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The Compatibility of the Notion of Nonintervention with the Right of Humanitarian Intervention

A thesis submitted in partial fulfillment of the requirements of the degree of

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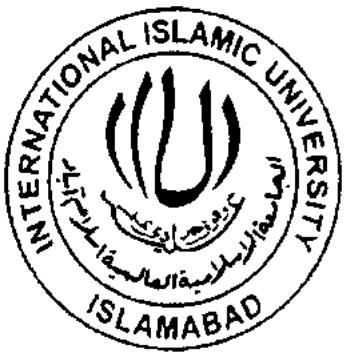

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FINAL APPROVAL

It is certified that we have read the dissertation submitted by Ms. Gul.i.Ayesha, Registration No. 31-FSL/MSHRL/F10 on **"The Compatibility of the Notion of Nonintervention with the Right of Humanitarian Intervention"** in Department of Law, Faculty of Shariah & Law. We have evaluated the dissertation, and found it up to the requirements in its scope, and quality by the International Islamic University, Islamabad, for award of M.S. Human Rights Law Degree.

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DEDICATION

Dedicated to my beloved Parents, especially my father, *Muhammad Javed Iqbal* for his selfless love, constant support and encouragement during my studies as well as in all my affairs of life.

Further dedicated to my husband *Hassan Ashfaq Bhatti,* our children *Muhammad Abdul Ahad Bhatti* and *Muhammad Abdur Rahman Bhatti,* for their love and support and especially for their patience.

DECLARATION

I, Gul.i.Ayesha, hereby declare that this thesis is original, and has never been presented in any other institute. I , moreover declare that any secondry information used hereby has been fully acknowledged.

Student: Gul.i.Ayesha

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Date: _____

Supervisor: Professor. Dr. Farkhanda Zia

Signature: _____

Date: _____

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ACRONYMS

Am. J. Int'l L American Journal of International Law

Chi.-Kent L. Rev. Chicago-Kent Law Review

Den. J. Int'l L. & Pol'y Denver Journal of International Law and Policy

Harv. Int'l L.J. Harvard International Law Journal

Ind. L.J. Indiana Law Journal

N.Y.Times New York Times

Wash. Q. Washington Quarterly

Mich. J. Inte'l Michigan Journal of International Law

Tex. Int'l L.J. Texas International Law Journal

U.N. Chron. United Nations Coronial

Brit. Y.B. Int'l L British Year Book International

Harv. Int'l L.J. Harvard International Law Journal

Cal. W. Int'l L.J. California Western International Law Journal

Can. Y.B. Int'l L. The Canadian Yearbook of International Law

Int'l & Comp. L.Q. International and Comparative Law Quarterly

Law Q. Rev. Law Quarterly Review

Nw. U. L. Rev. New western University Law Review

Mod. L. Rev. Modern Law Review

1 J. Conflict and Security L. International Journal of Conflict and Security Law

Denv. J. Int'l L. & Pol'y Denver Journal of International Law and Policy

CUP Cambridge University Press

CAC (Human Rights) Council Advisory Committee

CAT Committee against Torture / Convention against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment

CCPR Human Rights Committee

CEACR (ILO) Committee of Experts on the Application of Conventions and Recommendations

CEART (ILO/UNESCO) Committee of Experts on the Recommendation concerning Teaching Personnel

CED Committee on Enforced Disappearances

CEDAW Committee on the Elimination of Discrimination against Women / Convention on the Elimination of all Forms of Discrimination against Women

CERD Committee on the Elimination of Racial Discrimination

CESCR Committee on Economic, Social and Cultural Rights

CFA (ILO) Committee on Freedom of Association

CHR Commission on Human Rights

CMW Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

CR (UNESCO) Committee on Conventions and Recommendations

CRC Committee on the Rights of the Child / Convention of the Rights of the Child

CRPD Convention on the Rights of Persons with Disabilities

CSW Commission on the Status of Women

DAW United Nations Division for the Advancement of Women

DPI Department of Public Information

ECOSOC (United Nations) Economic and Social Council

GA (United Nations) General Assembly

GAOR General Assembly Official Records

HRC Human Rights Council

ICCPR International Covenant on Civil and Political Rights

ICED International Convention for the Protections of All Persons from Enforced Disappearances

ICERD International Convention on the Elimination of All Forms of Racial Discrimination 10

ICESCR International Covenant on Economic, Social and Cultural Rights

ICMW International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

ICPPED International Convention for the Protection of All Persons from Enforced Disappearance

ILO International Labor Organization / International Labor Office

NGOs Non-governmental organizations

NHRIs National Human Rights Institutions

OHCHR Office of the High Commissioner for Human Rights

OP Optional Protocol to the Convention on the Rights of Persons with Disabilities

OP-CAT Optional Protocol to the Convention against Torture

OP1 Optional Protocol to the International Covenant on Civil and Political Rights

OP2-DP Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the Abolition of the Death Penalty

OP-AC Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

OP-SC Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

SPT Sub-Committee on Prevention of Torture

UDHR Universal Declaration of Human Rights

UN United Nations

UNA United Nations Association

UNCHR United Nations Commission on Human Rights

UNHCHR United Nations High Commissioner for Human Rights

UNHCR United Nations High Commissioner for Refugees

UNESCO United Nations Educational, Scientific and Cultural Organization

UNICEF United Nations Children's Fund

UPR Universal Periodic Review

WGC Working Group on Communications

WGS Working Group on Situations

WHO World Health Organization

INTERNATIONAL CONVENTIONS AND TREATIES

- Charter of the United Nations (1945).
- The Universal Declaration of Human Rights (1948).
- Vienna Declaration (1969).
- Convention on The Elimination of all Forms of Discrimination against women (1979).
- Convention against Torture (1975).
- International Covenant on Civil and Political Rights (1966).
- International Labor Organization (1919).
- United Nations Educational Scientific and Cultural Organization (1946).
- Regulations of the Convention Concerning the Laws and Customs of War on Land (1907).
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).
- First Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (1977).
- I.C.J. Statute
- Jerzy Sztuki ,Jus Cogens and the Vienna Convention on the Law of Treaties (1947)
- Convention on the Prevention and Punishment of the Crime of Genocide (1951)
- The International Convention on the Suppression and Punishment of the Crime of Apartheid (1976).
- International Convention against Apartheid in Sports (1986).
- Convention Concerning the Duties and Rights of States in the Event of Civil Strife (1928)

- Convention on Rights and Duties of States (1933).
- Pact of the League of Arab States (1945).
- Charter of the Organization of American States (1948).
- Charter of the Organization of African Unity (1963).
- Final Act of the Conference on Security and Co-operation in Europe (1975).
- Charter of Paris for a New Europe of the Conference on Security and Co-operation in Europe (1990).
- Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1982).
- Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force (1987).
- Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970)
- Vienna Convention on the Law of Treaties(1969)

ABSTRACT

... The principle of nonintervention -- that is, the duty of States to refrain from interfering in the affairs of other States -- rests uneasily with international protection of human rights in general, and a right of humanitarian intervention in particular. ... Chapter one contains the detailed history of the right of humanitarian intervention and its theoretician foundations, further its comparison with the concept of state soverignity is discussed..... This study further elaborates the practice of humanitarian intervention done by states during nineteenth country,cold war era and post cold war era. Role of United Nation is authorizing necessary humanitarian intervention is also explained..... Study presents the argument for acknowledging a common law right of humanitarian intervention derived from the practice of States that coexists with the formal right of sovereignty. ... it is being argued that foreign States may in fact intervene where a government has acted in such a manner as to clearly violate the norm of sovereign legitimacy. ... The U.N. authorized actions in Northern Iraq and Haiti reflect the new approach to human rights and internal conflict -- in each case the humanitarian cost of internal conflict was held to constitute a threat to peace and security, and, hence the U.N. arrived at a justification for intervention. ... The history of humanitarian intervention suggests at the very least a demonstrable gap between the theory of international society -- where a formal right of sovereignty exists but no formal right of humanitarian intervention -- and the practice of States. ... During the twentieth century, although States have been unwilling to declare a formal right of humanitarian intervention for fear of eroding the right of sovereignty, the concept has developed more fully within the existing rubric of international law.....

INTRODUCTION

The principle of nonintervention -- that is, the duty of States to abstain from interfering in the affairs of other States -- lies uncomfortably with international protection of human rights in general, and a right of humanitarian intervention in particular[1]. While the former is a renowned principle of international law, the latter's international legitimacy is subject to much speculation[2].

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[1] According to Von Glahn, many commentators on international law take the modern conception of intervention to mean, "*dictatorial* interference by one state in the affairs of another state for the purpose of either maintaining or changing the existing order of things . . ." Gerhard Von Glahn , *Law among Nations : An Introduction to Public International Law*(Pearson,2012) (citing Lauterpacht, OPPENHEIM). This definition is attributed to the international legal scholar, Laza Oppenheim. The realist school places more emphasis on the use or threat of military force. For example, noted realist Martin Wight defined intervention as, "forcible interference, short of declaring war, by one or more powers in the affairs of another state." Martin Wight, *Power Politics* (A&C Black, 2002),191. According to Von Glahn, important international legal scholars have considered the exceptions to the general duty of nonintervention with respect to armed intervention to include the following: (1) Intervention by Right, i.e., by invitation or treaty; (2) Self-Defense; (3) Abatement of an international nuisance. This refers to state breakdown, when a sovereign can no longer maintain order within its borders, creating spillover effects to other border states. The abatement theory holds that where conditions in a neighboring state border on anarchy with the concurrent inability of the authorities to restore order and to prevent spillover to other countries, then a state has a duty to intervene. One example, given by Von Glahn, is the United States intervention in Mexico to put a stop to the Villa raids, after Mexico, which was involved in a civil war, was unable to stop Villa's incursions into United States territory.

[2] *See generally* Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963), 338-42. Ian Brownlie is a vocal critic of recognizing a right of humanitarian intervention. Brownlie discusses humanitarian intervention is entitled, "Other Justifications for Resort to Force of Doubtful Validity." *Id.* at 338. Moreover, Brownlie cites the legal philosopher W.E. Hall, who also questioned the legal validity of humanitarian intervention.

According to the traditional positivist theory of international law, States are the main subjects of international society[3]. Principally International law is the practice of States and is conscious with their rights and obligations[4]. Human beings do not have direct demonstration in international law but their interests are tackled by the State. States are sovereign as they are autonomous legal bodies which are free to perform their own matters[5]. As the legal theorist W.E. Hall states, "The right of independence is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community[6]."

On the other hand, the principle of nonintervention is an essential result to the right of sovereignty[7]. If States are independent then there is an equivalent duty not to intervene in the affairs of others in order to defend that right of autonomy and to safeguard the basis of international society. For the positivist, a right of humanitarian intervention would have serious implications for sovereignty as it plans a legal justification for the strong to overrun the weak and violates the right of States to determine their own affairs without interference from foreign powers[8].

Id. at 339.

[3] P.H.Winfield, "The History of Intervention in International Law", *British Year Book of International Law, Oxford Journals* (1923): 125-130.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] *See* Charles R. Beitz, *Political Theory and International Relations* (Princeton University Press, 1979),71-92 (discussing the philosophical underpinnings of state-centric theories of international relations), Bartram S. Brown, "International Law: The Protection of Human Rights in Disintegrating States" Chicago-Kent Law Review (1992):216

[8] *See generally* Mark W.Jains, *An Introduction to International Law* (Little, Brown, 1988 2nd ed. 1993), 227-35

On the contrary, the theory of humanitarian intervention speculates that human beings, not States, should be the true subjects of international law. State superiority in international law could be acceptable only to the degree that States act for their populations. Supporters of humanitarian intervention state that individual States are the worst violators of human rights and cannot be trusted to protect their own citizens[9].

International law is not willing to recognize a formal right of humanitarian intervention; largely because States are afraid of the results to their own existence should the focus of international law shift to individuals[10]. However, there have been a number of interventions in international history which possibly have been justified on the basis of a need to protect the human rights of citizens of a particular State. Even though controversial, some examples include the French intervention in Ottoman controlled Lebanon (1860-1861), the Indian intervention in East Pakistan (1971), and the collective United Nations ("U.N.") authorized interventions in Northern Iraq (1991) and Haiti (1994).

This thesis study how contemporary international law, with its stress on sovereignty and nonintervention, accepts humanitarian intervention and to what level the practice of States has created a common law right of humanitarian intervention given that no formal right exists. The research suggests that an inconsistency is present between international law in theory and in reality, as it is carried out in the practice of States. Regardless of constant support for the right of sovereignty, States have seen fit to condemn the behavior of other States, apply moral and

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(discussing the positivist view of individuals in international law).

[9] *See* David Luban, "Just War and Human Rights" *Philosophy and Public Affairs* (1980): 161-173

[10] P.H.Winfield, "The History of Intervention in International Law" *British Year Book of International Law, Oxford Journals* (1923): 125-130

diplomatic pressure, and even use military intervention in response to objectionable human rights practices. History exposes great tension with respect to the legitimacy of unilateral intervention, but generally support for collective intervention.

Furthermore, I believe basic change has taken place in the form of the internationalization of human rights at the level of the U.N. that is a collective body with deliberative organs that has gained a certain supranational legitimacy, however nothing reaching the degree of world government. If there is such a thing as a global consensus or world public opinion, it is to be found after debate at the U.N. The U.N. has established capability to observe human rights issues, pass resolutions and sanctions, and apply moral and diplomatic pressure, over and above take military action under certain limited situations.

In addressing the legal scope of humanitarian intervention, this thesis states that humanitarian intervention does not oblige States to intervene whenever situations pass a certain threshold, but gives the international community that option. In addition, for humanitarian intervention to have international legitimacy, it must first have a political consensus of support. The difficulty of achieving consensus will mean that the results will be uneven -- the U.N. and world community will fail to intervene in some cases even where the circumstances warrant it. In addition, an obligation to intervene as opposed to a right to intervene is not desirable in international law because it would effectively reduce the right of sovereignty in favor of the protection of human rights. International law should work hard for balance between these challenging goals, not favor one to the practical elimination of the other.

CHAPTER ONE: HUMANITARIAN INTERVENTION

1.1 What is Humanitarian Intervention?

"Humanitarian intervention saves lives and costs lives; it upholds international law and sometimes breaks international law. It prevents human rights violations, and it perpetrates them.[11]" Sometimes it happens that the philosophy of humanitarian intervention aims to put aside these inconsistencies whereas on the occasion of actual interventions may continue them. Sometimes the legality of humanitarian intervention has been of questionable nature and sometimes half hearted or sinister motivated interventions cause international controversy. On the other hand some missions have the ability to summon international consensus to stop human right abuses, avoid humanitarian catastrophes and prevent and preserve a humanitarian character .even when traditional conception of strategic interest are contradicted while doing so. Many questions rise on the legality and legitimacy because of these discrepancies which together provide a strong base for the philosophy of humanitarian Intervention. The question of on-the-ground character of humanitarian intervention also get most of attention of critics, and the question that how directly the actual task bears a resemblance to a mission performed to safeguard basic human right. In light of the above mention arguments on how such questions were answered, in a number of cases and covering a range of circumstances, the aim of this

[11] Ibid.

thesis is to shed light on advancement (evolution) of both the philosophy and practice of humanitarian intervention.

The words "evolved" and "humanitarian intervention" may need some clrearification and justification. It is being admitted that this might be unproductive to declare a clear cut linear evolutionary connection present in history and a clear and obviously legal and acceptable type of humanitarian intervention. Different political agendas, impediments and missteps decelerated and at times overturned these types of progressions. Nevertheless, evolution actually helps us in explaining the reinterpretation of lessons which have been learnt from the actions took in history. Booming analysis depends on the German proverb," Ubung macht den Meister which means that practice makes the master or you can say that in the situation like this "hindsight hones the vision" of past interventions. While it is being expressed by the scholars that the expression of Humanitarian intervention is normally explained as "the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.[12]"

1.2Theoretical Foundation of Humanitarian Intervention

On the theoretical foundations of humanitarian intervention the best and the most though recent works are based on Nicholes wheeler's saving strangers. In which the difference of opinion between what he calls "restrictions" and "counter-destructionists" on humanitarian intervention[13]. He introduced realistic, pluralist and solidarist theories of international society and he presented opinions for and against the theory of humanitarian intervention on the bases of

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[12] Ellary Stowell, *International Law :A Restatement of Principles in Conformity with Actual Practice* (University of Pennsylvania Press 1931), 349-50

[13]Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, 2000) ,41-42

these theories. Using this breakdown as a guideline, the research would sketch out these theories in brief that provide guideline for the existing thought on humanitarian intervention.

Under the realistic theory, humanitarian intervention does not exist in reality. All the states have their own premeditated importance and benefits and goals and they are not humane. This school of thought states that all the explanations for humanitarian interventions could merely work to disguise the hidden essential or strategic motives.[14] Therefore, anything resembling a humanitarian intervention takes place only in circumstances when human rights concerns and political power objective overlap.[15]

The pluralistic theory of international relations is supported by wheeler and other renowned English school theorists including hedly bull, r.j. Vincent and Martin Wight .They have their view that a society exists. And a society can both hold back and force state actions.[16] According to this theory, all the states have certain responsibilities and obligations in order to become a member of international society.[17] In compare with the realists ,pluralists claims that as states may well act in the quest of their own strategic interest therefore they must pursue these interests simply "within the agenda of customary rules in the society of states."[18] Hedly bull upholds that these rules are not steadfast, but satisfactory justifications for the transgressions must be provided by those states that break them.[19] With respect to humanitarian intervention, pluralists have their view that states may intervene on humanitarian grounds except those accepted

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[14] Id.at 21-52.

[15] *See generally* Thomas M. Franck & Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" *Am. J. Int'l L. (1973):275.*

[16] Nicholas J.Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, 2000), 30.

[17] Ibid. 6.

[18] R. J. Vincent & Peter Wilson, "Beyond Non-Intervention" in Political Theory, International Relations and the Ethics of Intervention (Ian Forbes & Mark Hoffman eds., 1993):127; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia university press 2d ed., 1995),6.

[19] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 2d ed., 1995), 12.

principles of nonintervention and state sovereignty. For example, there should be acceptable international justification for these interventions. It means that sometimes the notion of human rights and humanitarian concerns could be exceeded, to some extent in some cases, the previously presented principles that would not encourage and forbade such interventions. On the other hand, state sovereignty and concept of nonintervention remain strong bases of international society under pluralism. But there is a huge possibility of complications which would take place from inquiry about humanitarian good reasons for intervention in any state.

In terms of humanitarian intervention, solidarist theory is different from equally the realist as well as pluralist analysis. "In opposite to both the realists and the pluralists, solidarists seek to expand and codify a right to humanitarian actions, including armed intervention." [20] Solidarist view point has been attempted to clear in Wheeler's book by developing it into a practical hypothesis. "The solidarist conception is based on the belief that there is a political, moral and legal obligation for the international community to respond to humanitarian emergencies."[21] This proposal has been raised particular human rights, mainly which contains the right to be free of "systematic violence".

The questions of when and where interventions should take place are still trying to be answered by solidarists which are biggest proponents of humanitarian intervention concept. The seek to an adequate set of standards or tests which can be utilized as a channel to reply those queries, has been demonstrated appealing as well as vague. To be precise, numerous intellectuals and politicians have formed long list of aspects that must be fulfilled earlier than any armed humanitarian intervention develops into a policy. But till now no one have had any long-lasting

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[21] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP Oxford 2000), 33-51.

influence which can manipulate state practice[22].

The highest level political effort regarding this has come forward in the form of an approach by Tony Blair. The British prime minister embarks five conditions that need to be positively answered to lay concrete to intervention: (1) "Are we sure of our case?" (2) "Have we exhausted all diplomatic options?" (3) "Are there military options we can sensibly and prudently undertake?" (4) "Are we prepared for the long term?" and (5) "Do we have national interests involved?" [23] controversially, this declaration by British prime minister has widen the span of tasks that must be practiced under the principle of humanitarian intervention despite its expansive nature. However, verifiable alterations related to humanitarian intervention have been proved in designing its format very slow in state practice. Similar criterion is considering as helping guideline in the later examination of particular situations of humanitarian intervention.

1.3 Balancing of Order and Justice

In a heavy-handed comparison, it can fairly be said that the realist, pluralist, and solidarist theories respectively declare that "might makes right," "majority makes right," and "morality makes right." These three theoretical approaches support in portraying the presented discussion about humanitarian intervention. One more helpful technique to dissect "arguments for and against intervention is to look at the rivalry and prioritization of claims for the protection of order at one hand and those encouraging a greater awareness of justice in international society[24]."

Specialists of interventionists consider that from justice flows order. So to fulfill that

[22] Ibid.

[23] *See* Ved P. Nanda, "Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia: Revisiting the Validity of Humanitarian Intervention under International Law - Part II", *Denv. J. Int'l L. & Pol'y* (1998): 827-827 ;Oliver Ramsbotham & Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Polity; I edition 1996); Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers, 2005).

[24] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2d ed., 1995), 74-94.

reason it is given free hand to humanitarian disasters to be continuing unregulated, the international society, due to which, cleverly arises a hazard to international harmony and peace. In this prospect, the danger to global harmony and peace is caused by the principle of state sovereignty and principle of nonintervention by safeguarding the protections offered by them. In result it supersedes the risks related to the boarded right of intervention in emergency state of affairs. Consequently, objective and the purpose of a peaceful and violence free world can never be achieved specially in a world that stops construction and perpetuation of humanitarian based emergencies all but to the point of sanctioning them.

On the other hand, the specialists of nonintervention have their view that justice flows from the order. The claim of this side sustains, "the greatest goal of an international society" is to maintain peace in society. Any type of armed conflicts should be taken in few situations as possible because it can be harmful to the security balance enjoyed by the post-World War II international society. And specially, practice of and right to armed intervention on humanitarian bases is a serious threat to knock off balance of any existing security balance. There is a high risk by the powerful states that they would misuse this practice. They would have the potential to engage in arms in many areas of the world only if they could provide some sort of pro-humanitarian justification. It is best to keep intra-state conflicts on secondary importance. The primary underlying principle related to anti-intervention approach is likely that international anarchy produce more international anarchy, on the other hand domestic violence does not. For that reason to achieve global stability it is better to refute the right to intervene to the states, even on humanitarian grounds. Even if that demands that the international community may have to say yes to certain humanitarian abuses and human rights violations.

The order versus justice arguments explains differences of ideas and epochs. The pro-

intervention viewpoint addresses the world as one where conflicts have moved from the inter-state paradigm which was prevalent until the end of World War II. And it has occupied the intra-state fighting that has fully-grown established after the widespread decolonization in the second half of the twentieth century[25].on the other hand, the anti-intervention which believes in order-first, concentrates its efforts on stopping and avoiding inter-state conflicts. They don't give much importance to intra-state violence. They emphasize that if international community wants to avoid most potentially dire consequences based conflicts, which are inter-state conflicts, then it should keep the central focus of global security efforts on inter-state relationships. "Albeit the mass of brutal conditions may rises from a range of domestic situations. Because in comparison to those of international military conflict, those conditions long-term and crucial consequences for international stability and protection pale. It ends in a multifaceted connection between order and justice where, in some ways, justice is a precondition for order, while order in other respects is a precondition for justice.[26]" So to balance the two notions of international arrangement remains act a vital part in the discussions about interventions based on humanitarian grounds.

1.4 Humanitarian Intervention vs. State Sovereignty

Policy oppositions do not only stimulate the significant juristic opposition toward the formal approval or acceptance of the right of humanitarian intervention in international law. Humanitarian intervention is also believed to be incompatible with the seminal doctrine of sovereignty and, per se, represents the polar opposite of traditional legal wisdom. It is argued that

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[25] Michael Glennon , *The New Interventionism : The Search for a Just International Law* (Cambridge University Press 1999),78

[26] Ibid.

Humanitarian intervention assists menacing state behavior. And it also creates a radical departure from conventional legal ideas and traditions. So any expression of humanitarian intervention in practice would be no more and no less than a full frontal onslaught on the sovereignty of the target state. And this proposition is unsustainable in a system that idolizes the sovereignty of each of its components.

Hitherto history indicates that even before the classical period of international law, actual limitations were placed on a sovereign's treatment of its own citizens. And these were dutifully accepted and recorded in the work of Hugo Grotius (1583-1645) [27] and then after a century by the Swiss writer Emmerich de Vattel (1714-1767).[28] That sovereignty has, by tradition, admitted such formal limitations. And it is partially elucidated by the fact that the world is consist of a proliferation of states. This world has become one of competing and co-existing sovereigns. It does not compose of a single state or a monopolistic sovereign. In the metaphorical sense, we cannot say that a state is like an island because what a state does and what it decides to do are monitored by other states in the global neighborhood[29]. No matter what "outrages upon

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[27] Hugo Goritus , *De Jure Belli et Pacis ,Book II, chapter XXV* (1625),8

[28] Lassa Oppenheim , *International Law* (Longman1905) ,181; cf. Lassa Oppenheim, *Oppenheim's International Law: Law of Peace* (Robert Jennings & Arthur Watts eds., 9th ed. 1992), 442-44 (concluding that "intervention in the interest of humanity might be permissible")
There is general agreement that, by virtue of its personal and territorial supremacy, a state can treat its nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.

[29] *See* Report of the secretary-General on the Work of the Organization, U.N GAOR, 46th Session(1991) ; The Report of the secretary-Genral on An Agenda for Peace : Preventive Diplomacy , Peacemaking and Peacekeeping, (1997) ; Bhikhu Parek ,"Towards the Just World Order : The Aims and Limits of Humanitarian Intervention" *Times Literary Supplement* (26 september,1997).

humanity[30]" - or, in the words of John Stuart Mill, "severities repugnant to humanity" [31] - occur in this neighborhood suppose a common set of ethics that are worth protecting or fortification. It should be done in the first instance by changing international public views into diplomatic condemn which in turn could mature into "corrective action" because:

"The case for not impinging on the sovereignty, territorial integrity and political independence of states... would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection." [32]

Article 2 (7) of the United Nations Charter assigns this state of affairs legal recognition. Well-known for its articulation of the theory of nonintervention qua the United Nations "in matters which are essentially within the domestic jurisdiction of any state," this provision reinforces that the theory of nonintervention within the United Nations system is not unlimited and, while expressing its wider perspective and history, it is no longer enigmatic. Article 2 (7) specifies that the theory of nonintervention shall not "prejudice" any enforcement procedures taken in accordance with Chapter VII of the Charter. Here we have a clear prioritization of community willpower on top of individual claims of "sovereignty" but it happens only where the Security Council finds a "threat to the peace, breach of the peace, or act of aggression." [33] States

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[31] John Stuart Mill, "A Few Words on Non-Intervention, in Essays on Politics and Culture" (1859): 368 -80.
[32] Report of the Secretary-General on the Work of the Organization.

[33] Article 39 of the United Nations Charter stipulates this as a condition precedent for lawful measure (not involving

have, for that reason, acknowledged two values in one treaty provision - the principle of nonintervention and the notion of international peace and security - but they have also expressed inclination for the latter value in casus extremis at one and the same time.

The theory of nonintervention, acclaimed as the constitutional safe-keeper of the sovereignty of all states, thus, affirms to legal limitation qua the United Nations[34]. This is the clear-cut, literal meaning of Article 2 (7). But our lawful world is not occupied with conventional laws only. The International Court of Justice made the adroit and welcome observation in the Nicaragua Case (1986), which has been ignored in history, that international law also contains a series of customary recommendation and norms: "it was never intended that the Charter should embody written confirmation of every essential principle of international law in force." [35] Nonintervention is one of these customary principles. And certainly, the very principle of nonintervention regulates relations between states qua each other commands its government departments from the firmament of customary international law thus the principle of non intervention is not "as such, spelt out in the United Nations Charter." [36] The customary nature and legal force of this fundamental principle, together with that on the prohibition on the use of force, means that it is our duty, as lawyers, to explore whether international law puts similar limitations on this principle in custom. Here custom meant by the state practice expressed as legal belief. Now the point of discussion is that if the principle of nonintervention is present in customary international law, in that case it must be inspected whether this formal source of law

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the use of force) to be taken under Article 41 or " Such action by air, sea or land forces as may be necessary to maintain or restore international peace and security" under Article 42. United Nations Charter Article 42.

[34] United Nations Charter Article 2 paragraph 1 (Affirming the principle of the sovereign equality of all states, be they large or small, strong or weak, wealthy or not, and it is from this that the principle of non-intervention derives).

[35] Nicaragua Case, 1986 I.C.J. P202, at 106; Wilfred C. Jenks, Law in the World Community 8-9 (1967) (viewing spontaneous and institutional custom as "important illustrations of the continued vitality of custom in contemporary international law").

[36] Nicaragua Case, 1986 I.C.J. P202, at 106.

acknowledges any exceptions to or digressions from the principle of non-intervention.

The clash between humanitarian intervention and sovereignty is also obvious in the domain of jus cogens. Where states have united behind certain principles which are or have been illustrated as "peremptory norms of general international law."[37] The strength and duration of support for the principle of nonintervention in state practice must surely qualify the principle for this status[38], reinforced as it is by the proscription on the use of force (itself a main exemplar of jus cogens) contained in the United Nations Charter[39]. The prohibition of genocide has also attained the force of jus cogens, [40] such that states have sanctified an increasing range of premium norms which in the grand scheme of affairs are meant to co-exist with and even reinforce each other.

However, in accepting this growing series of ineluctable norms as "fundamental and superior values within the [international] system," [41] at least it is debatable, by their actions in recent practice that states have efficiently showed the likelihood that they have produced a conflict of interests. This conflict of interest means the individual versus the common interest. On the one hand, the principle of non-intervention works to protect the sovereignty of states and on the other hand, the right of humanitarian intervention can said to be as one possible mean of offering

[37] Vienna Convention on the Law of Treaties, Article 53, *See Generally* Jerzy Sztuki, Jus Cogens and the Vienna Convention on the Law of Treaties (1947); Christos L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North-Holland Publishing Company 1976).

[38] Malcolm N. Shaw, *Genocide and International Law, in International Law in a Time of Perplexity* (Cambridge University Press, 1989), 797.

[39] In Nicaragua Case both involved parties accepted this principle in their written submissions. This principle is of a general rather than an absolute nature since the United Nations Charter also accommodates the right of use of force in self- defense. this means that the proposition that the principle prohibiting the use of force has attained the status of jus cogens (from which no derogation is permitted) is "not without its difficulties". Rosalyn Higgins, *Fundamentals of International Law, in Perspectives on International Law* (Martinus Nijhoff Publishers, 1995).

[40] Malcolm N. Shaw, *Genocide and International Law, in International Law in A Time of Perplexity* (1989).
[41] Malcolm N. Shaw, *International Law* (Cambridge University Press, 4th ed. 1997), 97.

significant and valuable security for potential victims of genocidal or para-genocidal killing. [42] There is deficiency of endorsement for action from the Security Council therefore this is the reason that humanitarian intervention is said to be seen as an alternative means of realizing the obligation in preventing genocide.

"Nevertheless, such a comprehensive and deep-seated construction of the terms of the 1948 United Nations Convention on the Prevention and Punishment of Genocide"[43], which would envision scope for some form of armed intervention in order to subside genocidal killing. This solution was scrutinized in the Sixth Committee during the ninth session of the General Assembly, but was opposed by Israel, Nationalist China, and Panama. [44]The realpolitik of the Cold War had the perspective that states prioritized their own individual interests above and

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[42] Natalino Ronzitti has expressed the alternative view that while it is quite sure that responsibility to avoid the use of force is present strongly in a dogmatic norm of international law, it is not at all sure that the duty to promote human rights is set forth in the jus cogens rule.

Consequently, it is difficult to agree that the value protected by the duty to safeguard human rights should prevail over the value protected by the rule which forbids the use of force. Natalino Ronzitti, *Rescuing Nationals Aboard and Intervention on Grounds of Humanity* (1985), 15-16.

[43] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951). The precise wording of the obligation of this Convention is instructive: according to Article 1, the High Contracting Parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" Id. art. 1 (emphasis added).

On March 20, 1993, the Republic of Bosnia and Herzegovina instituted proceedings against Yugoslavia (Serbia and Montenegro) for violating the Genocide Convention, but also submitted a request for the indication of provisional measures under Article 41 of the Statute of the International Court of Justice. The Court responded on April 8, 1993 with an Order which specified certain provisional measures for the protection of rights under the Genocide Convention. These measures, however, were found to be insufficient by the Republic of Bosnia and Herzegovina, which submitted a second (exceptional) request for provisional measures on July 27, 1993, but the Court responded on September 13, 1993 by reaffirming its earlier Order. The Court subsequently found, on July 11, 1996, that it had jurisdiction to hear the case - but that this jurisdiction rested on Article IX of the Genocide Convention. In so ruling, the Court dismissed the claim made by Yugoslavia (Serbia and Montenegro) that the case was inadmissible. The case is now on its merits before the Court, and in its counter-memorial of July 22, 1997, Yugoslavia (Serbia and Montenegro) has launched a counter-claim in which it has requested the Court to declare that the Republic of Bosnia and Herzegovina "is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina" and that it has "the obligation to punish the persons held responsible" for these acts. Yugoslavia has also asked the Court to rule that Bosnia and Herzegovina is "bound to take necessary measures so that the said acts would not be repeated" and "to eliminate all consequences of the violations." Press Communiqué of the International Court of Justice, No. 97/18 (Dec. 17, 1997).

[44] *See* Ian Brownlie, *Humanitarian Intervention, in Law and Civil War in the Modern World* (John Norton Moore ed., 1974), 217- 227

beyond any opposing concerns and showed hesitant to disturb the Charter law while using force by appealing to or settling any so-called right of humanitarian intervention.

The turning point on this matter that has taken place after the Cold War though at the very smallest amount and it has re-opened these macro-legal questions. However our immediate past is filled with a variety of different examples of humanitarian action which are ranging from the provision of humanitarian assistance to full-scale intervention. These reactions to humanitarian disaster (of one form or another) could be explained as a series of freak impulses or reactions with limited or no legal worth. These reactions have actually taken place but on the other hand it is debatable whether these reactions can be said to have escalated to a new trend as a matter of law. There is another alternative view is also present which stated the possibility of world awakening in humanitarian concerned matters in normative so that there are now cases where the society concern (such as the prevention of genocide) has articulated itself on top of individual privilege of sovereignty and the principles prohibiting intervention and the use of force.

There is rising stockpile of state practice which has mounted up in recent times. Therefore it is must to put the question as to whether all these growing responses are indeed the result of certain normative decisions which are made by the states to face with the conflicting priorities of jus cogens. For example Germany warned that the treatment of the Kurdish population in northern Iraq in 1991 "harbored the danger of genocide" as a result of "the persecution of this ethnic group" and argued that "the armed repression against it must be stopped." [45] At a time when there was excess of charges of genocidal act during the ethnic conflict that destroyed the former Yugoslavia, Turkey (acting on behalf of the Organization of Islamic Conference) tabled a resolution in August 1992 which called for military intervention for

[45] U.N. SCOR, 2982 mtg. at 73, U.N. Doc. S/PV. 2982 (1991).

the protection of Muslim populations in the Balkans[46]. For her part, Russia has made her position with regard to the treatment of ethnic Russians in neighboring or proximate states crystal-clear, to the effect that "in certain cases, the use of direct military force might be necessary to protect our compatriots abroad." [47]

The potential conflict which may exist amid the values protected by jus cogens boosts primary questions of the priorities which states have shaped in the international legal order. In the event of a clash between such values and the norms that have been designed to protect them, what principles are to determine which of these essential values and norms prevail? [48]

Is preference to be given to the oldest peremptory norms which have embedded in historic and olden practice? Or do subsequent values and norms carry a power of implied repeal? Are we to presume and believe an anthropocentric or a statist bias? While getting a verdict on this matter, it is to be ideal if we stand back and take accumulation of international law's epic revolution in preferences and its growing security provided to human beings, both individually and in their miscellaneous associations. Because these are human beings that are the "ultimate

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[46] Keesing's Record World Events (1992), 39036; *see* also Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996), 286

[47]Andrew Higgins, "Kremlin Backs War to Protect Ethnic Russians, Independent", 89 New York Times (Apr. 19, 1995), at 7. President Yeltsin threatened the use of force for the first time in Russian foreign policy in the Balkans when he said, in August 1995: "If peace efforts fail, as well as attempts to restrain the Serbs, then regrettably force will have to be used by the international community." Helen Womack, Yeltsin Hopes Milosevic and Tudjman Will Talk, Independent (London), Aug. 8, 1995, at 7; *see also* Leonard Doyle, Russian President Invites Tudjman and Milosevic to Negotiations as Sidelined E.U. Mediator Hits Back, Guardian (London), Aug. 8, 1995, at 7.

[48] According to Professor Fernando R. Teson, "there is a growing trend in state practice and the literature in support of the proposition that the prohibition against massive human rights deprivations is indeed a rule of jus cogens." Teson, supra note1, at page 20. This proposition of law draws us closer to the notion of conflicting peremptory norms and forces us to address the issue of "why the preservation of peace (the value protected by the rule of non-use of force) prevails against, say, the prevention of serious and widespread human rights deprivations (the value protected by the exception of humanitarian intervention)." Id. Teson also proposes that "the only way to reach a conclusion is to focus the inquiry on the most appropriate moral-political theory of international law" and goes on to claim that the theory "must account for both state sovereignty and human rights." Id.

members" of the world community and its legal order. [49]Nevertheless, for any concrete statement of this nature to be made in international law, proof of legal authority is requisite.

And in the main this will be distinguish from the normative beliefs which states themselves possess when tackle with conflicting values and jus cogens norms. This process represents on a grand scale the extreme resistance between the global system's apologies and its utopias. And the conclusion of which will be determined by the changing meaning and understanding of sovereignty within the international law system. [50]

[49]John Westlake, *Collected Papers in Public International Law* (CUP Archive1914), 78

[50] In response to repeated criticisms that the United Nations military action in Haiti in 1994 constituted a violation of that country's sovereignty, Professor W. Michael Reisman has asked an array of thought-provoking questions:

Whose sovereignty? In modern international law, what counts is the sovereignty of the people and not a metaphysical abstraction called the state. If the de jure government, which was elected by the people, wants military assistance, how is its sovereignty violated? And if the purpose of the coercion is to reinstate a de jure government elected in a free and fair election after it was ousted by a renegade military, whose sovereignty is being violated? The military's? W. Michael Reisman, "Haiti and the Validity of International Action", *Am. J. Int'l L.* (1995): 82, 83; "Sovereignty and Human Rights in Contemporary International Law", *Am. J. Int'l L. (1999): 866.* Professor Richard Falk, critical of the precedent set by the American intervention in Haiti in 1994, considered whether the alternative (of non-action) would have been acceptable. Richard Falk, "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations", *36 Harv. Int'l L.J.* (1995): 341-357.

CHAPTER TWO: HISTORY OF HUMANITARIAN INTERVENTION

2.1 Humanitarian Intervention in Nineteenth Century:

It was an important political and legal concern to Intervene for the protection of human rights in the nineteenth century. In the majority cases the protection of human rights was based on deterrence of persecution of religious minorities. The nineteenth century has seen both military and diplomatic interventions to safeguard Christian minorities. And it was often in the Muslim dominated Ottoman Empire which extended from the Middle East to the Balkans. The French intervention in Lebanon that was then part of the Ottoman Empire (1516–1917). It is such an example and is a significant case of humanitarian intervention[51].

2.1.1 The French Intervention in Ottoman Lebanon to Protect the Maronite Christians:

Sectarian violence has been repeatedly marked by Lebanon's history. During the 1840's and 1850's strains between the Druze and the Maronites under Ottoman rule in Lebanon increased because of social and economic changes. And its outcome was setting in opposition the more

[51] John.P.spagnolo, "France & Ottoman Lebanon: 1861-1914", Ithaca *Press for the Middle East Centre, St. Antony's College Oxford* (1977):1-55.

populous, poorer, but upwardly-mobile Maronite Christians against the politically strong, aristocratic and feudal Druze Muslims[52].

In June, 1860, Druze groups attacked and besieged Maronite Christians all across Lebanon and later in Damascus because of which Druze -Maronite conflicts came to its peak. Initially French notified the Ottoman government to re-establish order[53]. But afterward, Druze militias stroked the Lebanese town Dair al-Qamar while annihilating thousands of Maronites. In the result of which Ottoman government did not show any response to this incident. A similar incident followed in Damascus. It was this incident, with the apparent abdication of Ottoman will to end the uprising, which drove the French to action[54].

The dilemma of the Maronites pulled concern from many European countries and in result the call for international action escalated[55]. French intervention gained more credibility and legitimacy due to the humanitarian considerations. "The offence to Christendom was self-evident; the suffering of Catholics most involved France. Humanitarian considerations, as understood at the time, demanded that something be done, and Louis-Napoleon was in a position to demonstrate the necessary activity[56]." Therefore, when the European powers acknowledged that the crucial situation in Lebanon justified European intervention, the remaining issue was its scope.

But on the other hand The British also panicked about French intentions on the region and that's why they wanted to restrict the scope of the French intervention to the humanitarian

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[52] Ibid at 2-3.

[53] Ibid at 29-33.

[54] Ibid at 2-3.

[55] Ibid at 33-34.

[56] Ibid at 33.

mission. When other powers agreed in August 1860, the European powers and the Ottoman Government signed a protocol and later a convention commissioned a 12,000 person multinational force to go to Lebanon for six months "to contribute to the restoration of tranquility[57]." The French not only directed the operation but also supplied the largest body of troops[58]. Although France wanted to expand the duration of the military intervention but Britain rejected and agreeing only to a two month extension[59]. The European forces left Lebanon by June 1861 soon after the restoration of order[60].

The French led intervention shows many challenges to the nonintervention principle. On the part of the European powers, it was a collective intervention example. Because European powers negotiated and signed a contract with the sovereign Ottoman Empire. And it was to set limits upon the erosion of Ottoman sovereignty. Additionally, it evokes that humanitarian intervention and sovereignty are not inevitably in conflict and can be reconciled in some cases. More importantly, as Stowell notes, the States were "actuated by motives of humanity to prevent religious persecutions[61]." Due to the presence of the British it was also sure that the purpose remained limited to the humanitarian goals. They reduced France's ability to follow imperialist objectives. The European powers assumed that they were enhancing the mission's international legitimacy by limiting the French. In a nutshell, the European powers believed that humanitarian intervention in Lebanon was legitimate and deserving of European attention. Their behavior

[57] Ibid at 302.
[58] Ellery Stowell, *Intervention in International Law* (General Books LLC, 1921), at 63-66.
[59] Ibid at 63-66.
[60] William Miller, *The Ottoman Empire and its Successors: 1801-1913*, (CUP Archive, 1936 - Eastern question (Balkan) 1923) at 302.
[61] Ellery Stowell, *Intervention in International Law* (1921) at 66.

indicates that there was no necessary inconsistency between respecting Ottoman sovereignty and the humanitarian crisis[62].

2.2 Humanitarian Intervention in Cold War Era:

Even though some governments openly referred to humanitarian objectives to justify intervention in the nineteenth century but during the Cold War States were disinclined to follow this path because of the fear of establishing a legal standard in favor of the right of humanitarian intervention. International society changes due to this reflected apparent change in behavior. As decolonization speed up During the Cold War era it resulted in increasing the number of States. But the legality of these States was a continuing effort which was bearing pressures for economic development joined with the opposing forces of ethnic nationalism. Moreover, the ideological differences between the superpowers often influenced on the newer States, and supposedly tangled their internal makeup, loyalty, and eventually their legitimacy.

With these pressures on States, a formal right of humanitarian intervention appeared to threaten the stability of the nation-states system. States feared that humanitarian intervention would be manipulated by the Superpowers or ideological regimes to intervene at will and threaten the independence of many States. Therefore, while the major powers of the nineteenth century who undertook the interventions were fairly secure in their own legitimacy and in the

[62] *See generally* Ian Brownlie, *International Law and the use of Force by States* (Clarendon Press, 1963) at 340. Although Brownlie criticizes Stowell is a sceptic of humanitarian intervention, he concedes that the French intervention to protect the Maronite Christians in 1860-61 might be a valid instance of humanitarian intervention.

inter-national norms of sovereignty, the twentieth century reflected insecurity and uncertainty about the survival of the States system itself[63].

Yet, human rights issue appeared and reappeared during the Cold War regardless of the hesitations on the subject of the impact of a formal right of humanitarian intervention. The epoch initiated many important examples about the scope of the nonintervention principle and the degree to which a State or the U.N. as a collective body could intervene where human rights issues were concerned. This section will start first with a debate of the Indian intervention in East Pakistan, which has been mentioned as strong example for a right of humanitarian intervention. Second, it will explore the U.N.'s role in the debate among the appropriateness of humanitarian intervention and the scope of sovereignty while concentrating specially on the U.N.'s relationship with South Africa.

2.2.1 The Indian Intervention in East Pakistan:

East and West Pakistan were created at the partition of India in 1948. It was an ideological union based on a common religion (Islam) and a common rival (India). Further than these two nations were different in almost every conceivable way: different cultural history, different languages, geography and level of economic development[64]. After the first democratic elections in East Pakistan, a pro-independence party came in power in national assembly n early 1971. After that, in the starting of March 1971, West Pakistani government broke a cruel military assault on the people of East Pakistan. In the result of this assult, almost three million, many of

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[63] Ian Clark, *The Hierarchy of States* (Cambridge University Press 1989), at 131-33. The importance of the internal makeup of a state was not novel to the Cold War, but was recognized by many European powers, especially the Habsburg and Prussian Monarchies, who feared nationalism and political and economic liberalism.

[64] Bangladesh, MICROSOFT ENCARTA (Microsoft 1993).

them which were supporters of independence and Hindus were killed by the West Pakistani army and security forces. And almost ten million East Pakistani refugees escape across the border to the Indian state of Bengal[65]. India forcibly intervened in the conflict in December 1971 after the nine months of this assault. A two-week war held between India and Pakistan, in which India was the vital vanquisher and East Pakistan got independence as Bangladesh. And it was immediately recognized by India and later by many of the world community[66].

In order to curtail the crises situation of Bangladesh UN did very little effort. However Indian involvement created an enormous firestorm at the UN. Many member states suspected the legality of the Indian action, specifically with respect to its significance as an example of humanitarian intervention. Yet India has justified its action on two bases.

Firstly, India stated self-defense based on Pakistani invasions into Indian region. Secondly, India derived considerable attention to the human rights circumstances in East Pakistan and its impression on the Indian State of Bengal. An Indian delegate stated while addressing the U.N. Security Council, "We shall not be a party to any solution that will mean continuation of oppression of East Pakistan people, whatever the pretext on which this is brought about. So long as we have any light of civilized behavior left in us, we shall protect them[67]." The U.N. did not criticize India but on the other hand it did not give authorization to its act either. Nonetheless, indirectly the international community accepted the Indian action as numerous countries recognized Bangladesh within one year after intervention.

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[65] V.P. Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis", *49 DEN L.J.* (1972): 53, 55-56.

[66] Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, 1985), at 182-83.

[67] Ibid at 96.

Supporters of humanitarian intervention claimed that the scope of the humanitarian crisis in East Pakistan legalized India's unilateral intervention in East Pakistan[68]. Furthermore, before intervening India waited nine months. And it is evident that the humanitarian crisis played an important role in India's decision-making[69]. In addition, supporters point to the speedy recognition of Bangladesh as unspoken approval of India's action. This shows emphasis on an absolute right of sovereignty given in international law's traditional theory[70].

On the other hand, Realists argue that India had self-regarding purposes as explained by the fact that Pakistan lost almost half of its land. In the result India became a vital regional power[71]. Realists powerfully reject the legitimacy of a unilateral intervention while analyzing India's statements related to human rights concerns as a validation[72]. The spirit of Realist approach stated that no matter how bad the circumstances are, there is no legitimate mode to produce a tolerable right of unilateral humanitarian intervention. For the reason that it would permit States to get benefits of the vulnerabilities of other States. And they will also violate the right of sovereignty by turning it into impunity. Despite of evidence which shows India's humanitarian

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[68] *See generally* Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 1977), at 105-07. *See also* Anthony Day, When Evil Calls Out for Action: The Nation Is Urged to Intervene Around the World to Do 'God's Work' and to avert a 'Second Holocaust.' How Do We Know When to Act on the Humanitarian Impulse?, L.A. TIMES, Feb. 9, 1993, at A1 (reporting that Walzer characterizes the Indian action as a rescue mission).

[69] *See* Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, 1985) at 95-97.

[70] *See generally* Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), at 105-07.

[71] *See* Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (1985) at 95-97.

[72]Thomas Franck & Nigel Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *AM. J. INT'L* (1973): 297-305. Franck and Rodley argue that beyond the Spanish American War, which itself is questionable precedent as a unilateral intervention, the Indian intervention in East Pakistan does not fall within the so-called tradition of humanitarian intervention. *Id. at 285.*

motive to protect the West Pakistani and Bengali people, a unilateral intervention is prima facie illegitimate[73].

Shortly, India's intervention is an example of unilateral intervention of one state into the matters of another state but this is not the only left exclusive way to protect human rights. However the mixed justification based on self-defense and human rights, presented by India is doubtful. Additionally this example contains sensitivity for the precedents as well. For example India itself is vulnerable towards its own crises of legitimacy and it definitely would not welcome if any foreign interference occurs for such a crises. On the other hand, Indian intervention also expresses quite significant explanations for legitimizing unilateral interventions where the human tragedy is compelling.

The Indian intervention also portrays considerable explanations for legitimizing unilateral interventions where the humanitarian tragedy is on peak, or as Walzer writes, "Shocks the conscience of mankind[74]." Walzer's statement is an embedded acknowledgment that the international community has shown some restrictions in tolerating human rights abuses. Despite that States may be hesitant in officially// recognizing or legitimizing humanitarian intervention yet under serious conditions. But they have not showed compliance to criticize the State which acts unilaterally.

2.3 United Nations and the Balance between Sovereignty and Humanitarian Intervention:

The U.N. Charter's effort to recognize both the principle of nonintervention and the international importance of human rights shapes up the unconfident nature of international law

[73] Ibid. at 304-05.

[74] *see generally* Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977) at 107.

on drawing a balance between respect for human rights and the right of sovereignty. Article 2(4) accepts the rule of nonintervention of the military sort by one member against another: "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, in any manner inconsistent with the purposes of the United Nations[75]." Apparently, Article 2(4) would prohibit forceful intervention for humanitarian or other purposes by unilateral ways. Article 2(7) has been more arguable because it relates to the relationship between the U.N. as an organization and an individual member: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but the principle shall not prejudice the application of enforcement measures under Chapter VII[76]."

Even though Articles 2(4) and 2(7) are obvious statements of the nonintervention principle, the Charter also makes abundant progress to recognize the importance of human rights. Article 55(c) is particularly important which binds the U.N. to promote universal respect for and observance of human rights and fundamental freedoms. And Article 68 which sets up the Commission on Human Rights. And then equally important is Article 13, which gives the task of initiating studies to the U.N. General Assembly and making recommendations for the realization of human rights and fundamental freedoms for all without distinction as to race, sex, and language[77].

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[75] U.N. Charter art 2, P 4; Eland Goodrich ET AL. Charter of the United Nations: Commentary and documents (3d ed. 1969),43

[76] U.N. Charter art 2, P 7.

[77] *See generally* Leland M. Goodrich & Edvard Hambro, "Charter of the United Nations, Commentary and Documents" (Boston, World peace foundation, 1946) at 133, 371, and 435. The U.N. Commission on Human Rights has operated under the Economic and Social Council since 1946. It submitted for General Assembly approval the Universal Declaration on Human Rights in 1948. Other human rights related Charter articles include the Preamble, "WE THE PEOPLE OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental human

These articles represent acknowledgment that human rights issues have international outcomes and belong within the international sphere of argument. The U.N. has been using these forums to legitimize its competency to evaluate human rights practices around the world[78]. Moreover, as the U.N. is a source of world opinion and a deliberative body which originates positions and policies to a degree which is a result of political bargaining and consensus building. It also represents a scale of international legitimacy which individual States do not possess[79].

Some have stated that the apparent meaning of Article 2(7)'s clause "essentially within the domestic jurisdiction of States" prevents intervention on behalf of human rights or for any other purpose[80]. On the other hand, the U.N. has noticeably established its aptitude to review any State's human rights practices and to criticize those practices. Moreover, the U.N. has passed resolutions, carried out relief missions, approved and monitored sanctions, and designated certain acts believed to violate human rights an international crime[81]. As Rosalyn Higgins observes,

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rights, in the dignity and worth of the human person, in the equal rights of men and women . . .", *id.* at 19, and Article 1(3), "The Purposes of the United Nations are . . . To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ." *Id.* at 25. *See also,* Enforcing Human Rights: The U.N. Machinery, The U.N. Machinery, 30 U.N. CHRON. 93, Mar. 1993 (listing key human rights agreements), John P. Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights* (Evan Luard ed., 1967),39

[78] *See* Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States", *AM. U. L. REV. 1* (1982). Sohn traces the growth of international human rights protections since the end of the Second World War. In his view, the evolution of international humanitarian law has been revolutionary. *Id. at 1.* Moreover, the U.N. Charter deserves great credit for advancing the principle that human rights is an international matter as evidenced by the Commission on Human Rights and its subsequent Declaration and Covenants. *Id. at 13-17.*

[79] Gerhard Von Glahn, *Law among Nations: An Introduction to Public International Law* (Pearson, 5th ed. 1986) at 180-96.

[80] Goronwy Jones, *The United Nations and the Domestic Jurisdiction of States* (University of Wales Press [for the] Welsh Centre for International Affairs, 1979), 37-40 (criticizing U.N. practice which has, in Jones' view, undermined the meaning of Article 2(7)'s emphasis on nonintervention). *See also* Gerhard Von Glahn, Law among Nations: An Introduction to Public International Law (5th ed. 1986) at 60-72.

[81] Gerhard Von Glahn, *Law Among Nations: An Introduction to Public International Law* (5th ed. 1986) at 180-94

U.N. practice of active involvement in internal human rights issues has narrowed the literal scope of Article 2(7): "One is led very near to saying that most things short of actual action by the United Nations are in fact now permissible interventions[82]."

The U.N. has achieved this transition through the application of its Charter's Chapter VII legal mechanism. Which allows the U.N. to characterize either human rights concerns or crises based in considerable measure on their human rights measurement as threats to peace and security[83]. The terms "peace" and "security" have never been defined. In addition, the U.N. has carried out a number of collective interventions where it has mentioned human rights as an important factor in adding to the breach of peace and security.

2.3.1 The United Nations' Relationship with South Africa

The standard set by the U.N.'s relationship with South Africa are noteworthy on two levels. First, it allows a long tradition in international relations of States criticizing and applying diplomatic and economic pressure against States with objectionable human rights practices. More importantly, it is in the case of South Africa that the U.N. established its competence to judge the human rights practices of States in the international community. This was no small achievement given the distinction articulated in the U.N. Charter between international conflict

(discussing the U.N. General Assembly's adoption, and member state's ratification, of the International Convention for the Suppression and Punishment of the Crime of Apartheid). Id. at 193-94.

[82] J.E.S. Fawcet, *Human Rights and Domestic Jurisdiction, in The International Protection of Human Rights* (Princeton University Press 1969) at 292-93.

[83] *See generally* Leland M. Goodrich & Edvard Hambro, "Charter of the United Nations, Commentary and Documents" (Martinus Nijhoff Publishers, 1946) , at 290-300. *See also* Jost Delbruck, "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations", IND. L.J. (1992): 887, 897. The U.N. must first decide under Article 39 that a threat to, or a breach of, international peace and security has occurred before relying on Chapter VII. Chapter VII allows the Security Council to undertake binding enforcement measures to "*maintain or restore international peace and security.*" Frederic L. Kirgis, Jr., "The United Nations at Fifty: The Security Council's First Fifty Years", *89 AM. J. INT'L L.* (1995): 506, 512.

and internal conflict, the latter being literally reserved under Article 2(7) for the domestic jurisdiction of States.

a. Dealing with People of Indian Origin in the Union of South Africa:

The Government of India brought a formal complaint against the Union of South Africa in 1946. The complaint was against certain laws which discriminated against persons of Indian origin. Indian land transactions were halted by The South African legislation. And created separate political rights for Indians which were distinct from and inferior to those granted to White South Africans[84].The Indian government be consistent had its view that the South African actions violated both the Cape Town Agreement of 1927 and 1932. Notably these two agreements were signed by both parties as well as the U.N. Charter's human rights provisions. Moreover, India claimed that South Africa declined to settle the matter by friendly means. Consequently the situation was probable to damage friendly relations between the two countries. South Africa argued that Article 2(7) prevent the General Assembly from even discussing the matter because it was basically an internal matter and did not pose a threat to peace and security[85].

Nevertheless, later in 1946 the General Assembly approved a resolution authorizing both parties to bring their query before the following Assembly session. As Goronwy Jones, a vocal critic of U.N. practice with respect to Article 2(7), observed, "It was thus implicit in the

[84] UNESCO, "The United Nations and South Africa", *UNESCO COURIER* (1983), at 17. The Pegging Act (1946) froze Indian land transactions in the state of Natal and Transvaal. The Asiatic Land Tenure and Representation Act (1946) extended Pegging Act provisions to all non-white persons and imposed the new system of separate communal, and political rights. *See also* R.B. Ballinger, *U.N. Action on Human Rights in South Africa* (Ohio University Press, 2012) at 248.

[85] Goronwy Jones, "The United Nations and the Domestic Jurisdiction of State", *Cardiff: University of Wales Press* (1979) at 39.

resolution that the General Assembly did not regard the principle of nonintervention under Article 2, paragraph 7, as a denial of its authority to discuss the substance of the case and to recommend a line of approach for its pacific settlement[86]."

In a later session of the Ad Hoc Political Committee in 1950, the discussion based on whether the nonintervention principle codified in Article 2(7) prevent the U.N. from hearing the issue. The Ad Hoc Committee affirmed itself capable to judge the matter and focused on South Africa's international obligations, the truth that the situation endangered to severely impair relations between the parties, that the obligations under the Charter was sufficient to establish U.N. competence, and that the Universal Declaration of Human Rights (1958) imposed negative moral obligations on members to stop from embracing measures which violated human rights[87]. Nonetheless, the findings of Ad Hoc Committee were not instantly binding on South Africa, and the U.N. Security Council took no further action on the matter[88].

b. The U.N. and Apartheid

U.N. contribution in the issue of apartheid dates back to 1950 and concluded successfully in 1993, when the Security Council voted to recommend the lifting of economic sanctions by member States. As R.J. Vincent wrote in 1973, the apartheid issue represented a potential erosion of the nonintervention principle because its focus on the legitimacy of

[86] Ibid. at 40. Furthermore, Jones writes: "But though U.N. organs have recognised that states are not bound by legal obligations in respect of human rights unless they have voluntarily ratified international conventions or covenants on such matters, they have nevertheless interfered in human rights questions with regard to which states have not accepted such obligations.
[87] Ibid. at 42-43.
[88] Ibid. at 44-45.

humanitarian intervention was "uncluttered with argument about aggression across international frontiers and claims to national self-defense or counter intervention[89]."

The U.N. appointed a commission, during the 1950's, to study the international effect of apartheid and passed several resolutions calling on South Africa to improvement its practices[90]. Those major western powers that were cautious of interfering in South Africa's internal affairs, rejected to enforce sanctions. They suggested that sanctions would violate South Africa's right of sovereignty[91]. But the turning point in U.N. involvement came after the Sharpesville massacre in 1960, when South African police fired on defenseless protesters protesting South Africa's pass laws. In result over 200 people were killed and wounded[92]. Later on South African government chased to capture and imprison the leaders of the political opposition. Which were the African National Congress, the Pan African Congress, the Liberal Party, and the Congress Alliance[93]?

Subsequently after the Sharpesville massacre, the United Nations Security Council passed a resolution which stated that South Africa's policies might become as a threat to peace and security. And this permits the U.N. to embark on Chapter VII enforcement measures to deal with the problem. U.N. imposed a voluntary arms embargo in 1963[94]. Later in the 1970's the U.N. went further than had been imaginable in the prior two decades by declaring apartheid an international crime. It banned the South African delegation from participating in its work by establishing the Special Committee against Apartheid to review apartheid and its international

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[89] *See* R.J. Vincent, *Nonintervention and International Order* (Princeton University Press, 1974) at 262; Lori Fisler Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs", AM. J. INT'L L. (1989).

[90] Ballinger, *The International Protection of Human Rights* (Ballinger Publishing Company2008), at 255-57.

[91] Ibid.

[92] Ibid. at 257-59.

[93] Ibid.; "The U.N.'s Long Campaign Against Apartheid", *UNESCO COURIER* (Feb. 1992), at 40.

[94] R.B. Ballinger,*U.N. Action on Human Rights in South Africa,* in *The International Protection of Human Rights* (Ballinger Publishing Company2008), at 259.

consequences. And it also accepted the rival African National Congress and Pan Africans Congress as observers to contribute in debates[95]. Furthermore, in 1977 the U.N. made mandatory the 1963 arms embargo as a Chapter VII action. And this was possibly the most noteworthy achievement in the campaign against apartheid in the 1970's. Because it confirmed apartheid a danger to harmony and safety and also represented first time that "the U.N. imposed a Chapter VII action against a member State[96]."

In the 1980's, the U.N. keenly campaigned for the suppression of apartheid. And it also sustained international isolation of South Africa by an ample program of sanctions and boycotts[97]. The Security Council passed a resolution in 1986 after increasing racial anxiety in South Africa in 1985. It also appealed for the instant release of all political prisoners and the abolition of apartheid. For a long time US stood against sanctions but later it also passed ample economic sanctions against South Africa. U.N. member States then passed a number of sports and cultural boycotts in 1986, which the U.N. monitored[98]. With the dismantling of apartheid in 1993, and the scheduling of the first all racial democratic elections, the U.N. declared victory and announced for the cancelling of sanctions and all remaining boycotts against South Africa[99].

In a nutshell since the 1950's, the U.N. clearly intervened in South Africa's internal affairs. By operating under the precept that apartheid were an international crime and a threat to

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[95] The International Convention on the Suppression and Punishment of the Crime of Apartheid was adopted by the General Assembly in 1973 and came into force in 1976.

[96] Gerhard Von Glahn, *Law among Nations: An Introduction to Public International Law* (5th ed. 1986) at 193-94.

[97] *See generally* "Aid to Liberation Movements in South Africa Urged; United Nations General Assembly Urges Cooperation in Struggle Against Apartheid", 31 U.N. CHRON. 74, Feb. 1984; John Morrison, "Pretoria's Trade Partners Urged to Impose Sanctions", *REUTERS* (June 17, 1986); Michael Wise, "Anti-Apartheid Groups Urge Tighter South African Arms Ban", *REUTERS* (May 28, 1986); "Security Council Votes Anti-Apartheid Measure", *N.Y. TIMES* (July 27, 1985), at A4.

[98] International Convention Against Apartheid in Sports Signed on 16 May by 43 States, 23 U.N. CHRON. 39, and Aug. 1986.

[99] Richard Bernstein, "Mandela Thanks U.N. for Apartheid Fight", *N.Y. TIMES* (Oct. 4, 1994), at A3.

international peace and security. The U.N. also established that the internal treatment of human rights can have international effects. As some have observed, human rights are not within the sole purview of the nation-state but are part of international law and discourse[100]. As long as the U.N. has been able to establish that a humanitarian crisis is a threat to international peace and security, then the members have been allowed to intervene.

In reality, the peace and security difficulty has probably done more than anything else to strengthen the argument that a right of humanitarian intervention exists. Most declarations claiming that a particular practice is a threat to peace and security follow a long extended debate and the progress of consensus among the member nations. As a result, once the U.N. has made such a declaration, it has the force of world opinion and has the authority of a collective intervention. And even realists may admit it a legitimate form of intervention.

The debate took place over four decades in the case of South Africa and many members of the international community changed their position to one favoring an active diplomatic and economic effort to isolate South Africa. The most prominent policy change was of US government. U.S. was a protector of South Africa and non-interventionism Until the Reagan Administration's second term. Nevertheless, after the Democrat-controlled Congress pushed through sanctions over President Reagan's veto, the U.S. moved to the opposite position. It has been a final significant force in uniting international resolve behind the destruction of apartheid in South Africa[101].

Martin Wight stated that in the nineteenth century the power and force to intervene inhabited solely with the most powerful nations and the somewhat weaker States had very little

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[100] *See generally* Louis Henkin, "The Mythology of Sovereignty", in *Essays in Honour of Wang Tieya,* ed. Ronald St. John MacDonald (Martinus Nijhoff Publishers, 1994).

[101] "Sanctions Veto Takes a Trouncing in Both Houses", *N.Y. TIMES* (Oct. 5, 1986), at Section IV. 1.

contribution[102]. The U.N. has been a forum for all States Since the beginning of the Cold War era. Even though weaker countries have had more contribution than they had in the past but vital power still resides with the Security Council. However collective intervention has become more and more legitimized under the guidance of the U.N. It is because of this broader range of contribution by member States. South Africa characterizes a working example. It is because the movement towards international isolation which began among the comparatively powerless States and increasingly enlisted the support of the powerful States over three consecutive decades.

2.4 Humanitarian Intervention in Post Cold War Era:

The disintegration of the Soviet Union and the triumph of the capitalist model of development have had two effects on the U.N. First, the nonexistence of a major superpower conflict has left the U.N. with a greater voice than in previous years. During the Cold War, the superpower clash held back the U.N. from taking significant action on the side of nonintervention or human rights in many cases. The U.N.'s political paralysis has since ended. Nevertheless, in the result of the superpower conflict, the post-Cold war era has faced monstrous turmoil internal to States due to movements for ethnic self-determination that have produced tragic humanitarian consequences[103].

[102] Martin Wight, *Power Politics* (A&C Black, 1978) at 191-93.
[103] *See* Karin Von Hippel, "The Resurgence of Nationalism and Its International Implications", *WASH. Q.* (1994): 185. Ethnic self-determination is at the root of most post cold war civil conflicts. The main risk to the international system as viewed by the U.N. is not war between States, but rather the implosion of States through secessionist and irredentist movements fueled by ethnic self-determination.

Consequently, since the end of the Cold War the U.N. has been called upon to observe, regulate, and directly intervene in every major conflict[104]. These shifting conditions have led to a significant change in U.N. thinking. While the Charter conveyed a strong difference between international divergence and matters of an essentially domestic nature. During 1990's the U.N. has internationalized many internal conflicts on the basis that they create potential international threats to peace and security[105]. While in the eyes of many political observers internal conflict is presently the most significant threat to the international society[106].

Therefore, now the U.N. acknowledges that economic development and ethnic self-determination are amongst the major challenges confronting the modern State. And it has turned its sights on the prevention of conflict within States. For example, in *An Agenda for Peace*, the U.N. Secretary General put forward many suggestions for acclimatizing the U.N. to internal conflict prevention. It points out the threats of ethnic nationalism for multi-ethnic States and stresses the importance of developing civic nationalism. This should develop with respect for democracy and human rights as indispensable to the survival of modern multi-ethnic States[107].

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[104] *See* Thomas G. Weiss, "Intervention: Whither the United Nations?" *WASH. Q.* (1994): 109. (discussing the myriad regional and internal conflicts the U.N. has been involved in since the end of the Cold War. The article goes on to criticize the lack of consistency in applying U.N. intervention under Chapter VII.).

[105] Ruth Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond", *MICH. J. INT'L L.* (1994): 544-45; Gene M. Lyons, "A New Collective Security: The United Nations and International Peace", *WASH. Q.* (1994):178-79.

[106] *See* Karin Von Hippel, *The Resurgence of Nationalism and Its International Implications* (University of Hawaii Press, 1994), 185.

[107] John Stremlau, "Antidote to Anarchy", *WASH. Q.* (1995): 27, Thomas M. Franck, "The Emerging Right to Democratic Governance", *AM. J. INT'L L.* (1992): 46 (emphasizing the growing necessity of democratization for governments to maintain legitimacy and the important role played by the U.N. as impartial observer in bestowing international legitimacy upon States attempting to democratize. U.N. monitoring of elections is discussed as an example.).

In addition, the U.N. now openly acknowledges that sovereignty is not absolute and that there must be some accommodation between States to address transnational problems[108]. In one sense, this is the natural consequence of the shift from the traditional interstate focus of international law to internal conflicts. The U.N. now recognizes that contrary to a traditional positivist view, protecting human rights may not only be consistent with sovereignty, but also may be necessary for the survival of many multi-ethnic States. The human rights consequences of internal conflict threaten to undermine the very foundation of the international society of nation-states should both the causes and consequences of internal conflict be left unaddressed. The U.N. authorized actions in Northern Iraq and Haiti reflect the new approach to human rights and internal conflict -- in each case the humanitarian cost of internal conflict was held to constitute a threat to peace and security, and, hence the U.N. arrived at a justification for intervention.

2.4.1. The U.N. Authorized Intervention to Protect the Kurds of Northern Iraq:

In February 1991, both Kurdish groups in Northern Iraq and Shiite Muslim groups in Southern Iraq revolted against the Hussein regime. This regime was destabilized by Iraq's recent beat by a U.N. multinational force led by the U.S. However, Saddam Hussein was able to regroup and suppress the insurrections by March, 1991. The result was a massive refugee crisis, especially among the Kurds of the North, many of whom fled to Turkey and Iran. This humanitarian disaster led to U.N. Security Council Resolution 688, which condemned Iraq's

[108] *See* generally Louis Henkin, "The Mythology of Sovereignty", in *Essays in Honour of Wang Tieya*, ed. Ronald St. John MacDonald (Martinus Nijhoff Publishers, 1994).

treatment of the Kurdish population and ordered that Iraq allow immediate access for international humanitarian relief efforts[109].

It was determined that the region needed to be made safe for Kurdish refugees to return home. In April 1990 the U.S. along with British and French dispatched 10,000 troops, to Northern Iraq to arrange and protect U.N. protected zones[110]. The U.S. defended the action based on Resolution 688 by arguing that its army was more operational for employing the emergency relief operation than standard relief organizations. Consequently by mid-June 1991 majority of Kurdish asylum seekers had returned to their homes in the U.N. secured enclaves. And in the short period the crisis was diminished[111].

On the other hand later in October 1991, the Iraqi Government started a new tactic to aggravate the Kurdish independence movement by inflicting an internal restriction on the Northern region of the country. They were trying to starve the rebels in to submission so the Iraqis refused to give the Kurds basic necessities including food and medicine. It caused electric power cut-offs which led to spoilage and breakdowns in hospital services. The U.N. countered this issue by importing generators and other humanitarian supplies in order to maintain stability in the region[112]. Although the emergency condition in Northern Iraq has decreased since 1991 but the mandates of Security Council Resolution 688 on the Iraqi Government have continued into the mid-1990.

The basic purpose for the U.N. intervention was in part that the clash between the Iraqi State and its Kurdish population threatened the latter's survival. In result it would worsen relations

[109] S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/Res/688 (1991).
[110] Neil Hicks, *The Iraqi Kurdish Refugee Crisis of 1991*, presented at the International Conference: The Kurds, Political Status and Human Rights (Mar. 17, 1993), at 4.
[111] Ibid. at 5.
[112] Ibid. at 4-6.

between them and cause threat to international peace and security[113]. The Kurdish human rights crisis was basically resulting in large amount from the refugee crisis and the consequent worry from the border states of Iran and Turkey. Therefore, the major factor in the U.N. decision to intervene was apparently a product of human rights concerns. Most of the critics have taken the intervention in Northern Iraq as a watershed case of humanitarian intervention because the U.N. forcefully prohibited a sovereign from attacking its own people[114]. Consensus was not achieved promptly because many went against the violation on Iraqi sovereignty. However, the pro-interventionist forces won the day and the U.N. established a new precedent of collective intervention[115].

2.4.2 The U.N. Authorized Intervention in Haiti:

Under U.N. supervised elections, in Haiti Jean Bertrand Aristide was elected as President by a tremendous majority in 1990. After one year in September 1991, he was overthrown in a coup. The U.N. rapidly protested on this turn of events, and passed resolutions. These resolutions proclaimed the seizure of power illegal and called for the restoration of Aristide to office and full observance of human rights[116]. Later on U.N. later pronounced the situation in Haiti a threat to

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[113] Ruth E. Gordon, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti", *Tex. Int'l L.J.* (1996), 43.

[114] Ibid.

[115] Lincoln P. Bloomfield, "The Premature Burial of Global Law and Order: Looking Beyond the Three Cases from Hell", *WASH. Q.* (1994), 142, 146 (noting that, although humanitarian intervention in the 'Kurdistan' region of Northern Iraq was successful, during this same period the Iraqi government was left free to crush rebellions in Southern Iraq by Pro-Iranian and hence Anti-American or Anti-Western Shi'ite Muslims).

[116] Ruth E. Gordon, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti", *Tex. Int'l L.J.* (1996),

peace and security under Chapter VII. U.N. also issued U.N. Security Council Resolution 841 for imposing a mandatory oil- and petroleum-related products ban in June 1993[117].

The de facto regime ruled for over three years and targeted the Haitian people to human rights abuses under Duvalier dictatorship[118]. Particularly supporters of Aristide were targets of the coup leaders. During the U.N. economic embargo, the coup leaders stored essential goods for the military and as a result basic necessities were not provided to many Haitians[119]. Furthermore, a steady flow of refugees was there during this period from Haiti to neighboring Caribbean countries and to the U.S.

In July 1993, Aristide and the coup leaders, led by General Raoul Cedras, met at Governors Island in New York City and signed the resultant Governors Island Accord[120]. The agreement asked for Aristide to go back to Haiti and in exchange there will be suspension of the U.N. sanctions adopted under Security Council Resolution 841, a general amnesty for coup participants, and U.N. mediation in reaching a political agreement between Aristide and the coup leaders[121].on the other hand the Haitian coup leaders consequently denied to accept the Governor's Island accord and stopped a U.N. relief mission from entering the country in October 1993[122]. The U.N. quickly restored the sanctions (U.N. Security Council Resolution 873), and increased their severity (U.N. Security Council Resolution 875)[123].

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[117] Ibid. : S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/Res/841 (1993).

[118] Fredric L. Kirgis, Jr., "Custom on a Sliding Scale", *American Journal of International Law* (1987).

[119] Gordon, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti", 557-60.

[120] Angel Lockward, *Haiti: Cronologia De Una Crisis* (Editora Taller,1993).

[121] Ibid.

[122] ibid.

[123] Thomas L. Friedman, "Leaders in Haiti Wrong to Think They Can Stall U.S., Clinton Says", *N.Y. TIMES* (Oct. 29, 1993), at A6; Howard W. French, "U.N. Envoy Proposes Talks to End the Impasse in Haiti", *N.Y. TIMES* (Oct. 30, 1993), at Section I, 5.

After the Haitian coup leaders denied to respect the Governor's Island accord, the tension between the U.S. and Haiti increased. For both the Bush and Clinton Administrations the Haitian situation was an important foreign policy issue. In 1994, the U.S. increased its movement to remove the coup leaders and restore Aristide to power. The U.N. passed Security Council Resolution 940 in July 1994, under U.S. leadership, permitting the U.S. to use "all necessary means" to restore Aristide[124]. Armed with U.N. approval, President Clinton sent many warnings to the coup leaders, demanding that they leave Haiti. With the use of a renowned group of personally-appointed U.S. negotiators, backed by a threat of imminent invasion, the coup leaders were persuaded to relent at the very last moment and agreed to give up power and leave Haiti in late September 1994[125]. U.S. troops peacefully occupied Haiti on September 20, 1994, and by October 15, 1994 Aristide was restored as Haiti's President[126]. The U.N. clearly supported the return of a democratically-elected leader and the removal of a military coup which it considered to be illegitimate[127].

Article 2(7) gave Haiti with little protection from U.N. action. In nutshell The Security Council refused to recognize the coup leaders and did not accept the coup as only the result of an internal power struggle. Furthermore the Security Council stated that the situation in Haiti was a

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[124] [124] Fredric L. Kirgis, Jr., "Custom on a Sliding Scale", *American Journal of International Law* (1987); U.N. Doc. S/Res/940 (1994).

[125]Steven Greenhouse, "Showdown in Haiti: Police Force", *N.Y. TIMES*, (Sept. 19, 1994), at A1; "Haiti's Military Leaders Agree to Resign; Clinton Halts Assault, Recalls 61 Planes: Restoring Order," *N.Y. TIMES* (Sept. 19, 1994), at A1; Larry Rohter, "3000 Troops Land Without Opposition and Take Over Ports and Airfields in Haiti", *N.Y. TIMES (*Sept. 20, 1994), at A1. The negotiators included U.S. Senator Sam Nunn, Former President Jimmy Carter, and Retired General Colin Powell.

[126] "Return of Aristide Hailed After Three-Year Exile", *U.N. CHRON.* (4, Mar. 1995). The U.N. lifted economic sanctions against Haiti through Security Council Resolution 944 on the day of Aristide's return to Haiti. U.N. Doc. S/Res/944 (1994). The coup leaders themselves were given asylum as arranged by Panama and the U.S.; Eric Schmitt, "U.S. Ready to Declare Haiti 'Secure'", *N.Y. TIMES* (Jan. 15, 1995), at A8.

[127] "Multinational Force Dispatched to Pave Way for Aristide's Return", *U.N. CHRON.* (20, Dec. 1994). The U.N. Secretary General's annual report on Haiti for 1994 emphasized the coup leaders' failure to honor the Governors Island Accord and noted that there had been a "grave deterioration of the human rights situation."

threat to peace and security. Still, when compared with situations like Somalia or Iraq, the criteria for Chapter VII treatment appear to have been loosely construed[128].

Effectively, the U.N. made a judgment that Aristide was Haiti's legitimate ruler and that the coup leaders were illegitimate. Additionally constant violation of Council resolutions together with gross human rights violations warranted a finding of a threat to peace and security. Therefore, the Haiti intervention takes a step in the cosmopolitan direction. The international community made a judgment that a democratically-elected government was more legitimate and preferable to a military rule, and gave the U.S. the right to reinstate that democratically-elected government to power.

[128] Jose E. Alvarez, "The Once and Future Security Council", *WASH. Q.* (1995), 5. Alvarez openly criticizes the U.N. decision to authorize the U.S. to remove the Haitian coup leaders. Moreover, he questions the nature of the threat to the international peace and security posed by Haiti. He suggests that the relatively low threshold for a threat to "peace and security" greatly expands the Security Council's powers and is questionable precedent. Id. at 9-10.

CHAPTER THREE: NOTION OF NONINTERVENTIION

3.1 History, Nature and Scope of the Notion of Nonintervention:

The principle of nonintervention undoubtedly carries a high prominence in International Law. A huge and massive amount of legal manuscripts and monotonous succession of declarations and proclamations contain recommendations for this principle. Its conventional subsistence is owed mainly to a range of global and regional treaties[129]. And its customary law status is confirmed in part by an on-going procession of United Nations resolutions[130]. "Both The jurisprudence of the International Court of Justice and generations of international legal scholarship have confirmed the principle's prime legal ranking[131]." "States spitefully adore the

[129] *See, e.g.,* Convention Concerning the Duties and Rights of States in the Event of Civil Strife, Feb. 20, 1928, art. 1, 134 L.N.T.S. 25, 51; Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 8, 165 L.N.T.S. 19, 25; Pact of the League of Arab States, Mar. 22, 1945, art. 8, 70 U.N.T.S. 237, 254; Charter of the Organization of American States, Apr. 30, 1948, art. 18, 119 U.N.T.S. 3, 58; Charter of the Organization of African Unity, May 25, 1963, art. 4, 2 I.L.M. 766, 768; Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292; Charter of Paris for a New Europe of the Conference on Security and Co-operation in Europe, Nov. 21, 1990, 30 I.L.M. 190.

[130] *See, e.g.,* G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) (adopted by 109 votes to zero with an abstention cast by the United Kingdom); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) (adopted by consensus); Definition of Aggression, G.A. Res 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974); Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/301, U.N. GAOR, 36th Sess., Supp. No. 31, art 1, U.N. Doc. A/36/761 (1982) (adopted by 120 votes to twenty-two with six abstentions); Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force, G.A. Res. 42/22, U.N. GAOR, 42d Sess., Supp. No. 41, at 1, U.N. Doc. A/42/41 (1987).

[131] *See, e.g.,* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 108 (June 27) [hereinafter Nicaragua Case]; Augustus Granville Stapelton, *Intervention and Non-Intervention or The Foreign Policy of Great Britain from 1790 to 1865* (John Murray Albemarle Street, London 1866); Ellery C. Stowell, *Intervention in International Law* (John Byrne & Co. Washington D.C.1921); J.E.S. Fawcett, *Intervention in International Law, II Recueil Des Cours* (Academe De Droit International,1961), 342 (1961); Ian Brownlie, *Principles of Public International Law* (Oxford Univewrsity Press,5th ed. 1998), 289; Dominic McGoldrick, *The Principle of Non-Intervention: Human Rights, in The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Vaughan Lowe & Colin Warbrick eds., 1994), 87-94.

principle of nonintervention, and it is the principal desire of aspiring states because it is the legal insurance of their sovereign existence. In theory, therefore, the principle of nonintervention as it has been defined in international law governs supreme[132]."

General Assembly Resolution 2625 (XXV) states that "no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state[133]." Armed intervention is pulled out for particular mention as a "violation of international law[134]," but the principle of nonintervention constructed also prohibits "the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind[135]." There is no scope to consider exceptional cases or conflicting considerations in the resolution. The most important part of the principle of nonintervention as defined so represents the spirit of the first formulation of the principle by the General Assembly in Resolution 2131 (XX) of 1965. This was repeated in Resolution 36/103 of 1981. Even though the United Nations has been practicing a series of interventions which have appeared and

[132] It is important to note the emphasis which the International Court of Justice placed upon the coercive nature of intervention as it understood the term in the Nicaragua Case, 1986 I.C.J. P205, at 108: "the element of coercion which defines and indeed forms the very essence of prohibited intervention is particularly obvious in the case of intervention which uses force." *See also* Thomas Oppermann, *Intervention,* in *Encyclopedia of Public International Law* (Rudolf Bernhardt ed., 1995), 1436. Antonio Cassese describes the principle of non-intervention as "a solid and indispensable "bridge' between the traditional, sovereignty-orientated structure of the international community and the "new' attitude of States based on coexistence geared to more intense social intercourse, and closer co-operation." Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), 144. States therefore find themselves in a situation in which the principle of non-intervention "plays the role of a necessary shield behind which states can shelter in the knowledge that their more intense international relations will not affect their most vital and delicate domestic interests." Id.

[133] *See* Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Palgrave Macmillan, 1986).

[134] This coincides with the cardinal prohibition on the use of force contained in Article 2(4) of the United Nations Charter, which obliges states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This principle is also firmly established in customary international law. *See* Nicaragua Case, 1986 I.C.J. P188, at 99; Arnold McNair, *The Law of Treaties* (Clarendon Press, 1961), 206-11, 215-18.

[135] G.A. Res. 2625,

continue to appear for various reasons. The deepening gulf which separates practice from principle has put the normative scope of the principle into question[136].

The International Court of Justice has followed a less didactic line in its jurisprudence on the nature and scope of the principle of nonintervention in international law. This approach could be best exemplified by the Court in the Nicaragua Case in 1986. Charged with the responsibility of deciding the disputes which are brought before it in accordance with international law, the Court was, and remains, mindful of the formal sources of law which it must consult in the execution of this task[137]. The Court reflected this approach in an important dictum of its ruling - a section of the judgment that appears to have been lost in the mire of recitations of the principle of nonintervention. After reviewing the prolific legal practice which has secured for the principle of nonintervention its pride of place in customary international law, the Court indicated that any "reliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend toward a modification of customary international law[138]." For this to occur, it was incumbent on the Court to determine "whether there might be indications of a practice illustrative of belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state,

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[136] For an eloquent exposition of this claim, *see* Vaughan Lowe, *The Principle of Non-Intervention: Use of Force, in The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Vaughan Lowe & Colin Warbrick eds., 1994), 66. The legal prohibition on reprisals has suffered an identical criticism in that "this norm has acquired its own "credibility gap' by reason of the divergence between the norm and the actual practice of states." D.W. Bowett, "Reprisals Involving Recourse to Armed Force", *Am. J. Int'l L.* (1972); *see* also Richard Falk, "The Beirut Raid and the International Law of Retaliation", *Am. J. Int'l L.* (1969), 415.

[137] Article 38 (1) of the Statute of the International Court of Justice, appended to the 1945 United Nations Charter, *59 Stat. 1055*, T.S. No. 993 [hereinafter I.C.J. Statute].

[138] Nicaragua Case, 1986 I.C.J. P207, at 109 (emphasis added).

whose cause appeared particularly worthy by reason of the political and moral values with which it was identified[139]."

With these words the Court demonstrated that it was prepared - at least in principle - to approach state practice on the nonintervention issue with a more open mind and with greater investigative rigor than the General Assembly, which could be said to have shown a general impotence to "cope with anything more than the shortest of intellectual agendas and the simplest of principles[140]." The Court, of course, labors under a more exacting obligation than does the General Assembly in that it is required to take heed of "general practice accepted as law" before it reaches conclusions that are defensible in law[141]. This approach is one that coincides more readily with the nature of customary law and the process of custom-formation in the international

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[139] Ibid.

[140] *See* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention, in Law and Force in the New International Order* (Lori Fisler Damrosch & David J. Scheffer eds., 1991), 185, 197 (contending that "opportunities [in the General Assembly] for expressing a clear position" on the legal status of humanitarian intervention "have been ignored"). In a similar vein, the International Court of Justice was faced with a "titanic tension between state practice and legal principle" in its Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809, 836 (dissenting opinion of Judge Stephen M. Schwebel, concluding that the "chasm between practice and principle may be bridged - and is bridged by the Court's Opinion"). I emphasize that this judicial sensitivity to state conduct manifested itself in principle - that is to say that the Court identified a specific method of law determination, one that it may not itself have followed with rigor or sufficient precision in practice. Meron, for instance, has suggested that the Court in the Nicaragua Case "should be reproached for its near silence concerning the evidence and reasoning supporting [its] conclusion" that both Articles 1 and 3 of the 1949 Geneva Conventions are representative of international custom. Theodor Meron, *Human Rights and Humanitarian Norms As Customary Law* (Clarendon Press, Oxford, 1989), 37. For a further critical appraisal of how the Court conducted its business on this matter in the same case, *see* Anthony D'Amato, "Trashing Customary International Law", *Am. J. Int'l L.* (1987), 101-102; Nikolaos Tsagourias, *The Theory and Praxis of Humanitarian Intervention* (University of Nottingham, 1996), 223 claiming that the approach adopted by the Court "conceded an unnecessary over-legitimization to governmental declarations and fails to apprehend the deeds"); Gennadii M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers,1993), 93. Criticisms of the Court's application of its own stated method need to be set against theories which have sought to explain the Court's approach by placing them in their wider normative context. *See* Fredric L. Kirgis, Jr., "Custom on a Sliding Scale", *Am. J. Int'l L.* (1987), 146.

[141] *See* I.C.J. Statute art. 38, para. 1. This position was reiterated in clear terms by the Court in its judgment in Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3), notwithstanding the questionable drafting of the concept of custom in Article 38 of the Statute, which refers to "international custom, as evidence of a general practice accepted as law." Compare the view of Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press,1994), 18 that "custom is the source to be applied, and ... it is practice which evidences custom." *See also* R.R. Churchill & A.V. Lowe, *The Law of the Sea* (2d ed. 1988), 5.

legal system[142]. As the principal judicial arm of the United Nations, the Court is charged with the application of the law as it appears in practice and not as it appears in abstracto: the Court is responsible for recognizing normative changes in state behavior in its institutional role as the eye-witness and ultimate arbiter of international law in evolution[143].

In addition, the International Court of Justice showed itself more able to appreciate the nuances of state practice in the Nicaragua Case in 1986, where it confirmed Resolution 2131 (XX) to be "only a statement of political intention and not a formulation of law" and attested to the legal nature of the principle of nonintervention in the later Resolution 2625 (XXV) of October 1970[144]. The Court, however, then went on to inquire into the "exact content" of the principle as well as the extent to which it was supported by state practice[145]. This inquiry represented an honest endeavor by the Court to scrutinize dispassionately and with a distinct sense of professional objectivity and detachment the trends of state conduct in their wider historical context before determining their precise consequences for international law. This has meant that the nature of the Court's work is such that it is possible, if not probable, that different conclusions and outcomes are reached by the Court in relation to the self-same legal questions tackled and deliberated upon by the General Assembly.

Notwithstanding these evident disparities in method, one despairing consequence of this state of affairs is that the General Assembly, which is able at any time to deliberate upon accepted,

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[142] In the construction of treaties, it is an accepted canon of interpretation that "there shall be taken into account, together with the context... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3) (b), 1155 U.N.T.S. 331 (emphasis added). For further discussion, *see* Eduardo Jimenex de Arechaga, *International Law in the Past Third of a Century, I Recueil Des Cours* (Academe De Droit International, 1978).

[143] The Statute of the International Court of Justice does recognize that this approach "shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto." I.C.J. Statute art. 38, para. 2.

[144] Nicaragua Case, 1986 I.C.J. P203, at 107.

[145] Ibid.

uncertain or controversial legal principles, has refrained from dealing with the question of humanitarian intervention either by itself or through vicarious means, whereas the Court (with its preferred approach for determining lex lata) operates under rigorous procedural (principally jurisdictional) constraints that do not allow it unfettered opportunities to give its expert verdict on identical legal issues and questions, even when they are most needed. Even so, it should be recalled that, but for the International Court of Justice, there would be no institutionalized judicial appraisal within the United Nations system of whether the General Assembly, in professing to declare existing laws, had slipped through the all-too "porous fence" between the codification and development of international law[146]. Added to this, of course, is the ability of the Court to evaluate deliberations of the General Assembly in the broader context of other (perhaps even conflicting) manifestations of state practice and to do so on legal questions which may not have been dealt with directly or in sufficient detail by the General Assembly.

The Court's verdict in the Nicaragua Case (1986) makes clear that the principle of nonintervention could admit to new exceptions in customary international law where states, through their legal actions, deem this appropriate. The Court in that case came to the conclusion that no "general right of intervention in support of an opposition within another state exists in contemporary international law, [147]"but it did so because "states [had] not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition," [148] and not because this was not possible or arguable as a matter of law. In the Nicaragua judgment, the Court found itself unable to formulate new exceptions to or deviations from established principles or rules of international law because facts, legal arguments and empirical evidence were not adduced and therefore the veritable threshold was not met, and not because no

[146] Blaine Sloan, "General Assembly Resolutions Revisited" (Forty Years Later), *Brit. Y.B. Int'l L.* (1987): 39.
[147] Nicaragua Case, 1986 I.C.J. P209, at 109.
[148] Ibid. P207, at 109

such threshold existed. In essence, therefore, the International Court of Justice was prepared to explore the normative impact of state practice in its seeming mission to liberate international law from the General Assembly's perpetual "tyranny of phrases[149]" on the principle of nonintervention.

3.2 Policy Objections to Humanitarian Intervention:

3.2.1 The Abuse of the Right of Humanitarian Intervention

The most common criticism at the right of humanitarian intervention is based on its incorporation into the system of the law of nations. As it might increase the chances for the abusive use of force and the long-term effect of it would be to bring the international normative system into disgrace. Critics has warned that approval of humanitarian intervention will open the door to a position in which its supporters would not be able to "devise a means that is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarian intervention from the herds of goats which can too easily slip through[150]." They made the reason that States might start "heroic" tasks to save and protect persecuted populations but in reality only use the cover of humanity to use power to understand options and suspect ambitions[151].

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[149] Lassa Oppenheim, *The Future of International Law* (Library of Alexandria, 1921) 58-59.

The term is used in the same spirit as it appears in the following passage by Lassa Oppenheim:

"As things are, there is scarcely a doctrine of the law of nations which is wholly free from the tyranny of phrases. The so-called fundamental rights are their arena, and the doctrines of state sovereignty and of equality of states are in large measure dominated by them. Anyone who is in touch with the application of international law in diplomatic practice hears from statesmen every day the complaint that books put forth fanciful doctrines instead of the actual rules of law."

[150] Richard Falk, "The United States and the Doctrine of Non-Intervention in the Internal Affairs of Independent States", *Harv. Int'l L.J.* (1959) 163, 167.

[151] Ibid.

Even human rights scholars have expressed their concerns in this regard by warning against the risks present in the formal acceptance of the right of humanitarian intervention. For example Henkin stated that humanitarian grounds are "easy to fabricate" and that every situation of intervention has been "justified on some kind of humanitarian ground.[152]" The toll which such a "right" would exact on the international normative order would thus, it is alleged, be inestimable: "Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other[153]." Furthermore in this new era where all the states are equal and sovereign in formal sense the legal right of humanitarian intervention would be a kind of temptation for "big power intervention on the opposite sides of a wide range of domestic disputes[154]."

History is witness that these fears are true and that they need full and serious contemplation. The most notorious example of the right of humanitarian intervention in modern history happened when Adolf Hitler demanded that German force was essential to protect the ethnic Germans living in Czechoslovakia who had been "subjected to the "brutal will [of] destruction [by] the Czechs' [and] whose behavior was "madness' [that had] led to over 120,000 refugees being forced to flee the country ... while the "security of more than [three million] human beings'

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[152] Louis Henkin," Kosovo and the Law of Humanitarian Intervention", *AM. J. INT'L L.* (1999) at 96.

[153] Ibid at 145.

[154] Ian Brownlie, *Humanitarian Intervention, in Law and Civil War in the Modern World* (John Norton Moore ed., 1974) at 340-41 (arguing that the insitution of humanitarian intervention "did not conspicuously enhance state relations and was applied only against weak states. It belongs to an era of unequal relations"); D.J. Harris, *Cases and Materials on International Law* (Sweet and Maxwell, 2010), 185. Compare the position of Lillich who argues, in the context of the right to protect nationals abroad, "these rules generally operated in the interests of the smaller countries as well."

was at stake[155]." And this is not the only example[156]. The outlook of the offensive application of humanitarian intervention is so a very real and strong contemplation but it is the one that needs a deliberate and logical response. Appealing to extreme solutions or responding is undesirable. Professor Rosalyn Higgins has argued:

"Many writers do argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims to the right to self-defense. That does not lead us to say that there should be no right of self-defense today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made[157]."

In supporting the recognition of a limited right of unilateral humanitarian intervention, this writer is not ignorant of the serious threats this approach contains. Specially the risk of abusive and offensive intervention. But as early supporters of humanitarian intervention pointed out almost a century ago: "It is a big mistake, in general, to stop short of recognition of an inherently just principle, [merely] because of the possibility of non-genuine intervention[158]."

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[155] *See* Norman Davies, *Europe: A History* (Oxford University Press, 1996), 987.

[156] *See*, e.g., Appeal from the Chinese Government under Article 11 of the Covenants, 12 League of Nations O.J. 2289 (1931) (discussing the Japanese justification of her occupation of Manchuria); Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Het Spinhuis,1993), 10 (providing other examples of past abuses of humanitarian intervention).

[157] Rosalyn Higgins, *Intervention and International Law, in International World Politics* (2004) at 247.

[158] Jean-Pierre L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: It's Current Validity under the U.N. Charter", *4 Cal. W. Int'l L.J.* (1974): 203, 269.

Therefore whether states respect some form of humanitarian intervention as allowable in principle within international law must be determined first. If yes then like that of self-defense, this will be subject to "regulation and evaluation by the law" on each and every occasion that it is bring into play[159].

Consequently we have two separate but connected matters for investigation have to discuss. One is whether humanitarian intervention is an acceptable head of intervention under international law. And it is a different question from whether its usage in a specific case is justified or lawful. As in the case of self-defense the use of force and the level of the force actually applied will require to be reviewed in light of the existing circumstances. If humanitarian intervention is not measured to be a acceptable form of intervention in international law then its invocation in a particular instance is probable to be considered as unlawful by itself, except, certainly, there is noteworthy support for a change in the legal position so as to allow it to become an acceptable head of intervention[160].

That's why the usage of armed forces on the bases of humanitarian intervention does not enjoy the automatic and ultimate acceptance of international community. The more considered response to these concerns about the potential abusive invocation of the right of humanitarian intervention is to establish a variety of safeguards for examination by states. Such as to recollect supportive and instructive standard of the right in action plus to express the appropriate legal

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[159]Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011).

[160] This is what Thomas Franck & Nigel Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *AM. J. INT'L* (1973): 303, this has labeled "the harbinger of a new law that will, henceforth, increasingly govern interstate relations,", and constitutes one of the classic dilemmas of the concept of custom in international law. *See* Roy Goode, "Usage and Reception in Transnational Commercial Law", *Int'l & Comp. L.Q.* (1997): 1, 9 ("The problem with the requirement of the observance of custom from a sense of legally binding obligation is that it is based either on circularity or on paradox, for it presupposes a belief in an existing legal duty which if correct would make the belief itself superfluous and if erroneous would convert non-law into law through error"). For a general discussion on the role of custom in international law, *see* John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980), 238-256.

principles such as those of necessity, proportionality and the humanitarian rationale of the operation. That permits the lawfulness of the use of force in practice to be evaluated and the abusive use of force to be prevented[161]. Such precautions against abuse are necessary because "whether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision-makers - by the Security Council, by the International Court of Justice, by various international bodies[162]."

Certainly, the predictable statement will come forward that the right of humanitarian intervention has much more possibilities of abuse in practice than is the right of self-defense. Especially since the right of self-defense is now regulated by Article 51 of the United Nations Charter. But mistreatments of this scale will in fact provide facilities to determinations of unlawful action because there is least trouble in revealing such serious infringements of the regulation of force for what they are. The inimitable, though modest, contribution of what Oscar Schachter once called "the invisible college of international lawyers" will help achieve this[163].

Such as, Christopher Greenwood, has admired the alliance intervention to protect the endangered Kurdish population in northern Iraq in 1991 on the basis that it was "a far cry from

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[161] For example, the international law of peace and armed conflict both articulate the principle that the use of force can never be used to acquire title to territory, the purpose of which is to ensure that in the application of force by states for whatever reason(s), "not an atom of sovereignty [invests] in the authority of the occupant." Lassa Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants", *Law Q. Rev.* (1917): 363-364. Which provides an authoritative statement of customary international law: "the territory of a State shall not be the object of acquisition by another state resulting from the threat or use of force" and that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." This statement is confirmed by laws regulating armed conflicts. *See, e.g.*, Regulations of the Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 100 B.F.S.P. 338 (discussing the temporary nature of any military control); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, 75 U.N.T.S. 287; First Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 4, 1125 U.N.T.S. 3.

[162] Ibid.

[163] *See* Oscar Schachter, "The Invisible College of International Lawyers", *Nw. U. L. Rev.* (1977): 217.

cases like Cambodia, in which the intervening state overthrew the government of its neighbor, or Bangladesh, in which India's intervention led to the creation of a new state[164]."

Furthermore, the mutual actions of armed force for humanitarian protection in Liberia in 1990 and then later again in northern Iraq in 1991 reveals that the fearful threat of abuse may not be as great as once imagined[165]. so there are certainly prima facie cases where some type of humanitarian intervention is acceptable exclusive of the happening of abuse - for example the overthrow of an present government or the violent dismemberment or permanent occupation of sovereign territory. President Saddam Hussein continued in power even after allied forces entered Iraqi territory in 1991 on their humanitarian mission. Even Regardless of considerable international criticism of his leadership and foreign policy. In addition, all these quick session interventions suggests that whenever the actions of a regional association or an ex tempore coalition of states can be concentrated to the common humanitarian need, the dynamic of such operations stand against the abusive or unlawful use of force[166]. Therefore States working together in this way to aid the humanitarian motives of a shared armed operation is helpful[167].

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[164] Christopher Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law", *55 Mod. L. Rev.* (1992): 153- 177. This analysis is without prejudice to the status of the right of humanitarian intervention at that point in time and is used to demonstrate how (assuming the right were endorsed in international law) it is possible to make substantive distinctions between one "invocation" of the right in action and another.

[165] Although, it should be noted, the creation of a no-fly zone in southern Iraq on August 26, 1992 - without the authorization of the Security Council - met with a hostile response from Algeria, Jordan, Syria and Yemen. Serious reservations were also expressed by Egypt and Saudi Arabia. *See* Keesing's Record World Events 39068 (1992). Furthermore, in September 1996, the United States extended the southern no-fly zone by 110 kilometers to the thirty-third parallel. It is significant to note that the episode exposed greater differences in world opinion: France and Russia registered their concern about the nature of American policy. *See* "Provocation and Response", *Economist*, (Sept. 7-14, 1996), at 37; *see* also Nigel D. White, "Commentary on the Protection of the Kurdish Safe-Haven: Operation Desert Strike", *J. Conflict and Security L.* (1996): 197 (providing a concise legal analysis of the issue); infra note 95.

[166] Brownlie regards the multilaterization of the French intervention in Syria in 1860 as an assurance of the "disinterestedness" of the prime mover behind the operation. *See* Ian Brownlie, *Principles of Public International Law* (4th ed. 1990), at 340. This multilateralization occurred in the form of an international convention, signed by Great Britain, France, Prussia, Russia and Turkey on August 3, 1860. But compare the positions of Murphy, supra note 1, at 54, and Pogany, infra note 86, who believe that the international action was sanctioned by the Sublime Port and, as such, does not stand as a precedent of humanitarian intervention, even though the intervening powers

3.2.2 The Selective Use of Humanitarian Intervention:

Certainly, there is much to be said for the old maxim that like cases must be dealt alike. Because this is the main characteristic this builds rights and awareness of a fair and just legal system. One of the enduring assets of the law is that it stands for the rule of law. And that rule of law recommends, in Dicey's famous formulation, "equality before the law[168]." so the principled protest to humanitarian intervention is that, if acknowledged in law, the right of humanitarian intervention will establish infinite chances for the selective use of force in humanitarian need cases and in return fundamental relationship between international law and the rule of law will be in danger: "Humanitarian intervention would be highly selective and nearly always dictated by political and strategic interest[169]." certainly , practice has shown that "widespread torture" takes place "in a large number of countries that appear blissfully unaware of their vulnerability to legitimate intervention[170]."

Even as this line of reasoning is acceptable to focus the selective and partisan nature of the process of humanitarian intervention in practice, But this claim wrongly envision the theoretical makeup and traditional perceptive of humanitarian intervention in international law. This perceptive has been introduced as a right of states and not as an obligation requiring state action. Innate in the very formation of a right is a factor of selectivity in the exercise of that

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asserted the right and regarded its exercise as inevitable. *See* Stephen Kloepfer, "The Syrian Crisis, 1860-61: A Case Study in Classic Humanitarian Intervention", Can. Y.B. Int'l L. (1985) : 246, 255, 258.

[167] Ibid.

[168] A.V. Dicey, Lectures Introductory to the Study of the Law of the Constitution (1885) at 208.

[169] *See* Ian Brownlie, *Principles of Public International Law* (1990) at 25-26; *see* also W.E. Hall, *International Law* (Clarendon Press, 1880), 342 (expressing concern that "the principle is not even intended to be equally applied to the cases covered by it").

[170] *See* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention, in Law and Force in the New International Order* (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

right[171]. This right resides with the judgment of that sovereign right holder body to decide whether or not to use the right in question and to deploy its army to the foreign territories. Plus it has the responsibility to explain the need to exercise this right. Generally it is seen that where the states have exercised this right they have justified it as some legal entitlement not as some sense of legal duty[172]. The level of satisfaction of this approach is still discussable, but the case is still there that even in humanitarian intervention actions in recent times, the legal belief of participating states is based on the sense of an entitlement and not in terms of a duty. The West African intervention in Liberia in 1990 was designed - in the words of the intervening states - to curtail "the massive destruction of property and the massacre by all the parties [to the conflict] of thousands of innocent civilians including foreign nationals, women and children[173]." No

[171] *See*, for example, Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", *Yale Law Journal* (1919), when he wrote of the "privilege" to do something. This privilege entailed a fundamental discretion as to whether or not to exercise a given right, such as the "privilege (or right) of self-defense" in the domestic order. Id. at 33; *see also* Arthur L. Corbin, "Legal Analysis and Terminology", *Yale L.J.* (1919): 163-165. By way of analogy, the right of collective self-defense in Article 51 of the United Nations Charter allows states - it does not oblige them - to resort to forcible measures in collective self-defense of a threatened or injured state. Philip Allott, "State Responsibility and the Unmaking of International Law", *29 Harv. Int'l L.J.* (1988): 1, 22 (discussing the significance of the legal right of self-defense). For French political thinking and legal doctrine, *see generally*, Mario Bettati, Le droit d'ingerence: Mutation de l'ordre international (1996); Bill Bowring, "The "Droit et Devoir D'Ingerence': A Timely New Remedy for Africa", *Afr. J. Int'l & Comp. L.* (1995): 493.

[172] One should be aware of the emerging political rhetoric which seeks to identify a "new approach to intervention [that has] incrementally appeared in the past two decades," which awards the international community "the right, indeed the responsibility, to concern itself with human rights within states." Warren Zimmermann, Bad Blood, N.Y. Rev. Books, May 28, 1998, at 39. This development should be placed within the context of the actual wording and interpretations of established conventional regimes. *See* notes 115, 116 and accompanying text. Statements of legal principle need to be dissected from statements of political rhetoric, exemplified by the emotive words of President Roosevelt, which he wrote in 1904 in the context of the Spanish-American War of 1898: "Brutal wrong-doing, or impotence, which results in the general loosening of the ties of civilized society may finally require intervention by some civilized nation, and in the Western Hemisphere the United States cannot ignore this duty," quoted in John Bassett Moore, *The Principles of American Diplomacy* (Harper & Brothers Publishers, New York and London,1918), 262.

[173] First Session of the Standing Mediation Committee: Final Communique, Economic Community of West African States, Aug. 1990, P6

statement was made in this case (or indeed in the leading precedents of the nineteenth century) to the effect that the humanitarian intervention occurred pursuant to some pressing legal duty[174].

While keeping this in mind, the argument is made that if humanitarian intervention is in principle supposed to be adequate to the international community then only on one condition humanitarian intervention when permission for the use of force is available from the Security Council[175]. Chapter VII of the United Nations Charter stated, there are two acceptable occasions for the use of force: enforcement action of the Security Council under Article 42 and the right of individual and collective self-defense under Article 51. Nevertheless, Chapter VIII acknowledges the position of regional organizations in the "maintenance of international peace and security as are appropriate for regional action" (Article 52) and for enforcement action under the authority of the Security Council (Article 53). No right of humanitarian intervention (as understood in its classic sense) was visualized within this agenda. And this has been proven that states have not been interested to incorporating de facto humanitarian interventions under the head of self-defense[176]. As a result, according to the precise text and paradigmatic and classic law of the United Nations Charter, Chapter VII (Article 42 in particular) states the only practical legal basis for such actions[177]. It has been emphasize that this understanding,[178] would arrange the lawful

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[174] *See* R.W. Seton-Watson, *Britain in Europe, 1789-1914* (CUP Archive, 1955), at 419-20 (discussing French intervention in Syria in 1860); David S. Bogen, "The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in Dominican Republic (1965)", *Int'l L. Club J.* (1966) at 266.

[175] *See* Vladimir Kartashkin, *Human Rights and Humanitarian Intervention, in Law and Force in the New International Order* (Lori Fisler Damrosch & David J. Scheffer eds., 1991) 185, 197; Jost Delbr, "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations", Ind. L.J. (1992): 887, 889-91. The Charter envisages enforcement action by regional arrangements or agencies, but, according to Article 53 of the United Nations Charter, "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." Theodor Meron, *Commentary on Humanitarian Intervention, in Law and Force in the New International Order* (Lori Fisler Damrosch & David J. Scheffer eds., 1991): 212, 213.

[176] *See* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention, in Law and Force in the New International Order* (Lori Fisler Damrosch & David J. Scheffer eds., 1991), 185-186

[177] Ibid.

explanation for humanitarian intervention by including it within the enforcement powers of the Security Council. This action will at one and the same time, reduce the chances for the selective, informal application of force by states in cases of humanitarian catastrophe.

For the approval of the use of force to happen under Article 42, the Security Council is obligatory to state that there exists a threat to the peace, a breach of the peace or an act of hostility. Article 39 of the United Nations Charter speaks about this requirement and worded in properly mandatory language: "the Security Council "shall" make such findings and this may be taken to introduce the requisite degree of consistency of treatment of similar cases of humanitarian catastrophe. Experience, however, has shown that the Security Council considers that such determinations result from the exercise of its unfettered discretion and not necessarily in accordance with pre-determined, objective criteria[179]". Even where the Security Council creates the necessary procedural finding under Article 39, the Security Council is not then in law indebted to approve the use of force under Article 42: the Charter admits that this issue lies within the decision-making right of the Security Council[180].

The reliability and efficiency of the United Nations as a global organization with universal appeal depends on the balance when it decides that Libya is a threat to the peace for failing to hand over suspected terrorists for trial but not Afghanistan[181], and when it decides to approve the

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[178] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, 1996), at 381.

[179] *See*, for example, the resolution adopted by the Security Council against Libya.

[180] *See* U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security").

[181] Osama Bin Laden, suspected of participating in the attempted assassination of Egyptian President Hosni Mubarak in Addis Ababa in June 1995 and in the bombing of American targets in Saudi Arabia in 1996, has been given shelter by the Taliban Islamic militia in the Afghan city of Kandahar. The position of Afghan authorities is that this sheltering is not in violation of international law. *See* Christopher Thomas, "Taleban Shelters Islamic "Terrorist,'" *Times* (London, 1997), at 18. The Security Council did, however, adopt limited measures against the Sudan for its apparent involvement in the assassination attempt. *See* S.C. Res. 1054, U.N. SCOR, 3660th mtg. at 1, U.N. Doc. S/RES/1054 (1996); S.C. Res. 1070, U.N. SCOR, 3690th mtg. at 1, U.N. Doc. S/RES/1070 (1996); but cf. S.C. Res.

use of force against unlawful governments in Haiti but not in Nigeria or Sierra Leone[182]. The problem is compounded because the United Nations Charter does not envisage the possibility of judicial scrutiny of Security Council action[183], and, of course, by the very nature of the political beast that is the Security Council[184].

748, U.N. SCOR, 3063d mtg., U.N. Doc. S/RES/748 (1992), in which the Security Council determined that the failure by the Libyan government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests contained in Resolution 731 (1992), [in which the Security Council decided that Libya should meet the requests of the United States and the United Kingdom to surrender two Libyans suspected of participation in the bombing of Pan American Flight 103 on 22 December 1988] constituted a threat to international peace and security and imposed extensive diplomatic and economic sanctions as a result. These sanctions have met with increasing opposition. *See* Ian Black, "Britain Fends Off Calls to End Libyan Sanctions", *Guardian* (London, 1992).

[182] *See* Ian Brownlie, *International Law in the Changing World Order, in Perspectives on International Law* (Nandasiri Jasentuliyana ed., 1995) 49-54. By unanimous decision, however, the Security Council imposed only oil, arms and travel sanctions on Sierra Leone after "the military junta had not taken steps to allow the restoration of the democratically-elected Government and a return to [the] constitutional order" that the junta usurped in May 1997. S.C. Res. 1132 U.N. SCOR, 3822d mtg. at 1, U.N. Doc. S/RES/1132 (1997). *See* Sanctions on Sierra Leone, Independent (London), Oct. 9, 1997, at 14. This decision is a response that echoes part of its strategy in dealing with similar political situation in Haiti after the 1991 coup d'etat there, but differs from its handling of the constitutional crisis that has unfolded in Nigeria since June 1993.

[183] *See generally* Jose E. Alvarez, "Judging the Security Council", *Am. J. Int'l L.* (1996); Derek Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures", *Eur. J. Int'l L.* (1994); Geoffrey R. Watson, "Constitutionalism, Judicial Review and the World Court", *Harv. Int'l L.J.* (1993). The International Court of Justice has emphasized that, under Article 25 of the United Nations Charter, decisions of the Security Council are legally binding, including controversial determinations. *See* Ruth Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond", *Mich. J. Int'l L.* (1994); cf. Dapo Akande, "The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations", *Int'l & Comp. L.Q.* (1997). In recent litigation, the International Court of Justice has found that it does have jurisdiction on the basis of Article 14 (1) of the Montreal Convention of September 23, 1971 to hear the disputes between Libya and the United Kingdom and the United States as to the interpretation or application of the provisions of that Convention notwithstanding the action of the Security Council. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K. & U.S), 1998 I.C.J. P53, (Feb. 27) (Preliminary Objections).

[184] In the context of the outbreak of violence in the Serbian province of Kosovo during the spring and summer of 1998, the claim has been made that it would be "absurdly legalistic to act on the Security Council's say-so" given the possible (Russian) veto of Security Council authorization for intervention. "Intervene and Be Damned? ", *Economist*, (July 4-10, 1998), at 14. Contemplating this possibility, President Clinton was reported to have made the case for air strikes against Serbian targets without authorization from the Security Council. *See* Carla Anne Robbins, NATO Surveys Members on Kosovo Air Strikes: Objective Is to End Attacks by Serbs, Wall St. J., Aug. 13, 1998, at A10. Igor S. Ivanov, the Russian Foreign Minister, advised the 53d session of the General Assembly against any acceptance of "attempts to undercut the Charter-stipulated powers of the Security Council to use coercive measures." Barbara Crossette, "West and Russia in Accord on Kosovo Actions", *N.Y. Times* (Sept. 23, 1998), at A8. "We must not allow," he argued "[the] creation of a precedent involving the use of military power in a crisis without the support of the Security Council." Id. See also the position of former British Prime Minister Margaret Thatcher during the Kurdish crisis in Iraq in April 1991 that "it should not be beyond the wit of man to get planes [into northern Iraq] with tents, food and warm blankets" and that it was "not a question of standing on legal

On the other hand, the supporter or political invocation of the right of humanitarian intervention can be attributed to the domestic forces of realpolitik but still managed by law and adjusted by the truth that humanitarian intervention has been regarded as a permissive rather than mandatory norm in legal principle and practice. Additionally, we must keep this in mind that there is no instant or forceful guarantee that armed force processed or authorized by an international institution for humanitarian purposes will ipso facto be less open to abusive behavior[185].

Consequently, if states will show the intent to authorize such actions in principle, maybe one way of minimizing the consequential uncertainty would be to recognize a de minimize threshold - taken from new and old experiences of state practice - for these type of operations, so as to put a basic prompt device in place for future reference and use. Certainly, this threshold might be of inadequate value in curing inconsistency in comparable cases, but it is one important contribution along with the precise function of the humanitarian mandate for the action that can be produced in adjusting the right of humanitarian intervention in practice.

These complexities expand to important realistic boundaries on how the Security Council may react in a given crisis or conflict situation. Even accepting, argued, the principle that Security Council authorization is the sole legal basis for some form of humanitarian action, that this in itself would produce the desired results of affording humanitarian protection to imperiled populations is doubtful. Although the Security Council determined on April 5, 1991 that "the

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niceties." George G. Church, "The Course of Conscience", *Times.* (Apr. 15, 1991): at 22.

[185] *See*, for instance, the discussion by Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights, in Law and Force in the New International Order* (Lori Fisler Damrosch & David J. Scheffer eds., 1991), 185-198. Abuse can take one of two forms: either of the mandate at hand or of the breach of the rules of warfare in the execution of that mandate. The American-led intervention, authorized by the United Nations, in Somalia in 1992 is the most potent example of the latter case. *See* Richard Dowden, "U.S. Massacred 1,000 Somalis, Revealed: How Trapped Soldiers Fired Indiscriminately on Crowds and Used Corpses and Shields", *Observer* (London, Mar. 22, 1998): at 1.

repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions" "constituted a threat to regional peace and security, the Security Council stopped short of sanctioning the use of force"[186]. Conventional assumption at that point in time recommended that if any such resolution had been put to the vote in the Security Council, certain states would have made the resolution the victim of the veto[187]. Nevertheless, the same states, acknowledge that they would not made objection against individual (or collec0tive) state action to attain the same result because their main motive was not to build an institutional model that could be used against them within that political setting in future.

Inside the particular Charter agenda on the exercise of force (Chapter VII), worried states faced with either non-action or an exceptional invocation of the right of humanitarian intervention[188]. Because of this specific reason, humanitarian intervention is still an individual doctrinal group in international law as it summarizes the concept from the classical period of international law, pre-dating the international law of human rights, of the individual or collective use of force on humanitarian grounds without the need to secure institutional authorization for

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[186] S.C. Res. 688, U.N. SCOR, 2982d mtg. at 1, U.N. Doc. S/RES/688 (1991) (ten votes in favor, three votes against Zimbabwe,yemen and cuba while india and china were abstaining..

[187] David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq and the New World Order, in Right Versus Might: International Law and the Use of Force* (Louis Henkin et al. eds., 1991), 109, 145-46. Cf. Helmut Freudenschubeta, "Article 39 of the U.N. Charter Revisited: Threats to the Peace and the Recent Practice of the U.N. Security Council", *Aus. J. Pub. Int'l L* (1993).

[188] *See* Fernando R.Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Irvington-on-Hudson, N.Y. Transitional Press, 1997): 185. Id. Consider also Reisman's view: "in these situations, it is not the human rights deprivations suffered by the victims that are perceived as the compulsion or justification for action. The justification for action is found in the threats the situations pose to the rest of us." W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law (1990). at 433.

"humanitarian intervention[189]." Per se, humanitarian intervention presents an essential working principle or conceptual framework for observing the degree to which state practice encourages this type of the use of force in modern international law.

Even though there was similar international approval for forcible action in Liberia in August 1990 but on the other hand Security Council was under pressure by the end results of the Iraqi attack on Kuwait on August 2, 1990. The Council merely supervised to support the urgent August 1990 intervention by West African forces in Liberia some two years later, in November 1992[190]. Though realistic may sounds Contentious but these issues compel us to understand that even when the international political climate is based on co-operation and not division, the omnicompetence of the Security Council in such issues remains an isolated and doubtful prospect. In that case in international law what remaining responsibility lies with states when faced with a humanitarian crisis on the scale of Liberia (1990) or northern (and even southern) Iraq (1991) to exercise the right to use force for humanitarian protection in lieu of authorization by the Security Council?

3.2.3 Purity of Motive

Doubts and enduring worries as to the legal toleration of humanitarian intervention also stem from a surviving cynicism that states are dubious to involve their armies in genuine unselfish intrusions. As corporate Hobbesian offspring, states are only ready to act in their own self-

[189] Richard B. Lillich, The International Protection of Rights by General International Law, 1972 Report of the International Committee on Human Rights of the International Law Association 38, 54. Even though the Security Council thrives on its current lease of life, and even though it is operating in a political environment of greater international co-operation, the Security Council may prove unable (as in Liberia (1990)) or unwilling (as in northern Iraq (1991) and southern Iraq (1992)) to allows the exercise of force for humanitarian matters because of this issue still remains a relevant one.

[190] *See* S.C. Res. 788, U.N. SCOR, 3138th mtg., at 1, U.N. Doc. S/RES/788 (1992) ("welcoming the continued commitment of the Economic Community of the West African States (ECOWAS) to and the efforts towards a peaceful resolution of the Liberian conflict");

interest by creating the ostensible right of humanitarian intervention appear as not but more than a lasting, even self-contradictory, legal convenience. The moral philosopher Michael Walzer, believes that the life of foreign person "don't weigh heavily in the scales of domestic decision-making" and quit himself to the noticeable unavoidability of "mixed motives[191]." Also, the historical record is one in which "the humanitarian motive [in such cases] is at least balanced, if not outweighed, by a desire to protect alien property or to re-enforce socio-political and economic instruments of the status quo[192]." In order to slot in the right of humanitarian intervention into its ranks, international law should accept not only a dangerous stance but a hypocritical one as states would never do something for purely humanitarian reasons as the right of humanitarian intervention can never serve as anything more than a facade validation which the law should neither welcome nor be seen to welcome[193].

Although the vision of mistreatment strongly connected to the first criticism made on humanitarian intervention and the requirement of the purity of the motives behind such operations may be distinguished on the bases that it possibly applies even in cases of prima facie lawful intervention. This has been said that for any lawful humanitarian intervention to happen, not only the use of armed force should be kept in check and based only on humanitarian need, but the purpose of participating governments should also be incontrovertible. For example, a

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[191] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Oxford University Press 2d ed. 1992), 102.

[192] *See* Sam Kiley & Charles Bremner, "Rwandan Rebels Seize Capital and Second City", *Times* (London, 1994). The French government did, however, later issue instructions to French forces to halt any further advances where these placed the lives of Hutu refugees at risk. *See* Barry James, "Rebels Take Kigali, French Army Guards Fleeing Rwandans", *Int'l Herald Trib.* (London, 1994), at 1. For a suggestion that humanitarian protection was behind France's creation of "safety zone" in southwestern Rwanda on July 2, 1994, *see* Barry R. Posen, "Military Responses to Refugee Disasters", *12 Int'l Sec.* (1996): 72, 97. For the domestic political considerations that accompanied the French intervention, *see* Gerard Prunier, *The Rwanda Crisis: History of Genocide* (Oxford Ubiversity Press 1995), 281-99.

[193] Stvan Pogany criticizes the French attack on Syria in 19th century on the basis inter alia that "it would be naive to view the object of French intervention as wholly humanitarian." Istvan Pogany, "Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined", *Int'l & Comp. L.Q.* (1986): 182-188.

renewed suspicion has been on the 1860-61 French "humanitarian intervention" in Syria because whether "humanitarian considerations" were "decisive" is dubious. French objectives were "probably ambiguous" sufficient to disqualify this as a reliable precedent of humanitarian intervention[194].

"Nonetheless, there is something definitely false about building legal determinations which are based on concealed motives or hidden plans"[195]. it has also been stated by the voices of political sophisticates throughout 1990-91 Gulf clash that the reaction of the Western world to the Iraqi pursuit of neighboring Kuwait was based on the law of self-interest and not the law of self-defense because "if Kuwait had been famous for its carrots, the United States would not have lifted its proverbial finger[196]." Professor Teson has made the important observation that we should not confuse "psychological motivation" with "legal justification[197]"- an attitude that is sure to lose us in a dilemma of assumptions, frequent claim and counter-claim[198].

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[194] Ibid at 187, 190

[195] Leo Kuper questions whether "impurity of motive" is a valid objection to humanitarian intervention given the intrinsic nature of state behavior and the alternative strategy "to impose conditions to reduce, in some measure, the outright abuse of the doctrine." Leo Kuper, *Theoretical Issues Relating to Genocide: Uses and Abuses, in Genocide: Conceptual and Historical Dimensions* (George J. Andreopoulos ed., 1994), 31, 42.

[196] The intriguing remark is attributable to the British Labor parliamentarian Tam Dalyell MP.

[197] Fernando R. Teson, *Humanitarian Intervention : An Inquiry into Law and Morality* (3d ed. 2005), at 254. To similar effect, see the argument advanced by Lillich that the "economic interests of the great powers... does not necessarily impeach the viability of the rules that were established" to protect their nationals on alien territories. *See* Richard B. Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Law and Civil War in the Modern World (John Norton Moore ed., 1974) at 328. Applying this distinction in practice Rein Müllerson has, for example, made the persuasive argument that,

> "... accepting that the concern for Kuwaiti oil was the main (or even overwhelming) factor triggering Operation Desert Storm would not in any way delegitimize the world community's response (led by the United States) to the Iraqi aggression. Saddam Hussein had also committed an original sin against the very essence of the interstate system-a direct across-the-border invasion. Even if it were possible to find out which had more influence in triggering the coalition's response-a blatant armed attack by Iraq or Western oil interests-it would not delegitimize the response."

[198] *See* Philip Alston, "The Security Council and Human Rights: Lessons to be Learned from The Iraq-Kuwait Crisis and Its Aftermath", *Austl. Y.B. Int'l L.* (1992):107, 110-12 (comparing Andre Gunder Frank, "Third World War: A Political Economy of the Gulf War and the New World Order", *33Third World Q.* (1992): 267, who mapped

In addition, what is the precise reason behind observing the motives behind an action? If "motive" is measured to be the sine qua non for permissible interventions, why is the legal power for this scheme so difficult to trace? Even if we were to accept these terms, would firmness on the "purity" of motive be logical? If not, why does "motive" then matter? If so, are motive-based arguments practical in practice? Are the real motives of states that simple to determine? Do states act on the basis of single or multiple constraints[199]? Are these constraints hierarchical? Do the objectives of states related to humanitarian interventions remain same? What of the reason of competing motives where there is multilateral action? Is declaring that states never act on the basis of humanitarian motives correct[200]? What should be the legal significance of such factors? And in the end, should legal significance be given to such factors?

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out Western economic, geo-political and hegemonic interests that allegedly underpinned the reason for military involvement, with Peter M. Labonski and Kunal M. Parker, "Human Rights As Rhetoric: The Persian Gulf War and United States Policy Toward Iraq", *4 Harv. Hum. Rts. J.* (1990): 152, 155-56, arguing that President Bush "rallied the general public to a war not just for oil or money, but for humanity"). The emergence of humanitarian values within the international system, alien to the unadulterated stato-centric model of an "international community," is one that is sure to attract a growing following: recalling the commitment of 500,000 military personnel in the 1990-91 Gulf Conflict, the Venezuelan Ambassador to the United Nations compared this with the relative inaction of states in the conflict in Bosnia-Herzegovina and proclaimed that the latter tragedy "has far more worrisome dimensions, as manifested in unspeakable crimes against humanity. There are essential values that should indeed be of strategic importance for the international community." U.N. SCOR, 3227 mtg., at 25, U.N. Doc. S/PV. 3228 (1993).

[199] Operation Alba, for example, the Italian-led intervention in Albania in April 1997, was attributed to reasons of "geography, history and perhaps even idealism." *See* "A Naughty New Bit of Nationalism", *Economist* (1997): at 30. On March 28, 1997, the Security Council "authorized the member states participating in the multinational protection force to conduct the operation in a neutral and impartial way" in order to "facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance." S.C. Res. 1101, U.N. SCOR 3758th mtg. at 2, U.N. Doc. S/RES/1101 (1997). The Resolution adopted under Chapter VII United Nations Charter, further authorized member states "to ensure the security and freedom of movement of the personnel of the said multinational force." Id. This consideration coincides with the identity of the intervening state(s) which does not itself appear to be treated as a significant or material factor. *See* D.W. Bowett, "International Incidents: New Genre or New Delusion", 12 *Yale J. Int'l L.* (1987): 386, 388.

[200]Some of the sternest critics of the doctrine of humanitarian intervention concede that "genuine cases of humanitarian intervention" do exist. *See, e.g.* Iona Lewis & James Mayall, *Somalia, in The New Interventionism 1991-1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia* (James Mayall ed., 1996) (discussing the possible motivations behind America's involvement in Somalia in 1992), 94, 110-11 ; Andrew S. Natsios, *Humanitarian Relief Intervention in Somalia: The Economics of Chaos, in Learning From Somalia: The*

What counts in such conditions is not so much the character of the motive - vague as this may be to find or decide - but the convenient product of the intervention in question: did forcible humanitarian safety alone occur as a straight result of armed intervention[201]?

Even though if the actual purposes behind an international deed are visible the usage of these purposes to achieve the legality of an action is unfair. And the only result of a given action is the real security of human life. This explanation has been presented as the legal justification for action. That's why it is being accepted by the world community without any change.

The above analysis is not to deny the possible suspicion which hidden motives or secret intentions could have. significance of this nature do become important where the model humanitarian aspect of the intervention is rejected by menacing agendas of permanent political change or may be by some form of international control. So in these cases the hidden reasons of the military operation discloses the unlawful or forbidden exercise of force. And this is the purpose that in its doctrinal form and traditional application, the right of humanitarian intervention has only authorized the exercise of power and force as it is essential and fair to the intention of humanitarian safeguard – "its very raison d'etre[202]".

Lessons of Armed Humanitarian Intervention (Walter Clarke & Jeffrey Herbst eds., 1997), 77-78 (suggesting that the American intervention in Somalia in 1992 was based "entirely on humanitarian rather than geopolitical objectives"); John G. Sommer, *Hope Restored? Humanitarian Aid in Somalia 1990*-1994 (RPG Refugee Policy Group, Center for Policy Analysis and Research on Refugee Issues,1994) at 29-33 (highlighting the political significance of providing humanitarian relief, support, and supplies at that point in time). The fact that Canada does not possess a colonial past in Africa established the bona fide credentials of her leadership of the proposed military intervention in Zaire in November 1996. *See* Joseph Fitchett, "Canada Agrees to Lead Military Force in Zaire", *Int'l Herald Trib.* (London, 1996), at 1. But the multinational force organized for this operation was not actually deployed. *See* N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester University Press, 1997).

[201] W. Michael Reisman, "Criteria for the Lawful Use of Force in International Law", 10 *Yale J. Int'l L.* (1985): 279, 284; *see also* Tom J. Farer, "Panama: Beyond the Charter Paradigm", *Am. J. Int'l L.* (1990): 503, 505-06 (arguing that "rescue missions cannot be persuasively indicted as violations of international law, as long as they comply with the principles of proportionality and necessity ... and are not tainted by ulterior motives").

[202] It is on this basis that Judge Koroma has criticized Rougher's description of humanitarian intervention as "the right of one State to exercise international control by military means over the acts of another State with regard to its

On the other hand, it is significance to recall the rapidity and effectiveness with which Operation Provide Comfort was executed in northern Iraq in 1991 - an intervention which was specially made to protect life by the states involved and at a time when the nature and genuineness of the expressed humanitarian motives of the mission were made the focus of serious critical analysis. The model suggests that the law is more usefully engaged where it designates the conditions depends on the permitted exercise of force and power in cases of humanitarian disaster till the time the international community is ready to support forcible humanitarian protection in principle[203]. This has happened that where a state wants to safeguard its own nationals whose lives are at risk on foreign soil: the controlled or proportionate use of force - "the epitome of a "surgical' military sortie[204]". This action has acceptable general legal understanding by states on situation that this humanitarian intervention does not include the recognition of indecent or intolerable motives and that is motives which do not match with the imperative legal basis. The bases that have forced states to recognize the principle of limited force to safeguard their own nationals.

Hence, the purity of motive aspect needs to be correctly and suitably measured when we slot in the rigors and the dynamics of legal analysis. Generally a query by lawyers into the motives behind a particular action or use of force will, presumably, take us down a blind and fruitless

internal sovereignty when such acts had been exercised in a manner contrary to the laws of humanity." Abdul G. Koroma, *Humanitarian Intervention and Contemporary International Law* (1995) , 409, 413. Concern, however, has been expressed as to whether the extended no-fly zone in southern Iraq remains necessary and the extent to which it has implications beyond its original humanitarian objectives. Roula Khalaf, "Iraq to Defy No-Fly Zone", *Times* (London, 1997), at 7; "White House Warns Iraq Against Pilgrim Airlift", *Int'l Herald Trib.* (1997): at 2.

[203] Ved P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti - Revisiting the Validity of Humanitarian Intervention Under International Law - Part I, 20", *Denv. J. Int'l L. & Pol'y* (1992) 305, 330-34; James A.R. Nafziger, "Self-Determination and Humanitarian Intervention in A Community of Power", *20 Denv. J. Int'l L. & Pol'y* (1991): 9, 29-32.

[204] Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge University Press, 2001), 229. For the legal distinction that has been made between the protections of state citizens as opposed to humanitarian intervention, which is the use of force to protect the threatened nationals of the target state.

path, for it is "naumive to consider that states can be put on the psychiatrist's couch where their hidden motivations will be revealed[205]." the principal consequences of any given military operation is significant even where a state's purpose for action are open to question or placed in serious suspicion. So if the international community is eager to call and encourage worldwide exercise of power to attain a chosen aims based on humanity then the use of force should be allowable to the extent that - and only to the degree that the exercise of force is targeted towards achieving the acceptable humanitarian reason for action. Once this lawful objective has been attained, the legal permission for the exercise of force (or the presence of foreign forces) expires and any continued force or presence will solicit international public censure and become vulnerable to charges of unlawful action.

[205] Nikolaos Tsagourias, *The Theory and Praxis of Humanitarian Intervention* (University of Nottingham, 1996), at 57.

CHAPTER FOUR: REVIEW, RECOMMENDATIONS AND CONCLUSION

4.1 Review: The Common Law Right of Humanitarian Intervention:

The history of humanitarian intervention has been suggested a certain gap between the theory of international society and the practice of states. A situation where a formal right of sovereignty is present but no formal right of humanitarian intervention is present there. Principles of the realist and liberal traditions encourage most strongly the principle of nonintervention but States have taken humanitarian intervention as both a rightful purpose and by and large compatible with sovereignty.

There is present a consistent tradition of humanitarian intervention in international law which authorizes one to establish a common law right of humanitarian intervention. So the foundation of this common law right is on the idea that sovereignty is an important, but not supreme, principle of international law. Sovereignty desires both an internal and external legitimacy. Thus states are obliged to other States as well as their own people. Moreover, the manner in which how a sovereign treats its citizens can influence this legitimacy in both an international and national sense. Other States may intervene, If a sovereign behave toward its citizens, or let them to be treated in a way which "shocks the conscience of mankind," or in means which violate basic conceptions of human rights.

Throughout the history, International law has never acknowledged a positivist norm of absolute sovereignty and nonintervention. Plus it has never accepted the Kantian norm of a free right of intervention to protect human rights in spite of concerns about sovereignty. More exactly, it has pulled out all the stops for balance. During the nineteenth century, the positivist notion of absolute sovereignty began to wear down. During the twentieth century, the inspiration of humanitarian intervention has been progressed more completely within the international law, even though States have been reluctant to announce a formal right of humanitarian intervention for panic of eroding the right of sovereignty.

While there is a restricted right of humanitarian intervention within this social order establish on sovereignty and self-help, unilateral and collective interventions must be distinguished. The precedent is much stronger with regard to the latter than to the former. Even though this does not prevent a legitimate unilateral humanitarian intervention and such interventions have been the most debatable. At a smallest, international civilization has showed a clear unwillingness to recognize without reservation the idea of unilateral humanitarian intervention because of fear of maltreatment by influential or ideologically driven States.

So far, collective intervention is another affair. Collective intervention has a considerable history dating back to the nineteenth century and has achieved even greater legitimacy under the support of the U.N. but in the past only the most dominant states intervened. At present, the U.N. is a strong forum where weaker States can have a valuable voice although the most powerful nations maintain great pressure. The U.N.'s forty year struggle against South Africa's practice of apartheid is a suitable example. This campaign against apartheid started among the weaker and newer members of the U.N. this is the reason that after forty years of debate the powers in the Security Council agreed to efficiently separate South Africa and speed up the decrease the loss.

In the post-Cold War era, the historical trend recommend an increasing right of collective humanitarian intervention in order to achieve goals first offered by cosmopolitan thinkers. The problem confronting the international society of States is internal conflict, driven predominantly by ethnic self-determination. In the view of the U.N. and many member States, this problem must be confronted by promoting civic nationalism. Moreover, for civic nationalism to succeed in the large number of multi-ethnic States, respect for the democratic process and human rights are necessary. Therefore, international security of human rights and encouragement of the democratic process are essential to preserving the international society of States. The U.N is working to carry on to be called upon to intervene when human rights are being dishonored. But on the other hand it also struggles to legitimize the democratic process in many countries by acting as an impartial arbiter and observer.

The U.N.-approved interventions in Northern Iraq and Haiti specify the threshold for the violation of peace and protection and, therefore, the Chapter VII treatment has been relax. The occurrence of a humanitarian disaster itself can prompt Chapter VII treatment even where the real threat to other States is not chiefly strong. In Haiti the U.N. basically claimed that it had capability to decide that a democratic form of government was more legitimate than a military dictatorship. Though there were many reasons for this but respect for human rights was obviously at the root of this judgment. Sovereignty offers very little protection to non-democratic governments that violate human rights. If the international political desire exists to intrude in response to the human rights practices of non-democratic regimes, then Haiti ranks as strong precedent supporting the legality of such action in the future.

Human rights have been internationalized and can now provide as a basis for a Chapter VII action; international law must also tackle the issue of when this action should be undertaken. In

simple words, is there a responsibility to intervene when human rights have been violated, or do States simply have the right to intervene? An obligation represents a duty; it is something that must be done. While in contrast, a right is an opportunity that one may decide whether or not to exercise and a right is not vanished if one fails to exercise it.

I do not think that presently the international society has this obligation to intrude to protect human rights. We need only glance at the number of examples in human history where the international community has failed to intervene. The intractable two decade old civil war in Sudan[206], the U.N. toleration of Iraqi repression of Shi'ite Muslims in Southern Iraq while it actively intervened in the North[207], and the Indonesian treatment of the people of East Timor [208] emphasize this point. Even though the U.N. has condemned these countries' human rights practices, it has not gone aboard on interventions.

One is next led to the question of whether humanitarian intervention *should* be an obligation. To revive their observation, cosmopolitan thinkers like Luban and Teson claim in effect that it should/ and the reason provided is because international law should be first and foremost about human beings. When a State has permitted human rights to be dishonored then its right to sovereignty should not be respected and the international community should intervene.

I oppose cosmopolitan thinkers on this question and consider that an optional right of States to intervene in reaction to human rights violations is more suitable than an obligation for two

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[206] *See* Judy Mayotte, "Civil War in Sudan: The Paradox of Human Rights and National Sovereignty", *J. INT'L AFF.* (1994): 496. Mayotte compares the U.N. reaction to the Kurdish refugee crisis with the U.N.'s inaction in the equally tragic Sudanese civil war, arguing that the U.N. should intervene just as it did in Iraq.

[207] Lincoln P. Bloomfield, *The Premature Burial of Global Law and Order: Looking Beyond the Three Cases from Hell* (Lincoln P. Bloomfield 1994) at 146.

[208] John G. Taylor, *The Indonesian Occupation of East Timor 1974-1989* (Oxfor University Press 1990) , 63, 79, 100, 129 (listing figures for deaths in East Timor in the tens of thousands during the mid 1970s and 1980s).

major reasons. Firstly, joint acts of humanitarian intervention are more legitimate to the international society than unilateral acts but it is unworkable to get international political agreement in every case where such intervention is justified. Collective act needs an international political consensus which is only achieved at through political bargaining. Political bargaining is a procedure which directs to unpredictable results. The case of Iraq is the most accurate example. Regardless of great public support for the Kurds among the powerful States it did not reach to the Shi'ite Muslims in the South who were facing similar resist with the tyrannical Iraqi Government. The reasons behind it were mainly political and strategic as the U.S. and Europe did not want to hand over the land and to support to a pro-Iranian and anti-Western movement for independence in the sensitive Persian Gulf region. Briefly, the political factor in international law efficiently stops this necessary right of humanitarian intervention from increasing to the height of an obligation in the practice of States.

Secondly, the right of humanitarian intervention should not go up to the stage of an obligation because this might result the position of States in international society to be worn to the degree that sovereignty would turn into worthless. Yet in Kant's idea of international society, republican States enjoy a near absolute right of sovereignty. States preserve great worth for people as provider of political and economic safety. Their authenticity is based on an agreement among members of a political community, with a common history, values and goals. The Liberal proposal that States can embody their populations and protect and advance human rights is not naturally faulty. But Kent stated that the problem is that a State's power vis a vis its population needs to be inspected. In international practice, the common law right of humanitarian intervention has progressed to involve higher level of behavior by States in order to provide safety of human rights. Albeit Luban stated that States are hardly ever to be trusted, one must

differentiate between democratic States, which by and large respect human rights, and non-democratic, authoritarian, or tyrannical states, where the possibility for human rights maltreatment is well understood and proven historically.

The problem can be narrow down to whether one believes that States hold any worth in international relations for enhancing the interests of human beings. Luban openly judges that States do not therefore must not be submissive to the needs of individuals. I believe that the dilemma is the type of State but not the nature of the State itself. Democratic States have tendency for broad value for human rights and affluent democratic States are now capable in building both riches and value for human rights. Consequently they also express benefits that come with independence accorded by international law.

Therefore, Humanitarian intervention should not be an obligation of the international society because a right of sovereignty is essential for States. This right of sovereignty is necessary to function in order to accomplish states obligations to their populations. But on the other hand the right of humanitarian intervention allows the international community greater elasticity in dealing with States which infringe human rights whilst recognizing the sovereignty of those who obey basic standards. If a country's human rights practices infringe basic standards then the international society has the right to seriously think about intervention. The right does not authorize intervention but gives the international community legal right that can be used to pressurize States to change their actions or risk international intervention. International law should struggle for balance between autonomy of government and safety of human rights and do not make one superlative over the other.

4.2 Recommendations:

In light of the number of atrocities committed by state governments against their own people during this century and the resulting regional and international instability, it is important to attempt to prevent genocide and other mass human rights violations in the future. In accordance with this goal, it is necessary to offer suggestions for the improvement of both international law in this area and to recommend future courses of action for states engaging in humanitarian interventions.

The law of humanitarian intervention may be improved in two ways. First, an international consensus should be established declaring the legality of humanitarian intervention in certain situations. This may be accomplished through a United Nations resolution. The resolution may rely on the legality of humanitarian intervention under several sources of international law, including the United Nations Charter, human rights agreements, customary international law, and the viewpoints of scholars. Establishing the legality of humanitarian intervention within certain parameters will give states international permission for future military actions.

Second, a set of criteria must be established to clarify the legal standard for humanitarian intervention. This criterion would state that humanitarian intervention is legal under the following circumstances:

(1) An immediate threat of genocide or other serious human rights violations;

(2) exhausted diplomatic efforts to resolve the dispute;

(3) The necessity of the use of force;

(4) A proportional use of force;

(5) The prompt end of the use of force once the violations have ended; and

(6) Compliance with Security Council directives.

This criterion is purposefully broad to allow states the greatest ability to engage in humanitarian intervention while providing some guidelines to prevent states from abusing humanitarian principles to attain their own objectives. These guidelines do not require host state invitation because there may be many instances where humanitarian intervention is necessary and no authority within the state is able to request assistance. Additionally, they do not require outside states to be disinterested in the internal matters of the state because situations may arise where intervention is required and outside states have vested interests in resolving the conflicts. This set of criteria will provide states with a standard by which to judge whether or not they should intervene militarily and will inform the international community as to when states engaging in humanitarian intervention are violating international law.

Until the law of humanitarian intervention receives international recognition and the law in this area is clarified, states should take the following course of action. First, they should condemn acts of genocide as a violation of international law under the human rights provisions of the United Nations Charter, the Genocide Convention, the Universal Declaration of Human Rights, and the Geneva Conventions. They should then try to obtain approval for the intervention as an enforcement action under Chapter VII of the Charter. They may also attempt to act under Article 51 of the Charter, which provides for the use of force in self-defense situations, or under Article 53 of the Charter, which permits regional arrangements to use force per Security Council authorization. By following this plan, states will establish a legitimate course of action for the use of force in situations requiring humanitarian intervention.

4.3 Conclusion:

This thesis has analyzed both the philosophical and historical foundations of humanitarian intervention and its association to the right of sovereignty and the equivalent duty of nonintervention in international law. International law is full up with differing traditions, some favoring a hard and fast rule of nonintervention while others supporters the right of humanitarian intervention only in restricted conditions. Although International law has made every effort to achieve balance between the norm of absolute sovereignty and nonintervention and the norm of a free right of intervention to protect human rights.

As this common law right of humanitarian intervention has developed it has moved away from the realist and pluralists and towards solidarist thinking. International law now acknowledges with little reservation that human rights is an international issue and can be a lawful basis for intervention. Now in this century, the duty of each State to follow a basic respect for human rights and to abstain from violating them in a manner which "shocks the conscience of mankind" or create a "threat to peace and security".

Nevertheless, what has developed is a common law right of humanitarian intervention more accurately instead of an obligation on the part of the international society to intervene every time States violate human rights. Like any right it can be exercised or ignored but cannot be taken away. The growing common law right of humanitarian intervention doesn't not has the purpose to overthrow the States system but on working within the system to make it better and more approachable to the possible ill-treatment of power by States with respect to the treatment of human beings.

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