

37. Murphy, Sean, D., *Humanitarian Intervention: The United Nations in an Evolving World Order,* Philadelphia: University of Pennsylvania Press, 1996.

38. Nandas, "*The Validity of US Intervention in Panama under International Law*", 84 AJIL (1990).

39. Neff, Donald, "*Warrior at Suez",* New York: Simon and Schuster, 1981.

40. Northedge, F. S., (Ed) "*The Use of Force in International Relations*" London: Faber and Faber Limited, 1974.

41. Ott D. H., "*Public International Law in the Modern World*" London: Pitman, 1987.

42. Peterson, Frederick, *The Façade of Humanitarian Intervention for Human Rights in a Community of a Sovereign Nations,* Arizona Journal of International and Comparative Law, 1998.

43. Ramsbotham, O., Humanitarian Intervention: The Contemporary Debate, in Williamson, R., (Ed) *Some Corner of Foreign Field,* New York: Palgrave, 1998.

44. Reisman, M., and McDoug Arend A.C. and Beck R, J., Ibid, al, Humanitarian Intervention to Protect Ibos in Lillich, R., *Humanitarian Intervention and United Nations,* University of Virginia Press, 1973.

45. Richard Lillich, *Humanitarian Intervention and the United Nations* Charlottesville: University Press of Virginia, 1997.

46. Robertson, D., *A Dictionary of Human Rights*, Europa Publications Ltd., 1997.

47. Ronzitti, N., *Rescuing Nationals Abroad through Military Coercion and Intervention on the Ground of Humanity,* Dordrecht: Martinus Nijhoff, 1985.

48. Schiff, *Z., A History of the Israeli Army,* Macmillan 1985.

49. Schwarzenberger, G., *International Law: As Applied by International Courts and Tribunels,* Vol: 2, London: Steven &Sons Ltd., 1968.

50. Simma, Bruno, (Ed*) the Charter of United Nations – A Commentary,* Oxford: Oxford University press, 1995.

51. Singh J. N., "*Use of Force under International Law"* New Delhi: Harnam Publications, 1984.

52. Skilling, H, Gordon, *Czechoslovakia's interrupted Revolution,* Princeton University Press, 1976.

53. Tandon, L, N., and Kapoor, S.K., *International law*, Mansoor Book House, revised ed., 2004.

54. Thant, U., "*View from the UN*" London: David and Charles, 1977.

55. Thomas, Hugh, *Suez,* New York: Harper and Row, 1967.

56. Weisburd, A, Mark, Use of *force: The Practice of states since World War II,* Pennsylvania State University Press 1997.

57. Weiss, Thomas, *Military Civilian interaction: Intervening in Humanitarian Crises,* Rowman & Littlefield Publisher Inc., Lanham, Maryland, 1999.

Documents

58. G A Res. 2131 (XX) of 1965.

59. G A Res. 3314 (XXIX) of 1974.

60. G. A. Res. 34/22 of Nov14, 1979

61. G. A. Res. 34/2A of Sep: 21, 1979

62. G.A.O.R (xxvi), 2003rd Plen. Meeting, Dec: 7, 1971

63. G.A.Res. (xxvi), 2793 of Dec: 7, 1971

64. GA Res 2131 (1965) and GA Res 265 (1970)

65. GA/ Res/ 377(V) (1950).

66. GA/Res/ 2625 (XXV) (1970)

67. ICJ Rep; 1949 S.C Res.232 of Dec; 16, 1966 (Rhodesia)

68. L. N.T.S., The Kellogg-Briand Pact,

69. Meeting, January 2, 1979, S.C.O.R (xxxiv) 2110th Meeting, January 13, 1979

70. Nicaragua VS US, ICJ Rep; 1986 a document of Security Council, S/13697, dated Dec; 19, 1979

71. S.C Res. 418 of Nov; 4, 1977 (South Africa)

72. S.C Res.1160 of Mar; 13, 1998 (Kosovo)

73. S.C Res.713 of Sep; 25, 1991(Yugoslavia)

74. S.C Res.794 of Dec; 3, 1992(Somalia)

75. S.C Res.940of Jul; 31, 1994(Haiti)

76. S.C.O.R (xxvi), 1606th Meeting, Dec: 4, 1971

77. S.C.O.R (xxvi), 1606th Meeting, Dec: 4, 1971

78. S.C.O.R (xxvi), 1608th Meeting, Dec: 6, 1971

79. S.C.O.R (xxxiv) 2108th Meeting, January 11, 1979

80. S.C.O.R (xxxiv) 2108th Meeting, January 11, 1979

81. S.C.O.R (xxxiv) 2110th Meeting, January 13, 1979

82. SC Doc. S/24111, 17 June 1992.

83. SC Res. 688 (1991) of 5 April 1991

84. SCOR, supplement for April to June 1986

85. SCOR, Supplement for July to September1976

Websites

86. www.google.com

87. www.lemennicier.bwm-mediasoft.com

88. www.socialjustice.catholic.org.au

89. www.wikipedia.org/wiki/use_of_force_by_states

90. www.ejil.org/journal/Vol10/No1/ab1-1.html

91. www.africa.upenn.edu/babik03.html

92. www.pm.gov.au/iraq/displayNewsContent.cfm?refx=96

93. www.chathamhouse.org.uk/documents/

94. www.un.org/millennium/