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Legal Aspects of Humanitarian Intervention in International Practice: A Survey of Evolving Norms

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

LEGAL ASPECTS OF HUMANITARIAN INTERVENTION IN INTERNATIONAL PRACTICE: A SURVEY OF EVOLVING NORMS

BY:

Dr. MOHAMED MAKKAWI

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Mohammed Makkawi
CHAPTER ONE

I - Introduction

The legitimacy of humanitarian intervention in international relations has long been a subject of controversy. In the wake of recent humanitarian crises and varying international responses to such situations, the debate surrounding humanitarian intervention has experienced a revival with important implications for the principle and its practice.

The concept of intervention for humanitarian reasons has long been a controversial matter in international law and relations. The traditional concept of humanitarian intervention coupled with the use of armed force can be traced back to ancient times, but the opinions of scholars, politicians, diplomats, legal literature and state practice still disagree on its existence and application. On the one hand, some say that intervention for humanitarian reasons cannot be legal, justifiable or permissible. On the other hand, there is growing international concern for the protection of human rights and the right to intervene towards these ends; and for some, there is an obligation to intervene when violations of human rights reach a point that shocks the conscience of mankind. The debate continues. Thus, it is important to re-examine the evolution of the doctrine of humanitarian intervention in international law and relations, and also its existence in history and contemporary practice of states. This is particularly pertinent since recent events relating to internal armed conflicts and their scale of human sufferings resulting from these conflicts have highlighted collective efforts to address the many crises that have

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2 Ibid; 2
arisen. While sovereignty is still important in international relations, humanitarian imperatives have led to more interventions in matters that are considered essentially within the domestic jurisdiction of states. It is in this context that the principle of humanitarian intervention has experienced a revival with ramifications to the extent to which it has been, or is, accepted in practice in the international community.

Before remarking upon the extent to which the principle of humanitarian intervention has been accepted by the international community, some preliminary considerations need to be addressed. In that regard, a brief general theoretically relevant discussion about how principles gain acceptance, or about indicators for the acceptance of principles in international relations, and about how they come to be rooted would be appropriate.

An important question that often arises in international relations is whether there are any universal behavior standards applicable to states, and whether those standards can be regarded as universal, given the different cultural traditions represented in the international system. If those standards exist, some would argue that they do not matter since the most obvious rule of state behavior is grounded in self-interest. It is argued, however, that there are certain minimum standards which states follow that can be regarded as universal, and that these standards matter in the assessment of state behavior.

Jones argues “the code that .... states have developed is not a rigid set of rules derived from static principles.”\textsuperscript{3} It is a set of guidelines that is designed towards the achievement of peace and security, although how that goal is attained is not specific. In that connection, “it is

\textsuperscript{3} The discussion that follows draws from Jones, Code of Peace: Ethics and Security in the World of the Warlord States (Chicago: The University of Chicago Press, 1991) at xi.
flexible and it is, and has been, responsive to changing conditions and concepts.4 These principles underlie relations between states, or as Jones puts it, "that states think ought to underlie" their relations. These standards have been derived from a whole range of interactions among states over the centuries, drawing on law, philosophy, and religious and social concerns. These principles have come to be embodied in numerous treaties, conventions, declarations, diplomatic protocols, resolutions and other international instruments that states reconsider and reaffirm from time to time.

Specifically regarding the principle of humanitarian intervention, this study attempts to follow closely these international instruments and what states have done and said in order to ascertain the extent of its acceptance in international relations. Even though the indicator or benchmark for acceptance of the principle is a gray area which lies along a continuum, certain characteristics tend to be evident. Its use by states, scholarly writings on the subject and its enshrinement in international institutions are but some of the characteristics that assist in knowing how the principle is or becomes accepted.

Another way of conceptualizing how principles get articulated and come to be entrenched in international relations is through the concept of epistemic communities.8 The epistemic community approach focuses on the process through which consensus is reached within a given domain of expertise and through which consensual knowledge is diffused and carried forward by

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4 Ibid. There are nine fundamental principles in the international system on which this code relies. These are: (1) Sovereign equality of states (2) Territorial integrity and political independence of states (3) Equal rights and self-determination of peoples (4) Non-intervention in internal affairs of states (5) Peaceful settlement of disputes between states (6) Abstention from the threat or use of force (7) Fulfillment in good faith of international obligations (8) Cooperation with other states, and (9) Respect for human rights and fundamental freedoms.

8 The epistemic community concept presents a research program with which students of world politics can empirically study the role of ideas in international relations. See Adler and Haas, "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program" (1992) 46 International Organization 367.
other actors. Its fundamental concern is the political influence that an epistemic community can have on collective policymaking. Haas argues that this approach may bring about "new patterns of reasoning to decision makers, encouraging them to pursue new paths of policymaking, which may in turn lead to unpredicted or unpredictable outcomes."

An epistemic community is primarily a "network of professionals with recognized experience and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area." Epistemic communities have: (1) a shared set of normative and principled beliefs, providing values-based rationale for the social action of community members; (2) shared casual beliefs deriving from their analysis of practices leading to a set of problems in their field which then serve as the basis for explaining the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity—that is intersubjective, internally defined criteria for weighing and validating knowledge in the field of their expertise; and (4) a common policy enterprise—that is a set of common practices relating to a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a result. An epistemic community may either be national where their activities are directed towards one country, or emerge as

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10 Haas notes that the term "epistemic communities" has been defined or employed in diverse ways. It is used particularly in reference to scientific communities. However, epistemic communities need not be made up of natural scientists or professionals applying the same methodology that natural scientists do. An epistemic community may consist of professionals from a variety of disciplines and backgrounds. According to Haas, members of an epistemic community may also "share intersubjective understandings; have a shared way of knowing; have shared patterns of reasoning; have a policy project drawing on shared values, shared casual beliefs, and the use of discursive practices; and have a shared commitment to the application and production of knowledge". These are additional notions associated with epistemic communities which normally distinguish them from other groups involved in policy coordination. See, ibid; at 3 and accompanying footnotes.
11 Ibid.
transnational\textsuperscript{12} over time, as a result of the diffusion of the community ideas through conferences, journals, research collaboration and various informal communications and contracts.\textsuperscript{13} A transnational community's ideas may have their source in an international organization or in various state agencies. These ideas are then diffused to other states through the decision makers who have been influenced by the ideas.\textsuperscript{14}

Fundamentally, the epistemic community approach plays an important role in "articulating the cause-and-effect relationships of complex problems, helping states identify their interests, framing the issues for collective debate, proposing specific policies, and identifying salient points of negotiation."\textsuperscript{15} Members of the epistemic community play both direct and indirect roles in policy coordination. They spread ideas and influence the position adopted by a wide range of actors. These actors might include domestic and international bodies as well as government bureaucrats and decision makers, legislative and corporate bodies, and the general public.\textsuperscript{16} The community can directly make a contribution to informal convergence of policy preferences if it can simultaneously influence several governments through its transnational membership.\textsuperscript{17} Epistemic communities with a transnational membership can influence national interests through identifying important issues and their implications from which policymakers may then deduce their interests.\textsuperscript{18} Policymakers in one state may, in turn, influence the interests and behavior of other states resulting in the likelihood of convergent state behavior and international policy coordination, informed by the causal beliefs and policy preferences of the

\textsuperscript{12} Collaboration in the absence of material interests binding together actors in different countries with common policy agendas suggests the existence of an epistemic community with transnational membership. Ibid; at 17.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid; at 2.
\textsuperscript{16} Supra, note 3 at 379.
\textsuperscript{17} Ibid.
\textsuperscript{18} Supra, note 4 at 4.
epistemic community. In the same vein, the epistemic community may contribute to the creation and maintenance of social institutions that guide international behavior.\(^{19}\) Haas notes that:

"by focusing on the various ways in which new ideas and information are diffused and taken into account by decision makers, the epistemic communities approach suggests a nonsystematic origin for state interests and identifies a dynamic for persistent cooperation independent of the distribution of international power."\(^{20}\)

This approach thus supplements structural theories of international behavior. In response to new knowledge expounded by epistemic communities, a state may choose to pursue entirely new objectives, in which case outcomes may be shaped by the distribution of information as well as by the distribution of power capabilities.\(^{21}\)

The essential characteristic of epistemic communities is that members are respected within their own disciplines and have the ability to extend their direct and indirect influence eventually to major actors in the policy coordination process.\(^{22}\) The timing of events is important in this regard. Crises and new developments in the international arena not only accelerate the diffusion process but also lend a sense of urgency to the task of re-evaluating current policies from which alternative results emerge.\(^{23}\) In essence, some scholars of international relations have argued that control over knowledge and information is a significant dimension of power. Thus, the diffusion of new ideas and information can result in new patterns of behavior and prove to be an important determinant of international policy coordination.\(^{24}\)

Thus, epistemic communities as an analytic approach to some particular issues in

\(^{19}\) Ibid.
\(^{20}\) Ibid.
\(^{21}\) Ibid.
\(^{22}\) Supra, note 3 at 380.
\(^{23}\) Ibid.
\(^{24}\) Supra, note 4 at 2-3.
international relations, it would seem, can be usefully employed in an attempt to consolidate support or cooperation regarding intervention to protect human rights in the international system.\textsuperscript{25}

The dilemma posed by intervention for human rights purposes rests on competing claims of state sovereignty and humanitarian assistance. However, recent events are leading to a re-examination or reassessment of normative assumptions concerning human rights, state sovereignty and non-intervention, particularly in situations of widespread violations of human rights caused by governmental acts or internal conflicts. Most of the recent cases of humanitarian intervention seem to point to the emergence of a realignment regarding the basic notion of the inviolability of state sovereignty. The cases of intervention in Iraq, Bosnia, Somalia, Rwanda, Liberia, Haiti, Kosovo and East Timor have provided grounds for reconsideration of the doctrine and practice of humanitarian intervention.

\textsuperscript{25} The study of international relations as a discipline has come under criticism lately for lacking a credible theory and set of explanations for the sources of international institutions, state interests and state behavior under conditions of uncertainty. In this regard, a prominent international relations theorist, Robert Keohane called for a "reflective" approach in the absence of "a research program that in particular studies that it can illuminate important issues in world politics". See, Keohane, International Institutions and State Power: Essays in International Relations Theory (Boulder: west view Press, 1989) at 173. The epistemic communities approach thus amounts to a reflective response to the challenge posed by Keohane.
Most of the literature on humanitarian intervention argues for the primacy of state sovereignty over human rights or vice versa. Other scholars have called for a delicate balance between state sovereignty and human rights. Whereas these approaches to the dilemma presented are commendable, this study argues that state sovereignty need not be interpreted as incompatible or inconsistent with concern for human rights protection. Sovereignty has always been limited by human rights concerns. This constraint is itself an attribute of sovereignty. In other words, the argument presented is that sovereignty cannot and should not be a justification for preventing humanitarian intervention. The responsibilities that states have in relation to their citizens should be recognized as part of their sovereignty, and thus permitting intervention to redress those rights where violated. The effect of adopting such an interpretation is one of restoring state sovereignty as a main principle of the international system while, at the same time, restoring notions of responsibility to state sovereignty.

In chapter 7 of this study, I will attempt to critically examine Islamic and Christian teachings on the question of humanitarian intervention. Islam is one of the most widely practiced religions in the world and it has played important roles in the international community. A doctrinal Islamic and Christian concept on this subject may be identified.

The question for Muslims especially since the Gulf War is whether, in case of government abuse of authority by committing mass violations of basic human rights of their citizens, other governments could intervene militarily to remedy the situation. The questions also become urgent and highly contentious ones in the 1990s for Muslims as humanitarian crises have spread internationally. Muslims have been aggressors and have suffered as victims in some situations. In some cases, Muslims have persecuted Christians, in others Christians have persecuted Muslims
(Bosnia), and Muslims have persecuted Muslims (Iran-Iraq). In all these situations, calls for armed intervention have been made. Where there has been collective military intervention on humanitarian grounds, associated with UN Security Council resolutions as in Iraq, Bosnia, Somalia, Rwanda, Haiti, Kosovo and East Timor, the governments of Muslim countries have almost always voted for these resolutions and provided troops as part of an international coalition.

In trying to establish a legitimate basis for humanitarian intervention, this study asks three questions. First, are there minimum duties states have in terms of protecting the rights of their nationals that are attributes of their sovereignty? Second, can violation of these minimum duties constitute the justification for humanitarian intervention? Third, how should such intervention be effectively implemented? It presents answers to the questions by examining how the doctrine and practice of humanitarian intervention have evolved up to the present in order to throw some light on future practice. It argues for intervention expressed in both legal and moral terms to alleviate the suffering of oppressed people and victims of internal armed conflict. Furthermore, in answering the third question, it employs the notions of epistemic communities as vehicles to build on the increasing support generated in the post-Cold War period in order to enhance the legitimacy and effectiveness of future interventions.

In the chapters of this study that follow, the meaning of intervention, armed intervention and unarmed intervention; the scope of humanitarian intervention; and the definition of humanitarian intervention and use of the term are examined. Chapter two reviews the traditional doctrine and practice of humanitarian intervention before World War II. Chapter three describes the evolving norms of humanitarian intervention. Chapter four maps out the cases of intervention during the Cold War era. Chapter five sets the scene for the practice of humanitarian intervention after the Cold War era. Chapter six makes a deep assessment of the contemporary development in
the principle and practice of humanitarian intervention in the post-Cold War era. Chapter seven is an analysis of Islamic teachings on the question of humanitarian intervention in the Islamic world. Chapter eight is a conclusion of this study.

In essence, this study tries to build a legitimate basis for humanitarian intervention through an examination of the evolution of the doctrine and its practice. It argues that sovereignty is compatible with humanitarian intervention. Sovereignty implies responsibility and thus when human rights violations reach a massive scale, either resulting from governmental acts or in situations of internal conflict, intervention to protect those rights is necessary.

II – Intervention

Intervention means various forms of nonconsensual action that are often thought to directly challenge the principle of state sovereignty. Many commentators would prefer to eliminate the word "humanitarian" before "intervention". Civilian humanitarians dislike the association with the use of armed force, viewing "humanitarian intervention" as two contravened words. Former colonies recall the disingenuous application of the term "intervention" for purposes that were anything except humanitarian. And many observers do not want the high ground automatically occupied by those who claim a humanitarian justification for going to war without serious scrutiny of the specific merits of the case or prejudging whether a particular intervention is defensible or not. "Of course armed intervention may be undertaken for humanitarian motives," cautions UN Secretary General Kofi Annan, but "let's get right away

from using the term “humanitarian” to describe armed military operations.”

The definition of “humanitarian” as a justification for intervention is a high threshold of suffering. It refers to the threat or actual occurrence of large-scale loss of life (including, of course genocide), massive forced migrations, and widespread abuses of human rights. Acts that shock the conscience and elicit a basic humanitarian motive remain politically powerful; it does not, however, include the overthrow of a democratically elected government, unless it results in large-scale loss of life.

The specific objectives are to explore the meaning and evolution of the concept, the implications of the United Nations Charter and nonmilitary forms of intervention, and to summarize the various dimensions of the contemporary intervention debate.

II.1. Meaning of Intervention

The actual meaning of the term "intervention" can be derived from the context in which it occurs, in addition to the purposes for which it is invoked. Actions do not amount to intervention if they are based on a genuine request from or with the unqualified consent of the target state. Consent, if it is to be valid in law, should come from the legal government of a sovereign state and be freely given. Forms of interference that lack coercion in the internal affairs of a state also do not amount to intervention.

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7 One searches in vain for a solid definition of “humanitarian” in international law. The International Court of Justice was provided an opportunity in the case of Nicaragua against the United States, but it declined to define the term. It engaged in a tautology of sorts by stating that humanitarian action is what the international Committee of the Red Cross does. The Oxford English Dictionary (Oxford: Oxford University Press, 1933) is not of much help, by stating that humanitarian is “having regard to the interests of humanity or mankind at large; relating to or advocating, or practicing humanity or human action.” A second definition notes that the term is “often contemptuous or hostile.”
Of course, wider definitions of intervention have always existed. In today's world, economic activities and direct foreign investment are considered by some observers as types of intervention. And with interdependence and globalization rising over the last few decades, anxiety levels among many governmental officials have increased because there are substantial new vulnerabilities about which they can do virtually nothing. High state sensitivities to economic and cultural influences across borders have also meant even greater sensitivities to human rights pressures that occur without the consent of governments.8

Obviously, the use of armed force against another state without its consent constitutes intervention but so too does the use of such nonmilitary means as political and economic sanctions, arms embargoes and international criminal prosecution. Intervention is a concept with a distinct character.9 This character lies in the use of forcible or non-forcible measures against a state, without its consent, solely on account of its internal or external behavior. Although intervention has most frequently been employed for the preservation of the vital interests (legitimately or illegitimately perceived) of intervening states,10 there is also a long history of intervention justified on the grounds of grave human suffering.

II.2. Armed Intervention

9 Robert Jennings and Arthur Watts, eds; Oppenheim’s International Law (London: Longmans, 1996), pp. 428-434; and Ian Brownlie, International Law and the use of Force by States (Oxford: Clarendon Press, 1963), pp.44-45. It is worth noting that some analysts include both solicited (that is, consensual) and uncocilated military force in their definitions of intervention. See, for example, Martin Wright, power politics (Harmonsworth: Penguin, 1979), chapter 11.
The advent of the UN Charter fundamentally affected earlier interpretations of the legality of intervention. Not only did the Charter set out the circumstances under which intervention was permissible, it also changed the terms of debate by employing the term “the threat or use of force” instead of “intervention”\(^\text{11}\).

As the charter explicitly permits the use of force in self-defense and enables the Security Council to authorize force to confront threats to international peace and security, a recurring aspect of the debate has been the use of force to protect human rights. The 1990s were not the beginnings of the dispute. Various interpretations of the legality of humanitarian intervention were fiercely debated, particularly beginning in the late 1960s\(^\text{12}\).

The ideological competition of the Cold War lent a particular character to interventions during that period. With much of the world aligned with one of the two superpowers, there was considerable pressure from both sides to intervene in both internal and international armed conflicts. The deadlock in the Security Council and the existence of the veto also increased the likelihood that interventions would either not occur at all or be undertaken in the absence of a Council mandate. In fact, interventions during the Cold War were far more likely to be undertaken by a single state (for example, the US in Vietnam, the Soviet Union in Afghanistan, and South Africa and Cuba in Angola), whether directly or by proxy, than they were by multilateral cooperation\(^\text{13}\).

On two occasions during this period, the International Court of Justice (ICJ) ruled on cases

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\(^{11}\) Ibid; 3

\(^{12}\) See, for example, Richard Lillich, Humanitarian Intervention and the United Nations (Charlottesville: University Press of Virginia, 1973)

that involved assessing the legality of interventions for which humanitarian purposes had been declared: the United Kingdom in the Corfu Channel and the United States in Nicaragua. In both cases, the ICJ adhered to the position that the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference and that international law requires territorial integrity to be respected. The ICJ rejected intervention that impedes a state from conducting those matters that each state is permitted, by the principle of sovereignty, to decide freely, namely its political, economic, social and cultural systems, and the formulation of its foreign policy.\textsuperscript{14}

More specifically, in the case of Nicaragua vs. the United States, the ICJ repeated the attributes of humanitarian aid or assistance that might also be applicable to military intervention for humanitarian purposes. If the provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs of a state, the ICJ took the view that it must be limited to the purposes hallowed in practice, namely to prevent and alleviate human suffering, to protect life and health, and to ensure respect for the human being without discrimination against all in need, and that it be "linked as closely as possible under the circumstances to the UN Charter in order to further gain legitimacy." These criteria should be applicable in extreme situations where the need to "prevent and alleviate human suffering, to protect life and health, and to ensure respect for the human being" constitutes a humanitarian crisis threatening international or regional peace and security. The ICJ also rejected the notion of the use of force to ensure the protection of human rights: "where human rights are protected by international conventions, that protection takes the

\textsuperscript{14} One searches in vain for a solid definition of humanitarian intervention in international law. The International Court of Justice was provided an opportunity in the case of Nicaragua against the United States, but it declined to define the term. It engaged in a tautology of sorts by stating that humanitarian action is what the international Community of Red Cross does. The Oxford English Dictionary (Oxford: Oxford University Press, 1933), is not of much help, by stating that humanitarian is "having regard to the interests of humanity or mankind at large; relating to, or advocating or practicing humanity or human action." A second definition notes that the term is "often contemptuous or hostile."
form of such arrangements for monitoring or ensuring the respect for human rights as are provided for in the conventions themselves. In any event, the use of force could not be the appropriate method to monitor or ensure such respect."  

Such a conclusion does not appear to be definitive. The protection of human rights by international conventions presupposes a stable and orderly system of monitoring and ensuring respect for human rights based on those conventions. Cases may arise where the existing arrangements are inappropriate for protecting human rights, owing to the nature and scale of the violations. Furthermore, in extreme situations in which the Security Council is unable to act, political and moral imperatives may leave no choice but to act outside the law.

Further clarification of the meaning of intervention in the context of the Charter can be drawn from UN negotiations over the past decade. The end of the Cold War was seen by many as a rebirth of the UN, and it bore witness to an urge for intervention to sort out problems of civil strife. Throughout the 1990s there was an unpredictable and diverse pattern of interventions by the UN, stretching from Iraq to Somalia, Bosnia to Haiti, and Kosovo to East Timor.

II.3.Unarmed Intervention

Most contemporary literature about intervention is concerned with the application of armed force to pursue humanitarian objectives. The following is an analysis of unarmed

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17 Report of the Secretary General on the Work of the Organization, Supplementary to an Agenda for Peace: Position paper of the Secretary General on the Occasion of the 50 Anniversary of the United Nations, Un Document s/24111(1992), and Supplementary to an Agenda for Peace, A/50/60, s/1995/1.
intervention, both through sanctions and criminal prosecution.

(A)- Sanctions

International economic and political sanctions as well as embargoes of various types became widespread in the 1990s. These sanctions were designed to impose a course of conduct (including a change of policy) on a state by banning or restricting that state’s economic, military or political relations. Sanctions are a punitive countermeasure against illegal acts.

Economic sanctions include trade and commercial restrictions, and sometimes embargoes on imports and exports, shipping, flights, investment, and the seizure of a state’s assets abroad. Political sanctions include embargoes on arms, denial of military assistance and training, restraint on the means and extent of a state’s level of armament, the non-recognition of illegal acts perpetrated by a state, and the refusal of entry of political leaders into the territories of other states. 18

Assessment of the use of sanctions under the UN Charter before and after the Cold War periods indicates three broad trends. First, there was a combination of unilateral and collective sanctions during the Cold war by individual states and by the UN, mainly in the process of decolonization (specified in Charter Chapters XI-XIII and elsewhere) 19 against Portugal (in relation to Angola and Mozambique before 1975), against Rhodesia in 1975, and South Africa’s

19 In relation to decolonization, the regime of the Charter develops standards for the conduct of colonial states in 1945 by establishing a framework for decolonization, based on the right to self-determination and the rights and duties of the Mandatory powers with regard to the protection of the inhabitants of Trust and Mandated territories, See “declaration on granting of Independence to Colonial Countries and peoples”. General Assembly Resolution 1514 (xv), December 14, 1960.
illegal presence in Namibia,\textsuperscript{20} as well as its practice of apartheid between 1975 and 1979.\textsuperscript{21} Only in the clearest cases was it possible for the Security Council to reach decisions on the collective use of sanctions. Consequently, many nonbinding resolutions on sanctions were passed by the General Assembly during debates on decolonization.

Second, there was increasing use in the 1990s of unilateral and collective sanctions in the context of diplomatic efforts to coerce state behavior with respect to maintaining international peace and security under Chapter VII. Compliance with sanctions regimes is often voluntary at the outset in order to generate consensus and only later do they sometimes become mandatory under Chapter VII.

There is the use of sanctions as a means of intervening in aid of democracy, not only by the UN but more by the British Commonwealth, the European Union (EU), the Organization of American States (OAS) and other regional organizations. The Haiti case is central because both the General Assembly and the OAS condemned the 1991 military coup that overthrew the elected government. The Security Council also prohibited special commercial passenger flights from going to Haiti and denied the entry of the Haitian military and others to territories of UN member states. The Security Council also imposed embargoes on a rebel organization fighting the government in Angola in breach of a peace agreement.\textsuperscript{22}

The Economic Community of West Africa States (ECOWAS) also imposed an economic blockade against the regime in Sierra Leone in 1997. The Commonwealth imposed economic and

\textsuperscript{22} Reisman and Sterick, "The applicability of International Law Standards to the UN Economic sanctions Programs," p. 124.
political sanctions on the military governments of Nigeria, Pakistan and Fiji.23 Also, there are smart sanctions which target elites through such measures as freezing foreign assets and preventing travel, and these have been used as Security Council practice showed.24

The dramatic suffering caused by economic sanctions suggests that sanctions and embargoes may not be an intervention tool of preference in the future.25 Paradoxically, the logic of the Charter to use forcible measures only as a last resort may be inappropriate to support humanitarian objectives. But rather, it is reasonable that an earlier resort to armed force may be more humane than extended and extensive sanctions.26

(B)- International Criminal Prosecution

Since the war crimes tribunals in Nuremberg and Tokyo following the Second World War, the 1990s revived the use of international criminal prosecution as a form of non-armed intervention. The basic principles for prosecution under international criminal law were set out in the late 1940s- that violations of the laws of war were subject to penal sanctions, that one’s superior’s orders do not release an individual from responsibility, and that certain acts constitute crimes against humanity. The 1990s witnessed a series of almost revolutionary changes. Not only are war criminals and human rights abusers being tried, but a series of transformations in

24 David Cortright and George A. Lopez, eds; The Sanctions Decade. Assessing UN Strategies in the 1990s (Boulder: Lynne Rienner, 2000)
26 For the humanitarian issues, see Thomas G. Weiss, David Cortright, George A. Lopez, and Larry Minear, eds; Political Gain and Civilian Pain: The Humanitarian Impacts of Economic sanctions (lanham: Rowman and Littlefield, 1997); And Larry Minear, David Cortright, Julia Wagler, George A. Lopez, and Thomas G. Weiss, Towards More Humane and effective Sanctions Management (New York; Un Department of humanitarian affairs, 19970.
international criminal law suggests that this type of intervention may become more routine.  

The establishment of the ad hoc war crimes tribunals for the former Yugoslavia in 1993, in Rwanda in 1994 and recently in Sierra Leone were a major development. Despite criticism, these tribunals have convicted senior officials and have contributed to the development of international criminal law. They have established criminal liability for war crimes during internal armed conflicts and that crimes against humanity extending beyond the confines of armed conflict and rape is now legally considered an aspect of genocide.  

Considerable progress has also been made in the rules relating to the immunity of leaders. Until recently, it was accepted that leaders while in power (and also retired ones) could not be tried in courts in another country for acts committed in their own country. The conviction in 1989 of President Noriega by the US was a dramatic transition in international law. In the UK, the House of Lords in Pinochet’s case established a very strong precedent for no longer treating government officials as having absolute protection under the rules of the sovereign immunity of states. The indictment of President Milosevic for his war crimes in Kosovo is another precedent. Recently, the establishment of the International Criminal Court (ICC) with the jurisdiction over genocide, crimes against humanity and war crimes is considered a tremendous development in international criminal law.

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27 Ibid; 3.
28 Ibid; 4.
29 The Pinochet case illustrates the limits on sovereign immunity in regard to crimes committed while in office. However, it does not affect serving heads of state or serving diplomats. It remains an as yet untested possibility that the 1949 Geneva Conventions and additional protocols of 1977 on humanitarian law in armed conflict, which are regarded as being jus cogens, could provide sufficient authority for an armed intervention to enforce them. Common Art. 1 of the Conventions states that: “the high contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” See Geoffrey Robertson, Crimes against Humanity; The Struggle for Global Justice (London: Penguin, 1999), p. 398.
III. THE USE OF THE TERMS “HUMANITARIAN INTERVENTION”

Intervention was invoked against a state’s abuse of its sovereignty in cases of brutal and cruel treatment of those (both nationals and non-nationals) within its power.. Such a state was regarded as having made itself liable to action by any state or states that were prepared to intervene. One writer in 1921 defined humanitarian intervention as “reliance upon force for the justifiable purpose of protecting the inhabitants of another state from the treatment which is so arbitrary and persistently abusive as to act to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.”

Intervention was surrounded by controversy, however, and many condemned the earliest cases of humanitarian intervention. Critics argued that the humanitarian justifications were usually a pretext for intervention motivated by strategic, economic or political interests. Furthermore, there can be no doubt that even when objectives were less objectionable, the intervening powers undermined the credibility of the enterprise.

One noted legal authority concluded in 1963 that “no genuine case of humanitarian intervention has occurred with the possible exception of the occupation of Syria in 1860 and 1861.” The scale of the atrocities in that case may have warranted intervention, thousands of Maronite Christians were killed or displaced. But, by the time the European troops had been

30 Stowell, Intervention in International Law, p. 53.
32 This legacy continues to color the intervention debate, for, as, Ramesh Thakur points out, developing countries are “neither amused nor mindful at being lectured on universal human values by those who failed to practice the same during European colonialism and now urge them to cooperate in promoting global human rights norms.” Ramesh Thakur, “Global Norms and International Humanitarian Law: An Asian Perspective,” International Review of the Red Cross 83, no. 841 (March 2001), p. 340.
deployed, the violence was largely over and, after undertaking some relief activities, the troops withdrew.

At the end of the 19th century, many legal commentators held that a doctrine of humanitarian intervention existed in customary international law, though a number of scholars disagree. Contemporary legal scholars disagree on the significance of these conclusions. Some argue that the doctrine was clearly established in state practice prior to 1945 and that its limits, not the existence of the doctrine, are open to debate. Others reject this claim, noting the inconsistency of state practice particularly in the 20th century. What is clear is that this notion of intervention evolved substantially before the concept of maintaining international order and protecting human rights.

Since 1945, the threat or use of force against the territorial integrity and political independence of states is prohibited by Article 2(4), with exceptions for the collective use of force under Chapter VII and for self-defense in the event of an armed attack in Article 51. Although the prohibition seems clear, questions about the legality of humanitarian intervention remained. In 1946, for example, an eminent legal scholar continued to argue that intervention is legally permissible when a state is guilty of cruelties against its nationals in a way that denied their fundamental human rights and shocked the conscience of humankind.34

III.1. Various Definitions of Humanitarian Intervention

The term humanitarian intervention has gained great currency in recent years, yet a

common definition is not easy to achieve. In general, there is no proper way to define the doctrine of humanitarian intervention.\textsuperscript{35} The literature shows that there are numerous and often conflicting definitions of humanitarian intervention.\textsuperscript{36} Nevertheless, a working definition may be useful to outline the scope of this study.

The term humanitarian is very broad and in common language can be used to describe "a wide range of activities by governmental and non-governmental actors that seek to improve the status and well-being of individuals." Even if this term is narrowed to a concept of protecting human rights, this term potentially implies a broad array of political, social and economic rights.\textsuperscript{37} Recently, the Canadian International Commission on Sovereignty and Intervention defined humanitarian intervention as "an action taken against a state or its leaders, without their consent, for purposes which are claimed to be humanitarian or protective."\textsuperscript{38} The term "humanitarian intervention" as Oppenheim and Lauterpacht defined is "a dictatorial interference by a state in the affairs of another state to compel certain action or inaction by which the intervening state imposes or seeks its will."\textsuperscript{39} By such interference, the intervening state demands that the other state does "an act which, if not compelled, it would not do, or refrain from doing an act which, if not compelled, it would do."

Several definitions of humanitarian intervention exist. Different scholars support either a broad or narrow definition of humanitarian intervention, and these differing approaches

\textsuperscript{36} Michael Reisman, Humanitarian Intervention and Fledging Democracies, 18 Fordham International Law Journal, 794-795 91995).
\textsuperscript{37} See Sean Murphy, "Humanitarian Intervention, the United Nations in an Evolving World Order", p. 8.
\textsuperscript{38} Humanitarian Intervention: Definitions and Criteria CSS Strategic Briefing Papers Volume 3; part 1, June 2000 ISSN 1175-1452.
sometimes create confusion. Classical humanitarian intervention\(^40\) is the unilateral intervention for protection of another state’s nationals from human rights violations.\(^41\) The theory of intervention on the grounds of humanity is probably that which recognizes the right of one state to exercise international control by armed force over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity.\(^42\) Recently, one commentator defined humanitarian intervention as “the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.”\(^43\)

Some other scholars understand humanitarian intervention to be a doctrine that deals with the right of states and international organizations to assist their nationals if they are subjected to human rights abuses.\(^44\) Ian Brownlie has defined humanitarian intervention more broadly as “The threat or use of force by a state, a belligerent community or an international organization with the object of protecting human rights.”\(^45\)

Beyond these definitions, some writers have pointed to the concept of humanitarian access. They draw a distinction between forcible humanitarian intervention and humanitarian access. The latter include the situations where the UN or humanitarian aid organizations negotiate with the governments in order to gain access to affected populations in the internal conflict or other humanitarian emergencies. It also includes situations where humanitarian access is obtained without the consent of a government. In both situations the use of military force is absent.

\(^40\) Ellery C. Stowell, Intervention in International Law 53 (1921).
\(^44\) Winjen-Thomas and Thomas 1956: 71-72.
Humanitarian intervention, according to some scholars, can encompass any kind of non-forcible state action taken to prevent human rights violations in another country.⁴⁶ Sometimes the parameters for the definition of humanitarian intervention are enlarged, including the use of armed force either for the protection of nationals abroad ⁴⁷ or with respect to rescuing nationals.⁴⁸ This type of humanitarian intervention is usually discussed as an aspect of self-defense.⁴⁹

There are also two relatively rare definitions of humanitarian intervention: intervention by invitation ⁵⁰ and by coercion. Some authors consider the use of coercion to rescue nationals abroad as diplomatic protection.⁵¹ A NATO seminar in Scheveningen on the topic in November 1999 defined humanitarian intervention as “an armed intervention in another state, without the agreement of that state, to address a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights.” ⁵² The key aspects of this definition are related to sovereignty and human rights. Firstly, for an action to be an intervention, the sovereignty of the state being intervened in must be breached. Under this definition, International Force (INTERFET) intervention in East Timor, while motivated by humanitarian concerns, was not an intervention as the action was taken with the consent of the Indonesian government.

⁴⁶ In 1921, Ellery Stowell defined humanitarian intervention as “reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treated which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.” Ellery C. Stowell, Intervention in International Law 53 (1921).
⁴⁸ For example, Reisman and McDougal classify the Israeli rescue mission at Entebe, where Israel rescued its nationals, as a lawful humanitarian intervention. See Myers S. McDougal and Micheal Reisman, Letter to the Editor, N.Y. Times, July 16, 1976, at A20.
⁴⁹ Teson, supra note 4, at 5.
⁵⁰ Thomas Buergenthal and Harold G. Maier, public International Law in a Nutshell 117 (1990).
⁵² Humanitarian Intervention: Definitions and Criteria CSS Strategic Briefing papers Volue 3; part 1, June 2000, ISSN 1175-1452.
Secondly, for an intervention to be humanitarian, the desire to address violations of human rights should be the driving force in the intervention decision.

As we have seen above, there are many conflicting definitions of humanitarian intervention. Therefore, I prefer to adopt a definition which addresses humanitarian intervention as a specific problem, namely whether and under which conditions it is permitted under international law to intervene or threaten to intervene by armed force in another state for humanitarian reasons without the consent of its government. This study goes with the following definition of humanitarian intervention: “Humanitarian intervention is the threat or use of armed force by a state, or group of states, or international organization against another state for humanitarian purposes without the consent of its government.” The use of this term includes two types of action: intervention as a collective action by and or authorized by the UN or a regional organization; and multilateral or unilateral action by states without such authorization. It is necessary to look at both types of intervention as a whole because the discussion on the legality of unilateral intervention to a large degree rests on the relevance of the question of whether effective international mechanisms are available to deal with the violation of human rights at issue.

Some important aspects which are more or less related to the problem of humanitarian intervention, however, must be excluded. First, intervention at the invitation or request or with the consent of the lawful government is beyond this work because this will be characterized as assistance or military cooperation with the consent of the target state and does not conflict with

53 See R. Sadurska, Threats of Force, AJIL 82 (1998), 239
55 The Report of the Advice Commission (1992), supra note 30, 2 says “there should be no invitation of the target state to intervene. This case is not viewed as humanitarian intervention, but as the provision of assistance.”.
any interpretation of the principle of state sovereignty. Therefore, the intervention in East Timor in 1999, while motivated by humanitarian concerns, was not a humanitarian intervention because it took place with the consent of the Indonesian government. In light of the abuses committed during interventions in the past, the problem here is how to establish what actually constitutes valid consent by the lawful government. A special problem arises if there is no effective government, as in the case of Somalia. Second, peacekeeping operations of the UN and humanitarian relief operations have always been based on an agreement with the respective government or the parties involved in the conflict. Such peacekeeping operations of the United Nations and humanitarian relief operations in emergency situations may be neglected in this regard because they do not deploy armed force. Third, also neglected will be military intervention which is not undertaken for primarily humanitarian reasons but for other purposes, such as to repel an aggression, to support a party in a civil war or to support or establish a democratic system of government in another state against illegitimate regimes. Although there is indeed a link to the issue of humanitarian intervention, that is only under the more general proposition of


57 For examples see Jennings/Watt (eds.), ibid; 436-437

58 As to the problem in general see, J.L. Hargrove, Intervention by Invitation and the Politics of the New World Order, in: Damrosch/Scheffer (eds.) (1992), supra note 9, 113; R. Mullerson, Intervention by Invitation, ibid; 125; R. Wedgood, Commentary on Intervention by Invitation bybid; 135; Gunewardene (1991) , supra note 6; see also in connection with preferential criteria for humanitarian intervention, Fonteyne (1974) supra note 1, at 267 et seq.


60 It appears there have been some humanitarian relief operations of non-governmental organizations, as distinct from intergovernmental organizations, which were conducted without the express consent of government, but analysis here is limited to state action. On relief general operations see M. Bothe, Relief actions, in R. Bernhardt (ed.), EPILA 4 (1982).


this intervention theory. 63

Finally, the term "humanitarian intervention" is occasionally used in a very broad sense to also cover non-forcible action for humanitarian reasons as we have already seen in this study. 64 Each element of this definition deserves brief comment:

1- Threats or Use of Force

Some scholars have defined intervention to include situations where a state, group of states or an international organization undertakes actions which do not involve a threat or use of force. This study focuses on intervention primarily with reference to threat or use of armed force. Also, attention will be paid to the increasing use of economic sanctions as a means of coercing state behavior.

In most cases, humanitarian intervention as considered in this study involves the actual use of armed force through the physical presence of military units into a target state. The goal of the use of force is to suppress local activities that endanger human rights, to reestablish order and create conditions for relief operations, or to return refugees and avoid further deprivation of human rights. Nevertheless, humanitarian intervention can be undertaken where force is not used in the territory of the target state, where the force is not an armed force, and where force in the sense of Article 2 (4) of the UN Charter is not even used. Interventions can be in different shapes, even among the ones we discussed in this study, and therefore any working definition of humanitarian intervention should not be so rigid that it cannot take account of these differences:

(1) Humanitarian intervention may not involve the actual military unit entering the target state.

63 As to the view of the International Court of Justice in the Nicaragua case, Rodley (1989), supra note 9, 331.
64 See also Beyerlin (1982), supra note 2, at 212; See L.F. Damrosch , Politics Across Borders: Non-intervention and Non-forcible Influence Over domestic affairs, AJIL 83 (1989) 1.
Military forces stationed outside the territory of the target state and impeding vessels and aircraft entering or departing the target state should be considered a use of force that, in appropriate circumstances, may qualify as intervention; it is usually recognized by the target state as an attack on its national security. 65

(2) Where there is only the “threat” of armed force, then clearly armed force itself is not actually being used. Instead, the intervener indicates that unless the target state changes its behavior, the interveners are ready to use armed force. The threat of armed force falls within the scope of restraints on the use of armed force since the international community recognizes that threat can be just as coercive as the actual use of force. States may prefer to use threats because it will cost less than the actual use of armed force. In the case of humanitarian intervention, the threat of using force may be a preferred method of intervention if the intervener seeks to protect persons prior to the deprivation of their human rights. Once deprivation occurs, their effects may be irreversible. The 1994 intervention in Haiti by the United States and other military forces involved a threat of forcible intervention, which led to the removal of the de facto regime. This is a good example of the threat of armed force.

65 See e.g; North Atlantic Treaty, Apr. 4, 1949, art. 6, 93 stat. 2241, 2244 U.N.T.T. 243, 246-48, reprinted in 2 Weston, supra note 1, at H.D.9 (for the purpose of Article 5 an armed attack on one or more of the Parties is deemed to include an armed attack...on the vessels or aircraft of the parties).
(3) Where economic sanctions are imposed on a target state with the effect of seriously impeding the ability of the state to provide goods and services to its people, then the type of coercion employed is not, by definition, armed force. The imposition of economic sanctions generally has not been regarded as a use of armed force according to Article 2(4), but has been regarded as relevant to the principle of non-intervention. Indeed, whenever coercion by a state or states, or a regional or international organization affects the ability of a target state to conduct its affairs, then coercion may encourage the target state to change its behavior. This coercion may be considered a form of humanitarian intervention if done for humanitarian purposes.

2- State, Group of States, or International Organization

Humanitarian intervention may be undertaken by a state, a group of states or a regional or international organization. The state or states may be acting under the express authority of the UN Security Council pursuant to Chapter VII of the UN Charter. Some interventions that do not have the express authority of the UN Security Council may nevertheless be considered within the scope of authority granted by the UN. Alternatively, such intervention could be undertaken by a state or states acting without any UN authority but rather under the authority of a regional organization, which shall be referred to as regional humanitarian intervention. Finally, humanitarian intervention could be undertaken by a state or states or international organization acting without the authority of either the UN or a regional organization, which some scholars refer to as unilateral humanitarian intervention, a somewhat misleading term since the intervention may be

undertaken by several states.

Since humanitarian intervention has been undertaken by a state, states or an international organization, then action by non-state entities designed to prevent widespread deprivations of human rights should be excluded. Without question, non-governmental organizations such as the Red Cross and Doctors without Borders play a key role in addressing humanitarian crises as they unfold, even when such organizations act without the consent of the local government. Their intervention is different from intervention by states, both in the likelihood of creating or aggravating a threat to international peace and security, and in the legal norms of the UN Charter and state responsibility that are engaged.

3- Target State and its Nationals

Generally, sovereign states are the targets of humanitarian intervention. The state that is a target of intervention must be known as the sovereign. However, humanitarian intervention has been undertaken in territories lacking one of the elements of statehood, which is a government. An entity that does not possess all the elements of statehood is more vulnerable to external intervention. The main reason is that intervention against such an entity does not constitute a violation of Article 2(4) or 2(7) of the UN Charter. Also, external forces have a temptation to impose on that entity the moral order of their choice without taking the risk of counter collective security measures. Thus, the emergence of failed states has enlarged the scope of humanitarian intervention. This doesn’t constitute intervention if a state interferes with the affairs of a section of its own citizens who have unilaterally declared their independence from it.

Humanitarian intervention could include protecting or rescuing one’s own nationals along
with the nationals of a third state. Military rescue operations by states to protect their own nationals from imminent danger abroad is different from the problem of humanitarian intervention. Because of the nationality link, it is disputed whether states have a right to intervene militarily in another state to protect their own nationals without the consent of the foreign government. A situation legally quite different to humanitarian intervention arises when nationals of the intervening states are rescued by military operations. For example, the 1978 Israeli raid on Entebbe in Uganda, in which the rescue of nationals of the intervening state was clearly the main objective, is legally governed by the right of self-defense. In my understanding, the description of rescue operations as acts of self-defense should be disregarded. Because human rights law has a universal reach, it extends equally to foreign nationals so there is no reason why the protection of nationals of intervening states should be less humanitarian than an action undertaken to protect nationals of the target state.

Intervention to rescue nationals abroad from dangers in another state should be recognized as humanitarian in nature and not as self-defense. Once the humanitarian nature of rescue operations is recognized, such operations can lead to actions required to protect the individual aliens of other foreign nationals and indigenous people, and to respond to atrocities committed within the target state.

If rescue operations are recognized only as self-defense, international law will favor the nationals of the intervening state over the target state's own nationals. Rescue operations should be viewed as humanitarian intervention requiring a collective response to rescue the nationals of

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68 Oppenheim’s International Law 440-42 (R> Jennings and A Watts eds; 9th ed; 1992) For further discussion of the right of a state under international law to intervene for the protection of its own nationals, see infra Chapter 8. This study also sets aside the issue of rescue of third-country nationals in the process of rescuing one's own nationals. Those rescues also fall within the scope of the more accepted doctrine of rescue protection of nationals of the intervening states.
an intervening state facing danger in a foreign country.

4- Humanitarian Objectives

It is difficult to identify an intervention where gross human rights violations are the sole reason for intervention. Often, there are other issues, such as the protection of persons who are not nationals of the target state. In the course of protecting thousands of local nationals, the intervener also protects a few nationals of its own or those of a third country, so then the intervention is considered humanitarian in nature.

Armed intervention will be neglected if it is not undertaken primarily for humanitarian reasons but for other purposes, such as to repel an aggression, to support a party in a civil war, to encourage self-determination, or to serve other economic or political objectives of the intervening state. Clearly, all humanitarian actions by states have mixed motives. States often use the language of humanitarianism even when they act out of self-interests and their real motives are not easily ascertainable. To determine the primary purposes of an intervention, the statements of officials of the intervening state, states, or international organization are relevant. Finally, the term humanitarian intervention is occasionally used in a very broad sense to also cover non-armed action for humanitarian reasons, such as natural and human-made disasters. This study focuses only on the term armed force to avoid any confusion with the discussion on whether the prohibition of the use of armed force in the UN Charter can be stretched beyond this definition of armed force so as to include mere economic or political measures.

5- Consent of the Target State Government

When we talk about "a threat or use of armed force against state" there must be a lack of consent by a target state government. An act amounts to armed intervention if the country concerned is opposed to it. Otherwise, the threat is not really a threat and the use of armed force is characterized as military cooperation. If a humanitarian operation is carried out with the permission of the government to stop human rights violations committed by a faction in a civil war, for example, this cannot be described as humanitarian intervention because it cannot be seen as dictatorial interference as defined by Oppenheim and Lauterpacht. So the action of the International Force in East Timor (INTERFET) in September 1999, while motivated by humanitarian concerns, was not an intervention because it was undertaken with the consent of the Indonesian government. Under this reasoning, the definition of humanitarian intervention should be limited to situations where a target state has not consented to the interference in its affairs. The consent from the target state for intervention poses some problems. In crisis situations, the local authorities of the target state may consist of government that is de jure and is mostly or wholly in control of its territory, a government that is de facto and is in control of only partial territory or in exile, or various factions controlling different portions of the territory of the target state. Whether or not an act of intervention has occurred would depend on which faction has a better legal title or greater political authority to speak in the name of the community. \(^{72}\) Also, whether or not it is an act of intervention depends on the attitude of the faction controlling the relevant area of the territory.
country.

In some cases, the problem will arise if the government of a target state collapsed and no authorities existed capable of giving consent or authorizing the intervention, as in the case of Somalia in 1992. Nevertheless, the issue of consent authorization is still relevant in such cases; it cannot be assumed that authorization would be granted if a recognized government existed. In most cases, some types of controlling faction capable of granting authorization exists for each of the different regions of the country, even if it is difficult to identify that faction. ##
CHAPTER TWO

Traditional Doctrine and Practice of Humanitarian Intervention

1- Introduction

The concept of intervention by a state in the internal affairs of another has always been one that the international community has had to confront. External interference in the relationship between ruler and ruled has been an enduring and pervasive characteristic of the Westphalia system since its advent. This has always been the case since issues pertaining to the relationship have an international dimension when the manner in which one state treats its citizens within its territory is challenged by other states. Intervention was common in the Greek city-state system, the Roman Empire, and in the religious wars of the 16th and 17th centuries. Two main motivations have been responsible for interventions in the relation between rulers and ruled. Firstly, states have intervened in the internal affairs of other states due to the fact that domestic

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20 The term “intervention” as applied in the international system eludes any precise definition. It has been generally used to mean almost any act of interference by one state in the affairs of another. In a more specific sense, it denotes dictatorial interference in the domestic or foreign affairs of another state that impairs that state’s independence. For various definitions of intervention see for example, Falk, “The United States and the Doctrine of Non-intervention in the Internal Affairs of Independent States” (1959) Howard Law Journal 163 at 166; Stowell, Intervention in International Law (Washington D.C.: John Byrne and Co; 1921) at 318, note 48; Thomas and Thomas, Non Intervention –The Law and its Import in the Americas (Dallas: Southern Methodist University Press, 1956) at Chap. IV; Winfield, “The History of Intervention in International Law” (1922-1923) 3 British Yearbook of International Law 130 (commenting that “intervention may be anything from a speech of Lord Palmerston’s in the House of Commons to the partition of Poland”); Kelsen, Principles of International Law (1956) at 64; Leurdijk, Intervention in International Politics (Leeuwarden: Eisma BV Publishers, 1986) at Chap.5.

21 Morgenthau, for example, observes that “from the time of the ancient Greeks to this day, some states have found it advantageous to intervene in the affairs of the other states on behalf of their own interests and against the latter’s will”. Morgenthau, “To Intervene or not to intervene” (1967) 45 Foreign Affairs at 425. See also, Phillipson, The International Law and Custom of Ancient Greece and Rome, Vol. 1 (London: MacMillan & Co. Ltd, 1911) at 100-101, Vol 2 at 90.
developments elsewhere could undermine their own security, either by increasing the chance of conflict between states or by undermining the legitimacy of their own regimes. Secondly, intervention has occurred because values related to material or security interests, or in the interests of humanity, have urged states to put pressure on others to change the way in which they treat their own citizens or subjects. The latter motivation for intervention, especially that in the interests of humanity, is the primary concern of this chapter. The chapter outlines the historical development of humanitarian intervention and its practice before the UN Charter era. It attempts to show the doctrine coexisted with state sovereignty. Its underpinnings can be found in international law, morality, scholarly writings, treaties and state practice. Thus, the approach used here is to progress from an examination of the origin and development of the doctrine of humanitarian intervention to a study of contemporary attitudes and practices.

It would be appropriate before embarking on an enquiry into the doctrinal evolution and practice of humanitarian intervention, however, to make some brief comments or observations on the concept of state sovereignty. This is pertinent because debates over the current status and future role of humanitarian intervention are embodied in the changing character of state sovereignty. The collaboration of state sovereignty with intervention reveals the examination of a wide range of issues and raises a series of questions. However, a paramount concern here is under what circumstances can a state or group of states, or the United Nations intervene in domestic affairs to hold governments responsible for failing to fulfill an international obligation, namely to provide their citizens with basic human rights? The answer is not an easy one. It is one that the international community is continuing to grapple with and prompts re-examination. Sovereignty

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features in the question of whether or not to intervene on humanitarian grounds. Definitions or conceptions that tend to emphasize the absolute nature of state sovereignty provide a shield against developing a strong practice of humanitarian intervention in international relations. It is contended that the meanings or interpretations of sovereignty are not, and have not, been incompatible or inconsistent with intervention to protect human rights. In other words, the responsibilities of states toward their citizens mean that human rights protection must be seen as part of the definition of sovereignty.

2- Historical Evolution of State Sovereignty and the Doctrine and Practice of Humanitarian Intervention

1. State Sovereignty

A defining feature of the modern international system is the division of the world into sovereign states. Most of the basic norms, rules and practices of international relations have rested on the concept of state sovereignty. In other words, for centuries this sovereignty of nation states— the idea of final and absolute authority of the state—has been a principal feature of the modern world. Yet its role in the relations between states has been "so thoroughly delineated, demarcated, qualified and categorized so much so that the term's continued useful precision is

23 See Jackson, “Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisdiction and the Third World” (1987) 41 International Organizations 519; Walker, “Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice” in Walker & Mendlovitz eds; Contending Sovereignties: Redefining political community (Boulder: Riener, (1990) at 159; Verhoeven, “Sovereign states: A collectivity or community” (1994) Hitotsubashi Journal of Law and politics 149. although various definitions of sovereignty has been proffered and distinctions drawn between internal, external, legal and political, shared or exclusive sovereignty, in an attempt at clarification, its exact meaning has not authoritatively defined. The brief discussion here is to show the evolution of the concept in an attempt to determine in subsequent chapters, the current understandings and meanings of the term.
open to question." 24 Some writers have even called for the introduction of other concepts that may provide more insights for analyzing the authority of nation states in contemporary international relations, or for its abandonment altogether. 25 It is, however, unlikely that sovereignty will be eliminated in the relations between states since the view persists that it is the best mechanism for organizing human society at the international level. Although the formal principle of sovereignty remains the basic norm of international relations, its content has shifted, as will be argued later regarding the concept of human rights.

Definitions of sovereignty tend to focus on its legal content which is often perceived to change little and thus the concept is viewed as a static one. Internally, sovereignty means the exercise of supreme authority by states within their individual territorial boundaries. Externally, it means equality of status between states comprising the society of states. Thus, the formal position of the concept in legal and diplomatic convention has implied both supremacy within and equality of status without.

The original meaning of sovereignty, according to Paasivirta, is related to the idea of

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24 Philpott, "Sovereignty: An Introduction and Brief History" (1995) 48 Journal of International Affairs 353 at 354. The term 'sovereignty' has a long and troubled history, and a variety of meanings. See Crawford, The creation of States in international law (Oxford: Clarendon Press, 1970) at 26. According to Oppenhiem it is "doubtful whether any single word has caused so much intellectual confusion". See, Oppenhiem, See Jackson, "Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisdiction and the Third World" (1987) 41 International Organizations 519; Walker, "Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice" in Walker & Mendolovitz eds; Contending Sovereignties: Redefining political community (Boulder: Rienner, (1990) at 159; Verhoeven, "Sovereign states: A collectivity or community" (1994) Hitotsubashi Journal of Law and politics 149. although various definitions of sovereignty has been proffered and distinctions drawn between internal, external, legal and political, shared or exclusive sovereignty, in an attempt at clarification, its exact meaning has not authoritatively defined. The brief discussion here is to show the evolution of the concept in an attempt to determine in subsequent chapters, the current understandings and meanings of the term. International Law, Vol. 1 (London: Longman, (1905) at 103; Fall, "Sovereignty" in Oxford Companion to Politics of the World (Oxford: Oxford University Press, 1993) at 854.

superiority. It stems from the Latin word ‘supra’. In mainstream legal and political theory, therefore, the sovereign is the holder of ultimate power. In the Westphalian international system the ultimate power holder is the state. This particular view of sovereignty maintains that because the state is under the legal influence of no superior power, sovereignty resides in the state. In other words, to be sovereign is to be subject to no higher power. The result of this theory of state sovereignty is that human rights are considered a matter of domestic, and not international concern.

This absolute norm of state sovereignty discussed above has its origin in Aristotle’s Politics and the classic body of Roman Law. In the Politics, Aristotle recognizes the fact that there must a supreme power existing in the state, and that power may be in the hands of one, of a few or of many. The idea of sovereignty as formulated in ancient Rome sought to establish the theoretical absolutism of the powers of the Emperor and to consolidate the despotism of his rule. Among the Romans, the idea of sovereignty found expression in the fact that “the will of the prince has the force of law, since the people have transferred to him all their right and power.”

In the Middle Ages, government based on the consent of the governed was the ruling

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27 In international law the meaning of sovereignty relates to the idea of independence. The right to be independent assumes the rights of state autonomy in issues pertaining to its internal affairs and the carrying out of its external relations. The classic definition given by Judge Max Huber in the Island of Palmas case in 1928, states that: “sovereignty” in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state”. Permanent Court of Arbitration, April 4, 1928. UN reports of international arbitral awards, Vol.2, 828 at 838. Again, in the Wimbledon Case, the Permanent Court of International Justice held that the sovereign state “is subject to no other state and has full and exclusive powers within its jurisdiction without prejudice to the limits set by applicable law”. PCIJ, series A, no.1, 1928 at 25.
31 Supra, note 9, Cicero for example wrote with reference to sovereignty that “there exists a supreme and permanent law, to which all human order, if it is to have any truth or validity, must conform” and that there is “no other foundation of political authority than the consent of the whole people”. Quoted in Carlyle, a History of Medieval Political Theory in the West (1950) at 16-17.
theory. The idea of original popular sovereignty universally prevailed. It was an axiom of political theory from the end of the 13th century that the justification of all government lay in the voluntary submission of the community ruled.\textsuperscript{32} At this time, however, a strong doctrine on the nature of sovereignty was prevented: firstly, by the prevailing idea of the dominance of divine and natural law over positive law; and secondly, by the idea of the so-called mixed form of state politically by the conflict between church and state, and by the feudal conditions prevalent within the state itself.\textsuperscript{33} In this era, the concept of absolute sovereignty and even arbitrary authority in the state or church was unknown.\textsuperscript{34} One writer notes that:

"There is nothing more characteristic of the Middle Ages than the absence of any theory of sovereignty as this conception has been sometimes current during the last three centuries. The king or ruler of the Middle Ages was conceived of not as the master, but as the servant of the law; the notion of an absolute king was not medieval, but grew up during the period of the decline of the political civilization of the Middle Ages."\textsuperscript{35}

Further development of the concept was to come with the formation of the national state. As the Rome Empire declined, the idea of sovereignty was reinvigorated to reinforce and legitimize secular authority.

The concept received its first systematic articulation in the works of scholars such as Jean Bodin, Hugo Gortius and Thomas Hobbes in the 16th and 17th centuries. Bodin defined sovereignty as, "the most high, absolute and perpetual power over the citizens and subjects in a Commonwealth... the greatest power to command."\textsuperscript{36} For him, the nature of the supreme power is absolute, wholly free from the restraint of law, and held subject to no conditions or limitations.

\textsuperscript{32} See, Merriam, ibid. at 12.
\textsuperscript{33} Ibid; at 13.
\textsuperscript{34} Larson, Jenks et al; Sovereignty Within the Law (New York: Dobbs Ferry, 1965) at 23.
\textsuperscript{35} Carlyle, supra note 12 at 457.
Even though he stated in very strong terms the nature of sovereignty, he was prepared to place limitations on the sovereign power. The sovereign was constrained by natural law, divine law and the law of nations.  

Grotius defined sovereignty as “that power whose acts are not subject to the control of another, so that they may be made void by the act of any other human will.” The supreme power is, however, limited by divine law, natural law, the law of nations, and by such agreements as are made between ruler and ruled. He points out that:

"...an indefinite number of rights may be subtracted from the authority of the ruler; his acts may be rendered subject to ratification by a senate or other body; it may even be provided that in certain cases a right of insurrection falls to the people yet the sovereignty still retains its essential quality unimpaired."  

Hobbes defined sovereignty more absolute than Bodin and Grotius did. He regarded sovereignty as absolute, unified, inalienable, based upon a voluntary but irrevocable contract. The idea of absoluteness regarding this classical notion of sovereignty has been interpreted as complete or unlimited freedom of action with no political or institutional constraints regarding the capacity to act. Using another interpretation, an absolute sovereign is not limited by moral considerations, so that for a sovereign power nothing can be unjust. In this formulation, therefore, sovereignty is

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37 Supra, note 9 at 15-16, see also, Skinner, the Foundations of Modern political thoughts, 2 vols. (Cambridge: Cambridge University Press, 1978) 2: at 244-254.
38 Cited in Merriam, ibid; at 21.
39 Ibid; at 23.
40 Ibid.
41 Ibid; at 27.
42 See, Betiz, “sovereignty and Morality in International Affairs” in Held ed; Political Theory Today (Stanford university Press, 1991) at 238.
43 Ibid.
regarded as final political authority. It is pertinent to note that both Bodin and Hobbes wrote long after territorial states or city states had formed in Europe. They were driven to a more extreme defense of sovereign control by the disorders that were engendered by the religious wars of the 16th and 17th centuries. The importance of these theorists to the development of state sovereignty is that they “provide European rulers with a variegated menu of intellectual ideas from which they could draw to justify their policies.”

Although the concept of state sovereignty has been influential from the 16th century onwards, it has nevertheless been contested or qualified by the continuing influence of developments within the international system over the past four centuries. The European pattern of territorial entities ruled by sovereigns and each having equal sovereignty received its confirmation at Westphalia following the end of the Thirty Years War that had raged over Europe in the early 17th century. The Peace of Westphalia (1648) marked the acceptance of the idea of the sovereign authority of the state. The international system that evolved, initially centered in Europe, was based on the idea that states were the major actors. Their sovereignty was to be regarded as absolute. The supposition was that states would maintain domestic order within their borders and command the resources necessary to carry on effective relations with other states outside their own jurisdiction. Institutions eventually evolved to maintain order and stability in a

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44 Ibid.
45 Krasner, “Westphalia and All that” in Goldstein & Keohane eds; Ideas and Foreign Policy: Beliefs, Institutions and political Change (Ithaca, N.Y: Cornell University Press, 1993) at 263.
46 There is disagreement as to whether the Peace of Westphalia marked a decisive break between the medieval and modern worlds by creating a system of sovereign states or consolidated 300 years of evolution towards such a system. See, for example, ibid; at 235-264; Tilly, coercion, capital, and European states, AD 990-1992 (Oxford: basil Blackwell, 1990) at 167.
system of international relations. These institutions were: a balance of power to prevent the rise of a powerful state and to contain aggression; the codification of rules of behavior through international law; the convening of international conferences to settle major differences; and diplomatic practices through which states would be encouraged to negotiate differences among themselves.\footnote{48}

Within the institutions mentioned above, it is important to note that the Peace of Westphalia did not sanction the right of rulers to do whatever they pleased within their own territories. There were important limitations contained in its provisions on the authority of the sovereign, especially regarding the practice of religion, which was the dominant political question of the 17th century.\footnote{49} It provided for a set of internal practices by recognizing rights for both Protestants and Catholics, thus rejecting the right of rulers to change the religious practices within their territories arbitrarily. A sovereign, for example, who changed his religion could not compel his subjects to change theirs.\footnote{50} The tension between the scope of sovereign authority and international pressures indicated in the treaties of Westphalia is analogous to the ongoing debates regarding a universal human rights regime.

It would seem to be the case that the actual content of sovereign authority -its content both internally and externally- has never been generally agreed upon and recognized in absolute terms.\footnote{51} A discussion of sovereignty in its broad historical context and as an abstract theoretical construct suggests its meanings and practices are historically variable.

\footnote{49} Supra, note 26 at 244.  
\footnote{50} Ibid.  
\footnote{51} Ibid; at 261. Also see generally, Biersteker and Weber, eds; State Sovereignty as Social Construct (Cambridge: Cambridge University Press, 1996) at 1-21, 278-286 (arguing throughout the course of history, the meaning of sovereignty has undergone important change and transformation from the location of its legitimacy (in God, in the monarch, or in a people) to the scope of activities claimed under its protection).
Humanitarian intervention has been for a long time a routine feature of the international system and has coexisted with the development of state sovereignty. The theory of humanitarian intervention is based on the assumption that states in their relation with their own nationals have the international obligation to guarantee to them certain basic or fundamental rights which are considered necessary for their existence, and for the maintenance of friendly relations among nations. It holds further that these rights are so essential, universal and of high value to the human being that violations by any state cannot be ignored by other states. This assumption would authorize intervention by other states in case of flagrant denial of these rights by any state to its own citizens.\(^{52}\)

Although a "usable general definition" of humanitarian intervention is "extremely difficult and virtually impossible to apply rigorously" according to some commentators,\(^{34}\) the concept may be defined as "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."\(^{35}\) In a frequently used definition, the 'theory of intervention on the grounds of humanity recognizes the

\(^{34}\) Franck and Rodley, "After Bangladesh; The Law of Humanitarian Intervention by Military Force" (1973) 67 American Journal of International Law 275 at 305.
\(^{35}\) Stowell, supra, note 1 at 53. Arntz, for example, maintains that "when a government, although acting within its rights of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other states or by an excess of cruelty and injustice, which is a blot on our civilization, the right of intervention may lawfully be exercised, for, however worthy of respect are the rights of state sovereignty and independence, there is something yet more worthy of respect, and that is the right of humanity or of human society, which must not be outraged". Payne trans; Cronwell on Foreign Affairs at 72, quoted in ibid.
right of one state to exercise international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity.\textsuperscript{36} Teson defines it as the “proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who, themselves, would be rationally willing to revolt against their oppressive government.”\textsuperscript{37} These definitions do overlap in important aspects and provide a fundamental understanding of the employment of the term by scholars. It is generally an act performed for the purpose of compelling a sovereign to respect fundamental human rights in the exercise of its sovereign prerogatives.\textsuperscript{53} The classical concept covered any use of armed force by a state against another state for the purpose of protecting the life and liberty of the nationals of the latter state unable or unwilling to do so itself.\textsuperscript{54}

\textsuperscript{36} Quoted in ibid.
\textsuperscript{53} Supra, note 33.
\textsuperscript{54} Beyerlin, “Humanitarian Intervention” in Berndt ed; Encyclopedia of Public International Law 3 (Amsterdam: North Holland Publishing Co; 1981) at 211. In International Law, some commentators tend to draw a distinction between intervention for the purpose of protecting a state’s nationals abroad from other types of humanitarian intervention. The claim is made that although the former is a humanitarian act, the legal ground for protection of nationals is traceable to the independence of states, and thus it is not proper to consider both under the umbrella of humanitarian intervention. Asrat, Prohibition of Force Under the UN Charter: A Study of Art. 2(4) (Uppsala: Juridiska Foreningen I, 1991) at 184-185. Bowett claims the legality of humanitarian intervention is far more controversial than the right of protection of nationals abroad thus the two principles should not be lumped together; the reason being that if they are grouped together it might undermine the latter principle. Bowett, “The Use of Force for the Protection of Nationals Abroad” in Cassese ed; The Current Regulation of the Use of Force (Dordrecht: Martinus Nijhoff Publishers, 1986) at 49. See also, Ronzitti, Rescuing Nationals Abroad Through Military Correction and Intervention on Grounds of humanity) (Dordrecht: Martinus Nijhoff Publishers, 1985). Fairley contends that this distinction exists in theory but should be abolished in practice. He states that: “with respect to the use of force by states for humanitarian ends, the utility of the two-fold classification of customary international law collapses for the purpose of assessing the legal propriety of humanitarian intervention in the post-1945 era.” Fairley, “States Actors, Humanitarian Intervention and International Law: Reopening Pandora Box” (1980) 10 Georgia Journal of International and Comparative Law 29 at 35; Gordon, however, indicates that humanitarian intervention “is employed to describe three very different situations: First, where a state uses force to protect the lives or property of its own nationals abroad; Second, where the use of force serves to prevent a foreign government from initiating or perpetuating a massive and gross violation of the human rights of its own or a third state’s nationals; Third, where a state intervenes in a foreign state’s civil war or so-called war of national liberation”. Gordon, “Article 2(4) in Historical Context” (1985) 10 Yale Journal of International Law at 277. It is suggested that the nature of interventions today does not warrant such a distinction. Whether the right of protection of nationals flows from self-defense or not, the ultimate objective involved here is the protection of human rights. For purposes of this work humanitarian
The genesis of the doctrine can be traced back to ancient times and the religious wars of the 16th and 17th centuries. Its institutions, however, clearly seem to be a creation of the 19th century. Prior to the 19th century, humanitarian intervention was based on Christian beliefs and the religious concept of the dignity of man. St. Thomas Aquinas made references on the basis of religious solidarity to the effect that a sovereign has the right to intervene in the internal affairs of another when the latter greatly mistreats its subjects. Similarly, the Spanish scholar Vitoria argued that:

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

Vitoria thus contended that resistance by the heathen princes to the Christian missionaries and measures to force converted Indians to return to paganism would entitle the Pope to remove the Indian princes and justify war. These statements provided the ideological grounds for most...
interceptions undertaken by 'civilized nations' in the affairs of 'non-civilized nations.' When Christian populations in 'non-civilized nations' were subjected to persecutions or atrocities it was lawful to intervene. It was also lawful to intervene to end such practices as human sacrifice, although it is noteworthy that these statements also provided the basis for European powers who invoked such principles to justify their imperialistic behavior.

Moving from the ecclesiastical underpinnings of the doctrine, the question of when humanitarian intervention is permissible became secularized in the principle of lending lawful assistance to peoples struggling against tyranny. Support was found for the doctrine among many international scholars. For Grotius, writing in 1625, it was important that the law governing every human society be limited by a widely recognized principle of humanity. If a sovereign acts contrary to the rights of humanity by grievously ill-treating his own subjects, the right of intervention may be lawfully exercised. In his quoted words, he asserts:

"There is also another question, whether a war for the subjects of another be just, for the maintaining "only on condition that the friend himself would be justified in avenging himself and actually proposes to do so. But if the injured party does not entertain such a wish, no one else may intervene, since he who committed the wrong has made himself subject not to everyone indiscriminately, but only to the person who has been wronged". He, however, went further to state that a punitive war might be waged to preserve a people's right to worship "on the ground of the defense of the innocent...and if the prince forcibly compelled his subjects to practice idolatry; but under other circumstances, would not be a sufficient cause for war, unless the whole state should demand assistance against its sovereign. A Christian prince may not declare war save either by reason of some injury inflicted or for the defense of the innocent which is permissible in a special sense to Christian prince.

60 Green, supra, note 41.
61 See Stowell, supra, note 1 at 55.
62 He writes: "The fact must be recognized that kings, and those who posses rights equal to kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not affect them excessively violate the law of nature or of nations in regard to any persons whatsoever. Truly it is more honorable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind. Kings in addition to the particular care of their own state, are also burdened with a general responsibility for human society. The most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men, which of itself affords sufficient ground for rendering assistance". Grotius, De Jure Belli ac Pacis Libri Tre (1625), Kelsey trans. (New York: Bobbs-Merrill Co; 1925) at 504-505, 582. Another writer of the period, Pufendorf, also maintained that "common descent alone may be a sufficient ground for our going to the defense of one who is unjustly oppressed, and implores our aid, if we can conveniently do so". See de Officio Humanis et Civis (1682), Moore trans. (1927) at Lib. 11, cap., XVI, s.11.
purpose of defending them from injuries by their ruler. Certainly it is undoubted that, ever since civil societies were formed, the rulers of each claimed some especial rights over his own subjects. But if a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such a case. It would not follow that others may not take up arms for them."  

Consequently, the sovereignty or independence of states stopped where it was violated beyond the point of tolerance. Another writer of the period, Vattel, in his thoughts on the subject, states:

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

Thus, authorities on international law considered humanitarian intervention to be in conformity with natural law. Their writings pointed to the permissibility of the use of force against tyrants who mistreated their subjects. Whereas publicists around the period in which Grotius and Vattel were writing formulated the rules of international law in terms of the recognition of natural rights, the 19th century saw the domination of legal positivism as the basis of international law.

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

64 Vattel had earlier observed that "the sovereign is the one to whom the Nations has entrusted the empire and the care of government; it has endowed him with his rights; it alone is directly interested in the manner in which the leader it has chosen for itself uses his power. No foreign power, accordingly, is entitled to take notice of the administration by that sovereign, to stand up in judgment of his count and force him to alter it any way. If he buries his subjects under taxes, if he treats them harshly, it is the Nation's business; no one else is called upon to admonish him, to force him to apply wiser and more equitable principles". De Vattel, 2 Le Droit Des Gens, Prader-Fodere ed. *1863) Ch. IV, para. 55. Quoted in supra, note 40 at 214.

65 Quoted in ibid; at 215.
jurisprudence. Arntz, for example, developed the theory of humanitarian intervention by recognizing it in an absolute way against all states. He maintains that "when a government, even acting within the limits of its sovereignty, violates the rights of humanity, either by measures contrary to the interests of other states, or by excessive injustice or brutality which seriously injure our morals and civilization, the right of intervention is legitimate. For, however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect, namely the law of humanity, or of human society, that must not be violated. In the same way as within the state freedom of society, the individual is and must be restricted by the law and the morals of society, the individual freedom of the states must be limited by the law of human society." 67

Some writers, however, recognizing the independence of sovereign states denied the right of another state to intervene even though a neighbouring state treats its nationals in an atrocious manner. To intervene was to usurp the sovereign characteristics of the state against which it was invoked. Mamiani68 and Carnazza-Amari (both Italian Scholars), for example, did not recognize the legality of intervention for humanitarian purposes. The latter states that "neither can one justify intervention in the case where the local government does not respect the elementary laws of justice and humanity".69 The French scholar Pradier-Fodere, in essence, observed that the doctrine is illegal since it constitutes a violation of the independence of states.70 Other writers

66 For an exposition on the distinctions between "natural" and "positive" law as applied to humanitarian intervention see generally, Harff, Genocide and Human rights: International Legal and Political Issues (Denver: Graduate School of International Studies Univ. of Denver, 1984).
67 Quoted in supra, note 40 at 220.
68 Carnazzi-Amari, quoting Mamiani, considered “the actions and crimes of a people within the limits of its territory do not infringe upon anyone else’s rights and do not give a basis for a legitimate intervention.” Carnazza-Amari, 1 Traite De Droit International En Temps De Paix (Montanari-Revest Transl. 1880). Quoted in supra, note 40 at 215.
69 Ibid. at 555.
70 He writes that “this humanitarian intervention is illegal because it constitutes an infringement upon the
such as Halleck, Bonfils and Despagnet expressed similar views.\textsuperscript{52}

Nevertheless, the doctrine still had its support among scholars.\textsuperscript{53} Some writers, however, partially accepted the doctrine. They seemed concerned about whether the doctrine could be incorporated into the principles of traditional international law. Their worries apparently were heightened by their fundamental ideological or political beliefs regarding sovereignty and non-intervention versus of humanitarianism. Bernard stated that "the positive law prohibits intervention. However, there may even be cases in which it becomes a positive duty to transgress positive law."\textsuperscript{54} Referring to humanitarian considerations, Harcourt argues "Intervention is a question rather of policy than of law. It is above and beyond the domain of law, and when wisely and equitably handled may be the highest policy of justice and humanity."\textsuperscript{55} Similarly, Lawrence stated "intervention to put barbarous and abominable cruelty a high act of policy above and beyond the domain of law." He stated that it "is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree, international law, therefore, will not

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\textsuperscript{52} See Halleck, International Law; or Rules Regulating the Intercourse of States in peace and war (1861) at 340; Bonfils, Manual le droit International Public 4th ed. (1950) at 168 et seq; Despanet, Cours de Droit International Public 4th ed; (1910) at 258 et seq. Cited in Ronzitti, supra, note 37 at 89 and accompanying footnotes. Stowell also provides authorities denying the existence of humanitarian intervention. Stowell, supra, note 1 at 58-60 and accompanying footnotes. Some South American jurists also rejected the doctrine. Writing at the beginning of the 20th century, Pereira, for instance, states: "internal oppression, however odious and violent it may be, does not affect, either directly or indirectly, external relations and does not endanger the existence of other states. Accordingly, it cannot be used as a legal basis for use of force and violent means". Pereira, Princios De Direito Internacional (1902), quoted in Hassan, ibid. at 864, footnote 11.
\textsuperscript{53} See Hassan, supra, note 55 at 860.
\textsuperscript{54} Bernard, On the Principle of non-intervention (1860) at 33-34, quoted in supra, note 40 at 218.
\textsuperscript{55} Harcourt, Historicus: Letters on some Questions of International Law (1863) 14, quoted in Stowell, supra note, 1 at 60.
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condemn interventions for such a cause."\textsuperscript{56} Phillimore maintained that in the absence of a specific treaty provision, the right of intervention could be exercised only "in the event of persecution of large bodies of men, on account of their religious belief, in which case an armed intervention on their behalf might be as warrantable in international law as an armed intervention to prevent the shedding of blood and protracted internal hostilities. No writer of authority on international law sanctions such an intervention, except in the case of positive persecution inflicted avowedly upon the grounds of religious belief.\textsuperscript{57}

Westlake, one of the prominent English writers of the period on the other hand, recognized a right to intervene in the interest of humanity, especially in response to popular feeling. He was of the view that even a single state could exercise this right.\textsuperscript{58}

\textsuperscript{56} Furthermore, Lawrence forcefully argues for maintaining a right of intervention by stating that: "so prone are powerful states to interfere in the affairs of others, and so great are the evils of interference, that a doctrine of absolute non-intervention has been put forth as a protest against incessant meddling. If this doctrine means that a state should do nothing but mind its own concerns and never take an interest in the affairs of other states, it is fatal to the idea of a family of nations. If, no on the other hand, it means that a state should take an interest in international affairs, and express approval or disapproval of the conduct of its neighbors, but never go beyond moral suasion in its interference, it is foolish. To scatter abroad protests and reproaches, and yet to let it be understood that they will never be backed by force of arms, is the surest way to get them treated with angry contempt. Neither selfish isolation nor undignified remonstrance is the proper attitude for honorable and self-respecting states. They should intervene very sparingly, and only on the clearest grounds of justice and necessity; but when they do intervene, they should make it clear to all concerned that their voices must be attended to and their wishes carried out". See Lawrence, The Principles of International Law 4\textsuperscript{th} ed. (London: Macmillan and Co; 1910) at 129, 137-138. Hall also observes that "while however, it is settled that as a general rule a state must be allowed to work out its internal changes in its own fashion..intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavor". Hall, A Treatise on International Law 2nd. Ed. (1884) at 265.

\textsuperscript{57} He asserted that "intervention in the internal affairs of another state is justifiable when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace, external or internal of its neighbors, whatever the conduct of its government may be in that respect....In considering anarchy and misrule as a ground for intervention...the moral effect on the neighboring population is to be taken into account. Where this include considerable numbers allied by religion, language or race to the population suffering from misrule, to restrain the former from giving support to the latter in violation of legal rights of the misruled state, may be a task beyond the power of their government, or requiring it to resort to modes of constraint irksome to its subjects, and not necessary for their good order if they were not excited by the spectacle of miseries which they must feel acutely. It is idle to argue in such a case that the duty of the neighboring peoples is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance of the best human nature that at the time and place they can hope to meet with". Westlake, International Law, Part 1, Peace, (Cambridge: Cambridge University Press, 1904) at 305-307.
By the early 20th century, the right of humanitarian intervention had gained wide acceptance in the doctrine of non-intervention.\(^5^9\) Many writers refused to recognize state sovereignty as absolute. It was a principle that was susceptible to restrictions. Consequently, absolute sovereignty and non-intervention were relegated to the background in favor of protecting human values in some situations.\(^6^0\) According to Borchard:

"Where a state under exceptional circumstances disregards certain rights of its own citizens over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene of grounds of humanity. When these human rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin of the rights of the individual, therefore, it seems assured that these essential rights rest upon the ultimate sanction of international law and will be protected, in the last resort, by the most appropriate organ of the international community."

Similarly, Oppenheim stated that "there is no doubt that, should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention for the purpose of compelling such a state to establish a legal order of things within its boundaries sufficient to guarantee to its

\(^5^9\) See Mandelstam, The Protection of Minorities 1 (1923) Recueil Des Cours 367 at 391. Brownlie writes that: "by the end of the 19th century the majority of publicist admitted that a right of humanitarian intervention existed". Brownlie, International law and the Use of Force by States (Oxford: Clarendon Press, 1963) at 338, although he notes elsewhere that "unilateral action by a state in the territory of another state on the ground that human rights require protection, or a threat of force against a state for this reason, is lawful" Ibid. at 226.

\(^6^0\) See supra, note 40 at 222-223.

citizens an existence more adequate to the ideas of modern civilization." 62

The doctrine of humanitarian intervention had come to be justified as "an instance of intervention for the purpose of vindicating the law of nations against outrage. For it is a basic principle of every human society and the law which governs it that no member may persists in conduct which is considered to violate the universally recognized principles of decency and humanity." 63 It was grounded upon a minimum standard for the treatment of individuals within a state, or to put it another way, minimum conditions for the survival of humanity. In situations where these standards were violated, the offending state was to be held responsible for such actions.

It is worth noting from an examination of doctrinal writings on the subject that, while they concentrated on the philosophical, religious and ideological foundations of the doctrine, they failed to provide definite criteria for the exercise of the right of humanitarian intervention. 64 However, gleaning through the various writings it is possible to discern some yardstick for the exercise of the right. This included, firstly, lack of other interests or motives than for purely humanitarian reasons on the part of the intervener. 65 Secondly, there must be a preference for

62 Oppenheim, International law (London: Longmans & Co; 1905) vol.1 at 347. The editor of Oppenheim's treatise (Sir Hersch Lauterpacht) in 1955 observed that "there is general agreement that, by virtue of its personal and territorial supremacy, a state can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interests of humanity is legally permissible". Lauterpacht, ed. 8th ed; (1955) at 312-313.

63 Stowell, supra note 1 at 51-52. Regarding the doctrine's future status in international law, one writer concluded at the beginning of the 20th century that "as the feeling of general interest in humanity increases, and with it a worldwide desire for something approaching justice and international solidarity, intervention undertaken in the interests of humanity will also doubtless increase. We may therefore, conclude that future public opinion and finally international law will sanction an ever increasing number of causes for intervention for the sake of humanity". Hodges, The doctrine of Intervention (1915) at 87, quoted in supra, note 40 at 223, footnote 70.

64 See generally, supra, note 40 at 226-267.

65 Amos indicated that "so far as humanitarian intervention is concerned, it is above all, desirable that the purity of the motives should be conspicuous." Amos, political and Legal Remedies for War (New York: Harper,1880) at 159. Quoted in ibid; at 227.
collective action. Thirdly, intervention must be in response to situations such as tyranny, extreme atrocities, and violations of specific fundamental human rights. Lastly, intervention was to be restricted to certain situations such as "civilized" against "non-civilized nations." Interestingly, an attempt at setting out some normative criteria as to when it is permissible to exercise the right was provided by Rougier in his "Theory of Humanitarian Intervention" in 1910. Starting from a critique of the concepts of absolute sovereignty and non-intervention he rejected the legality of individual intervention but accepted collective action instead, basing his reasons on various policy and legal grounds.

In essence, while there was no unanimity regarding the incorporation of the doctrine of humanitarian intervention into customary international law, a great number of authorities held consistent views on the subject matter, acknowledged its existence, and not only sanctioned permissible intervention but also argued that it was necessary. The doctrine also sought a balance between the sovereignty of states and certain basic or natural laws aimed at the protection of human dignity. For, when a state's conduct toward its subjects is such that it leads to

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66 Fonteyne, ibid.
67 Creasy, First Platform of international Law 91876) at 303-305.
68 Higgins ed; Hall's Treatise on International Law 8th ed; (1924) at 344.
69 See supra, note 40 at 227.
70 According to Stowell "when by exception a civilized state transgress the dictates of humanity, it also may be constrained to reform its conduct". Stowell, supra, note 1 at 65.
71 He established three requirements for legality. Firstly, that the even which motivates intervention be an action of the public authorities and not merely of private individuals". These included actions authorized by states as well as those by persons in a private capacity but condoned by the state. Secondly, "the action constitutes a violation of the law of humanity and not merely a violation of national positive law". The only rights which justified intervention were the rights to life, freedom and justice. Thirdly, "that the intervention fulfils certain circumstantial requirements". Factors relevant to this requirement included, "the extent of the scandal, a pressing appeal from the victims, the very constitution of the guilty state, and certain favorable conditions relating to the political balance, economic rivalries, and the financial interests of the interveners". Rougier, "The Theory of Humanitarian Intervention" (1910) 17 Revue Generale de droit International Publique at 497-525.
72 Corbett writes that "since the very beginnings of the literature of international law, many jurists have asserted that a just cause of war or other form of intervention existed against a state persecuting residents for racial, religious or political reasons. He adds that from time to time, also governments have justified interventions in foreign policy on such grounds". Corbett, Law and society in the relations of States (New York Harcourt, Brace& Co. 1951).
massacres, brutality, or religious or racial persecution, and when these acts are of such nature that they shock the conscience of mankind, the international community has the right to intervene to restore some semblance of civilized conduct. In some situations, such action may even lead to the removal of a tyrannical sovereign.

The following are the precedents in state practice tended to support such right of humanitarian intervention.

3- State Practice in the 19th and early 20th Centuries

State practice regarding interventions for humanitarian reasons date back to earlier times. One of the earliest known cases occurred in 480 B.C.. The Prince of Syracuse, in defeating the Carthaginians, laid down as one of the conditions of peace that they refrain from the barbarous custom of sacrificing their children to Saturn.73 The history of international relations shows many cases of humanitarian protest and representation by one or more states on behalf of the citizens of other states.74 For the most part, and especially from the latter half of the 17th century, humanitarian action was undertaken mostly on behalf of persecuted religious minorities and other

73 It is claimed, that a century later the Carthaginians suffered another defeat at the hands of a Sicilian prince> This defeat was considered by the prince a punishment for stopping human sacrifices, thus restoring it. See Sohn & Buergenath, International Protection of human Rights (New York: Bobb-Merrill Co; 1973) at 178.
74 Lord Phillimore in 1789 writes that “the practice of intervention of the one Christian state on behalf of the subjects of another Christian state upon the ground of religion, dates from the period of the Reformation. The great Treaty of Westphalia, in its general language respecting Germany, established, as maxim of public law, that there should be an equality of rights between the Roman catholic and Protestant religious; a maxim renewed and fortified by the Germanic Confederation of 1815. In these cases, it is true that several states to which the stipulation related were all members of one confederation, though individually independent of each other. But the precedent does not stop here; for passing by the interventions of Elizabeth, Cromwell and even Charles 11, on behalf of foreign protestants, and going back no later than 1690, we find in that year Great Britain and Holland intervening in the affairs of Savoy, and obtaining from that kingdom a permission that a portion of the Sardinian subjects might freely exercise their religion.” Lord Phillimore, Commentaries Upon International law, vol.1, 3rd ed. (London: Butterworth, 1879) quoted in supra, note 33 at 3.
recognizable minority groups.

Perhaps an initial step in the protection of minorities was to be found in the 1555 Treaty of Augsburg. This affirmed the principle ‘whose the region, his the religion’ but provided that in the Free Cities of the Holy Roman Empire Protestants and Catholics, often only constituting small minorities, were to live “quietly and peacefully.” 75 A more significant treaty was the Peace of Westphalia, providing that:

"For Catholics and Protestants living under the opposite faith, the conditions of public and private religious worship, which had obtained at the most favorable date in the year 1624, were to be accepted as decisive and to be maintained. Subjects who in 1627 had been debarred from the free exercise of a religion other than that of their ruler were by the Peace granted the right of private worship and of educating their children at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were at liberty to emigrate, sell their estates or leave them to be managed by others." 76

As mentioned earlier, Westphalia recognized some rights for both Protestants and Catholics, rejecting the rights of rulers to change religious practices within their territories arbitrarily. While there was no provision for international enforcement, the relevant provisions were described as:

"A perpetual Law and established Sanction of the Empire, to be inserted like other fundamental Laws and Constitutions of the Empire, and the Empire was obligated not to pass any legislation which would discriminate between Catholics and Protestants." 77

76 See Ward, “the Peace of Westphalia” (1934) 4 Cambridge Modern History at 412.
77 Art. CXX, quoted in Green, “Group Rights, War Crimes and Crimes against Humanity” (1993) International
Other Treaties of Peace signed during this period included, for example, that between Brandenburg and Poland, 1657 (Treaty of Velau); between Sweden, Poland, Austria and Brandenburg, 1660 (Treaty of Oliva); and between the Holy Roman Empire and France, 1679 (Treaty of Nimeguen). All these treaties constituted examples of Roman Catholic intervention on behalf of their subjects in countries ceded to Protestant sovereigns. One writer notes that almost without exception, major peace treaties concerning changes of sovereignty contained clauses protecting the rights and properties of populations transferred to new sovereignties.

The doctrine of humanitarian intervention as practiced in the 18th and 19th centuries was mainly concerned with the rights of Christians, although secularization of religious belief led to the basing of such intervention on behalf of the dignity of man, as well as Jews and other minority groups in various countries, and in parts of the Ottoman Empire. It was mainly done

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79 See for example, Article 16 of the Treaty of Velau which provided for “the free exercise of the Catholic religion.” Ibid. vol. 4, at 435-36. Similarly, section 3 of the Treaty of Oliva stated: “the towns of Royal Prussia which have been during this war in the possession of his Royal Swedish Majesty, and of the Kingdom of Sweden, shall likewise be continued in the Enjoyment of all Rights, Liberties and privileges, in matters Ecclesiastical and civil, which they enjoyed before this war, (saving the free exercise of the Catholic and Protestant Religion) as it prevail’d in the cities before the war.” Ibid. Vol.6, at 60-87. See also, Feinberg, “International Protection of human Rights and the Jewish Question (An Historical Survey)” (1968) 3 Israeli Law Review 487 at 490; Israel, Major Peace Treaties of Modern History: 1648-1967 Vol.1 (New York: Chelsea House, 1967) at 7-49.

80 See Green, “General Principles of Law and Human Rights” (1955-56) 8 Current Legal Problems 162.

81 The principle of international protection of Jews, for example, was stated succinctly in a speech in the English Parliament by Burke as follows: “having no fixed settlement in any part of the world, no kingdom nor country in which they have a community nor a system of laws, they are thrown upon the benevolence of nations. If Dutchmen are injured and attacked, the Dutch have a nation, a government and armies to redress or revenge their cause. If Britons are injured, Britons have armies and laws, the law of nations to fly for protection and justice. But the Jews have no such power and no friend to depend on. Humanity, then must be their protection and ally”. To further illustrate the principle, the British representative in a dispatch to the Rumanian government in 1867 stated: “the peculiar position of the Jews place them under the protection of the civilized world”. Burke, 13 Parliament History of England From the earliest Period to the year 1803 (1814). Quoted in Feinberg, supra, note 83 at 490. See also Kutner, “World Habeas Corpus and Humanitarian Intervention” (1985) 19 Valparaiso University Law Review 593. Generally the doctrine of humanitarian intervention embodied in these principles during this period protecting Jews and other minorities became part of diplomatic practice. The question of the situation of Jews in various countries was discussed either directly or indirectly at various Congresses. At the Congress of Vienna (1814-1815) for example, the
through diplomatic channels, although there were cases of military intervention. It was not until the 19th and early 20th centuries that humanitarian intervention reflected in state practice gained ground, as the great powers occasionally sought to protect individuals and groups of individuals against their own states, though power politics was also involved. Although individual states invoked humanitarian intervention, in most cases, several of the major powers acted collectively under the aegis of the concert of Europe, typically against the Turkish/Ottoman Empire. 82

1- Intervention in Greece (1827-1830)

During the period 1827-1830, France, Britain and Russia intervened in Greece to protect the Greek right of self-determination and Greek Christians from the oppressive rule of the Turks following a number of massacres. 83 This action resulted in acceptance by the Porte of the question of the situation of Jews in the German Confederated states was addressed. Furthermore, at that same Congress an obligation was imposed on Holland not to discriminate between the members of all religious faiths (which included members of the Jewish faith). Also, another example of intervention by one or more of the Great Powers through diplomacy occurred in 1840 on behalf of the Jews in Rumania, when the government, in breach of the Treaty of Berlin refused them recognition as citizens and denied them fundamental rights. See generally, Feinberg, ibid. 82 The interventions under the concert of Europe had some religious impetus as well, since most were carried out to protect Christian minorities in non-Christian states. Supra, note 40 at 232. Rougier, however, notes other than the intervention in Syria in 1860 which was humanitarian, other interventions in the Ottoman Empire were exercised "less in the interests of the Ottoman subjects than in order to resolve the conflicting interests of England, Austria, France and Russia in the Black Sea area". Supra, note 73 at 525. Quoted in Feinberg, ibid. at 492.

83 On the question of motives for that intervention, Stowell notes that the "motives of the intervention would seem to have been to protect the rights of Greek self-determination". Stowell, supra, note 1 at 126-127. Oppenheim, point out the interest mainly to be the European powers concern for the Christian population being subjected to great cruelty in an attempt to forcibly absorb them into the Muslim empire. Supra, note 66, at 2nd. Ed; at 194; The contention that this intervention was humanitarian in nature is borne out by the terms of the London Treaty of 1827 to which Britain, France and Russia were parties. The treaty stated that the contracting powers "having moreover received from the Greeks an earnest invitation to interpose their mediation with the Ottoman Porte, being animated with the desire of putting a stop to the effusion of blood, have resolved to combine their efforts, and to regulate the operation thereof, by a formal Treaty, for the object of re-establishing peace between the contending parties, by means of an arrangement called for, no less by sentiments of humanity, than by interests for the tranquility of Europe". British and Foreign state papers, vol. 14, (1826-1827), 633, quoted in supra, note 33 at 22. For a detailed discussion see supra, note 34 at 280-283.
1827 London Treaty by which they agreed that bloodshed would be put to an end through limited employment of military troops, and ultimately in the independence of Greece in 1830. Turkey rejected the proposal, arguing that the matter was an internal affair. Therefore, the three powers intervened in Greece with military force. As mentioned, the major powers indicated in the London Treaty that their action was mandated "no less by sentiments of humanity, than by interests for the tranquility of Europe." On the question of whether considerations other than humanitarian were involved, Brownlie points out the fact that a realist might see this action from the perspective of the powers being afraid of a unilateral Russian intervention. This comment, perhaps, recalls the presence of power politics in the arena of international relations. The tendency of powerful states to invade weaker ones for a variety of reasons cannot be discounted. Nevertheless, it should be borne in mind that a number of scholars have accepted this intervention as based on humanitarian considerations. More recent writers have pointed out that the desire to eliminate impediments to European commerce mixed with unrest was one of the motivations of the intervening state, and that the intervention could be considered a lawful exercise of treaty

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84 The treaty also proposed a limited local autonomy for the region within the Ottoman Empire. The Turkish government rejected this proposal which consequently, resulted in an armed intervention by the Major Powers on 14th September 1829 and acceptance of the treaty. See Ganji, ibid.

85 Ibid.

86 Brownlie, supra, note 63 at 339.

87 Verwey suggests that this particular intervention was also justified as a protection of commercial interests. Verwey, "Humanitarian Intervention Under international law" (1985) 32 Netherlands International law Review 357 at 399.

88 See Stowell, supra, note 1 at 126, 489. Moskowitz notes the 1827 intervention as an occasion on which the doctrine of humanitarian intervention has been invoked on behalf of nationals or inhabitants of foreign countries felt to have been subjected to practices which shock the conscience of mankind. He goes on to cite other examples like the numerous interventions protesting Turkish treatment of Americans and other Christians, and the protests by the United States in 1891 and 1905 against anti-Semitic outrages in Russia. Moskowitz, Human Rights and World Order (New York: Oceana Publications, 1958) at 16. Ganji also suggests "this intervention... can be identified as humanitarian intervention mainly because its primary motive was to bring an end to the effusion of blood and the human sufferings which had accompanied the six years of war between Greece (then part of the Ottoman Empire) and the Sublime Porte". Supra, note 33 at 22; See Also, Lillich, "Forcible Self-help by States to Protect human Rights" (1967-1968) 53 Iowa Law Review 325 at 332; Reisman and McDougal, "Humanitarian Intervention to Protect Ibos" in Lillich ed; Humanitarian Intervention and the United Nations (1973) at 180. But see Brownlie, supra, note 63 at 339.
concessions previously obtained from Turkey by Russia. Neither position is wholly convincing. The action of the intervening states evidences a belief that widespread killing of persons is a matter of concern to other states and can serve as a basis for their intervention, yet, the intervention cannot be regarded as one conducted by states operating under the purest of motives, and the justification stated does not reflect explicit reliance on a right to humanitarian intervention under international law.

2- Intervention in Syria (1860-1861)

From the 16th century until World War 1, Syria was composed of Lebanon, Jordan, Israel, Syria, the West Bank and Gaza, and constituted an integral part of the Ottoman Empire. For centuries before the Ottoman conquest of Syria, the mountains of Lebanon were a refuge for persecuted religious communities, particularly Maronite Christians. Turkish rule led to the suppression and massacre of thousands of Maronite Christians by the Muslim population. Consequently, France was authorized by Austria, Great Britain, Prussia, Russia and Turkey, meeting at the conference of Paris of 1860, to intervene in Syria to restore order. As a result 6,000 French troops were deployed. A constitution of the Lebanese region was adopted requiring a Christian governor who was responsible to the Porte. The French forces withdrew in 1861 after accomplishing their tasks.

Although the Sultan was a formal party to this intervention as a result of the protocol of

89 Stowell, supra, note 1 at 63.
90 For details of this intervention see ibid. at 63-66.
Paris, Turkey assented “only through constraint and desire to avoid worse.”\textsuperscript{91} This constraint was deemed lawful by virtue of humanitarian considerations involved.\textsuperscript{92}

Some writers of the pre-Charter era have characterized this case as one of humanitarian intervention; others have been skeptical regarding the innocence of the Christian population. While motivation of the European powers appears humanitarian in nature, the Turkish consent to the European powers by signing the protocol of Paris argues against regarding this case as evidencing the legality of nonconsensual humanitarian intervention. If we question the validity of the Turkish consent, it seems clear that Turkey agreed to the French intervention only through constraints and to avoid worse. Rather, the case reflects a weakness of the Ottoman Empire in becoming progressively incapable of maintaining consistent control over certain of its regions and conceding the growing influence of the European powers.

3- Intervention in the Island of Crete (1866-1868)

As a result of several years of persecution and discrimination at the hands of the Turkish authorities on the island, the Christian population of Crete revolted against the Ottoman rulers in 1866 and proclaimed union with Greece. The European powers called for the establishment of an international Commission of Enquiry to investigate the allegations. Turkey refused on the grounds that the issue was one that fell within its domestic jurisdiction. Great Britain stepped in as a

\textsuperscript{91} Ibid. at 66.

\textsuperscript{92} Some writers have questioned the humanitarian objectives involved here, contending the French expeditionary force stayed on the after rescue operations were completed and actually behaved like an occupational force. See for example, supra, note 89. For further discussions on the French intervention in Syria see, Pogany, “Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined” (1986) 35 International and Comparative Law Quarterly 182; Kloepfer, “The Syrian Crisis, 1860-61: A case Study in Classic Humanitarian Intervention” (1985) 23 Canadian Year book of International Law 246.
neutral mediator, offering friendly advice to Turkey, and thus preventing armed intervention. Consequently, the Turkish government adopted a constitution deemed acceptable to the Christian population as well as making commitments for the protection of human rights.93

4- Intervention in Bosnia-Herzegovina and Bulgaria (1876-1878)

Russian intervention in Bosnia, Herzegovina and Bulgaria in 1877 offers an illustration of state practice. Following Turkish misrule and harsh treatment of the Christian populations of Bosnia, Herzegovina and Bulgaria within the Ottoman Empire, the concert of European powers became concerned about the possibility of the creation of effective and equal guarantees for the rights of the Christian population of these areas in comparison with the rights enjoyed by the Muslim inhabitants of the Empire.94 The European powers requested that an international commission operate in the areas to observe and protect the Christians. Turkey rejected the proposal but the powers signed a protocol stating that they reserved the right of action should Turkey fail to maintain the minimum conditions demanded in these areas. Russia declared war on Turkey with the consent of Austria, Prussia, France, and Italy.

The war between Turkey and Russia ended with the preliminary treaty concluded between them at San-Stefano. This treaty provided the basis for deliberations and the adoption of the Berlin Treaty of 1878. By this treaty, a system of Christian autonomy was set up for Bulgaria and Montenegro, the independence of Serbia and Rumania were recognized, and Bosnia and

93 Supra, note 33 at 26-29.
94 In describing the situation at the time, Stowell quotes Morley as saying: “fierce revolt against intolerable misrule slowly blazed up in Bosnia and Herzegovina, and a rising in Bulgaria, not dangerous in itself, was put down by Turkey troops... with deeds described by the British agent who investigated them on the spot, as the most heinous crimes that had stained the history of the century”. See Stowell, supra, note 1 at 127.
Herzegovina were occupied and annexed by Austria-Hungary.\textsuperscript{95} It further provided for freedom of worship and for the principle of non-discrimination on the grounds of religion where it concerned the enjoyment of civil and political rights, admission to public employment, and the right to the exercise of any profession in any locality in all of these states or territories.\textsuperscript{96}

Although this case appears to have been justified by the overriding humanitarian concerns of the major powers, it also portrays the inherent risks in exercising the right of humanitarian intervention. The British government insisted at the time that whatever the repressive nature of Turkish rule over the Bulgarian, Herzegovinians, and Bosnians, the Russian intervention, sanctioned by the other powers, “based in theory upon religious sympathy and upon humanity was a move, in fact, upon the Straits and Constantinople, in pursuance of Russia’s century long program.”\textsuperscript{97} One writer suggests, and as a fact pertaining to this example, the “alleged humanitarian motives were influenced or affected by the political interests of the intervening state.” \textsuperscript{98} It appears that there was lack of inclusive supervision in implementation which facilitated abuse by Russia, ultimately resulting in only partial relief for the victims of oppression and misrule.\textsuperscript{99}

5- Intervention in Macedonia (1903-1908-1913)

Another case of intervention in the Ottoman Empire occurred in 1903. In the

\textsuperscript{95} Supra, note 33 at 29-33. For an exposition on the question of treaty obligations on the successor states see, Green, “Protection of Minorities in the League of Nations and the United Nations” in Gotlieb ed; Human rights, Federalism and Minorities (Toronto: Canadian Institute of International affairs, 1970) 180.
\textsuperscript{96} Ibid. at 33.
\textsuperscript{97} Woosley, America’s Foreign Policy (New York, 1898), quoted in supra, note 32 at 283.
\textsuperscript{99} See ibid.
course of a rebellion, fuelled partly by attempts to convert the Christian population in Macedonia, Turkish troops committed atrocities by attacking the civilian population and destroying many villages with a considerable loss of life. Austria-Hungary and Russia, acting under the aegis of the European powers, demanded the Sultan put into effect a program to provide for among other things, future protection of the population including taxes as reparation for the loss and destruction suffered by the local population.\(^{100}\) Although Turkey accepted the demand, there was a subsequent revolution which led to new atrocities in Macedonia. This led to a declaration of war by Greece, Bulgaria and Serbia on Turkey. The war ended with the signing of the 1913 Treaty of London, wherein Turkey ceded the greater part of Macedonia for partition among the Balkan allies.

Although the Balkan allies were not able to invoke treaty commitments of the 1878 Berlin Treaty, they did not hesitate to resort to armed force. They justified their action on the grounds of humanitarian concern for the continuing atrocities that were being perpetrated upon the Macedonian population.\(^{101}\)

6- Intervention in Cuba (1898)

American action against Cuba in 1898 could possibly be characterized as a case of humanitarian intervention.\(^{102}\) Following the rebellion of Cubans against Spanish rule, the

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\(^{100}\) Supra, note 33 at 33-38.

\(^{101}\) Ibid. at 37.

\(^{102}\) Various interpretations have been placed on the American action; while some commentators perceive it as an example of humanitarian intervention, others have seen it as “the powerful influence of endangered investments and trade”. See Fitzgibbon, Cuba and the United States, 1900-1935 (1964) at 22, quoted in supra, note 34 at 285. Woolsey after studying this case concludes that as far as the facts go the American action in Cuba was justified on the ground of humanity. Supra, note 101 at 75-76. Stowell points out the basis of the action as putting “an end to the shocking
President of the United States reserved the right of intervention. In President McKinley’s war message to Congress, he declared the purpose of the United States intervention, among other things, as being “in the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and therefore none of our business.”

A joint resolution of Congress authorized an armed intervention by the United States in Cuba leading to the defeat of Spanish forces. A general election was held on the Island under the authority of the United States, a constitutional convention was convened and within two years the Republic of Cuba was established.

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

Perhaps a general observation to be made is that international scholars examining these various cases of intervention have recognized that, while the motives were not always pure and

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104 The joint Resolution stated, in part “that the people of the Island of Cuba are and of right ought to be free and independent and that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof, and asserted its determination when that is accomplished to leave the government and control of the island to its people”. Ibid. at 23. This statement hints at the altruistic nature regarding motives for undertaking the action in Cuba. Brownlie contends the “joint Resolution of Congress approved on 20th April 1898 justified the intervention in terms of American interests”. Brownlie, supra, note 63 at 46. Lillich opposes this contention by referring to the Preamble to the Resolution which mentions “abhorrent conditions which have existed for more than three years in the island of Cuba and which have shocked the moral sense of the people of the United States”. He relies on the similarity between the words “shocked the moral sense” in the text in the preamble and “shock the conscience of mankind” as descriptive of conditions which sanction humanitarian intervention. Lillich, “Humanitarian Intervention: A Reply to Ian Brownlie and a plea for Constructive Alternatives” in Moore ed; Law and Civil War in the Modern World (Baltimore: John Hopkins University Press, 1974) at 234.
were most often dictated by political advantage, the motivations of the intervening powers were in fact humanitarian.\textsuperscript{105} In each of these cases, the sovereign authorities were either involved in committing atrocities or did nothing to prevent the killing of innocent individuals or groups within their territories. In sum, the humanitarian motives, for example, behind the Concert of Europe’s recurrent interventions in Ottoman affairs should probably not be dismissed as false.\textsuperscript{106}

By the early 20\textsuperscript{th} century there was less willingness to intervene for the sake of humanity.\textsuperscript{107} Following World War I, the principles of humanitarian intervention as reflected in state practice were manifested in treaties protecting minority rights. The guarantees of human rights and collective intervention were vested in the League of Nations as a principal organ to ensure the treaties were kept,\textsuperscript{108} with ultimate recourse to the Permanent Court of International Justice for interpretation.\textsuperscript{109}

In the 1920s, the minority system of the League worked quite well\textsuperscript{110} but broke down after 1931 in the face of the threat of totalitarian aggression.\textsuperscript{111} States were either singly or collectively

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\item Supra, note 34 at 281.
\item Ibid. however, Brownlie, after examining the various cases of state practice relating to the doctrine asserts “the state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860 and 1861.” Brownlie, supra, note 63 at 340.
\item Earlier in the previous century, it was thought that the Treaties of Paris (1856) and Berlin (1878) which introduced the system of collective guarantees of certain rights for individuals by the European Powers would be likely to eradicate intervention for political purposes, under the guise of humanitarian. In reality this did not work due to absence of machinery to deal with violations. Thomas and Thomas, supra, note 1 at 375.
\item The minority treaties concluded sought, among other things, to protect rights of linguistic and ethnic minorities within new state territories created by the Treaties of Versailles and St. Germain. Although the League’s role regarding protection of minorities was not a great success, it paved the way for later concern to protect human rights. See Robinson, were the Minorities a Treaties a Failure? (New York: Institute of Jewish affairs, 1943); Sieghart, The International Law of Human Rights (Oxford: Clarendon Press, 1988) at 13; Shaw, International Law (Cambridge: Grotious Publications Ltd; 1986) at 29; Green, supra, note 99.
\item The PCIJ had occasion to interpret the significance of particular minorities Treaties and even the Minorities regime. See for example, Treatment of Polish Nationals in Danzig, PCIJ. (1932 2 Hudson 789; Minority Schools in Albania, PCIJ (1935) 3 Hudson 485.
\item See Jones, “National Minorities: A Case Study in International Protection” (1949) 14 Law & Contemporary Problems 599.
\item Thomas & Thomas, supra, note 1 at 375. Green notes that “during the period between the accession to power of National Socialism in Germany and the outbreak of war in 1939, the desire to maintain the balance of power was
\end{enumerate}
\end{footnotesize}
unwilling to intervene in the name of humanity. This unwillingness was shown by the Powers, for example, in the light of Hitler’s false argument of oppression of Aryan minorities and consequent aggressive action, resulting in the incorporation of Austria into Germany, the disintegration of Czechoslovakia and the partition of Poland.\footnote{112} Again, there was no intervention in the mass extermination of Jews in Europe in the 1930s and 1940s.\footnote{113}

In light of Nazi Germany’s aggression and the arguments used to support it, Thomas and Thomas observed that the ideal of humanitarian intervention for the protection of minorities “was twisted and warped into a cloak for illegal intervention.”\footnote{114} Opponents of the doctrine have cited these cases of unjustified interventions of other nations as a fundamental reason why the doctrine should not be recognized by the international community. The problem here relates to distinguishing the credible exercise of the right from the non-credible.\footnote{115} These cases of misapplication of the doctrine do not strip it of its inherent value as a safeguard for the protection of humanity.

In sum, the discussion suggests that state sovereignty has coexisted with intervention for the sake of humanity since the establishment of the state system. Humanitarian intervention is based on the notion that sovereign jurisdiction is conditional upon compliance with minimum fundamental in European politics thus playing a major role in frustrating the work of the League of Nations as a protector of minorities. This desire also had much to do with the silent tolerance of atrocities being perpetrated in Germany at the time”. Green, “The Intersection of human Rights and international criminal Law” In Cotler and Eliadis eds; International human rights: Theory and Practice (1993) 213 at 250.
\footnote{112} In justifying the German occupation of Bohemia and Moravia in 1939, Hitler referred to “assaults on the life and liberties of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities”. Brownlie, supra, note 63 at 340.
\footnote{113} It should be noted that military intervention by the Allies in World War II was in response to Nazi Germany’s external aggression and not to its commission of human rights atrocities against Jews Living in Germany and other European nations under Nazi occupation. Scheffer, “Toward a Modern Doctrine of humanitarian Intervention” (1992) 23 University of Toledo law Review 253 at 225.
\footnote{114} Thomas & Thomas, supra, note 1 at 375.
\footnote{115} Reisman & McDougal, supra, note 92 at 167.
standards of human rights. Thus, an offending state which has abused its sovereign rights cannot claim absolute sovereignty. The content of sovereign authority is not immune from state action to protect humanity. In situations of grave violations of human rights members of the international community should step in for humanitarian considerations. These considerations and precedents in state practice motivated the international scholars to document the legality and cases in which the doctrine has been invoked.

While the doctrine’s writing is wider, state practice was limited to conventions such as peace treaties and minority treaties. The precedents show in some cases a tendency to abuse the doctrine, or the presence of mixed motives in undertaking state action. However, the crucial concern of the intervening states is related to oppressive and inhuman treatment suffered by populations under the jurisdiction of sovereign authorities who were supposed to protect their rights.

In conclusion, it seems clear that the argument supporting the doctrine has its grounds in recognized sources of international law as the views of international scholars and treaties indicate. In addition, the many cases during the 19th and early 20th centuries in which states invoked humanitarian grounds to justify intervention abroad constituted sufficient evidence of state practice to permit recognition of the right of humanitarian intervention. As Lillich stated,

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116 Ibid.
118 A minority view, argues that since most of these interventions were based on treaty provisions authorizing the European powers to intervene in the states of the Ottoman Empire to protect Christian minorities from atrocities, they do not support recognition of a broad right of humanitarian intervention. See for example, Brownlie, supra, note 63 at 342; supra, note 33 at 43. Somarajah, however, concludes that an examination of state practice indicates that despite the invocation of treaty rights of intervention, states nonetheless, “claimed the right of intervention on humanitarian grounds, attaching primacy to that principle over their treaty rights as the justification for the intervention”. Somarajah, “Internal Colonialism and humanitarian Intervention” (1981) 11 Georgia Journal of International and Comparative Law 45 at 57.
"the doctrine appears to have been so clearly established under customary international law that only its limits and not its existence are subject to debate."\textsuperscript{119} ##

\textsuperscript{119} Lillich, "Intervention to Protect Human Rights" (1969) 15 McGill Law Journal 205 at 210. Similarly, Shacross asserts that "the rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the recognized law of nations". Speeches of the Chief Prosecutors at Nuremberg, Commd. Papers 6964 (1946) at 40, quoted in Thomas and Thomas, supra note 1 at 374. Fonteyne, after an in-depth analysis of the doctrine and state practice, concludes that "while divergences certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention, as well as to the manner in which such operations were to be conducted, the principle itself was widely, if not unanimously, accepted as an integral part of customary international law". Supra, note 40 at 235. See also Somarajah, ibid; at 56.
CHAPTER THREE

The Right of Humanitarian Intervention in the Post-Charter Era

1- Introduction

Every so often an event happens and compels a re-examination of traditional doctrines of international law. Such a re-examination occurred after World War I and II conflicts that led to the creation of the United Nations, new norms were codified in treaties and conventions, and fundamental changes occurred in the legal field of international relations.\footnote{Examples of changes in international law following World War I include the League of Nations and its associate Covenant, the Mandates system, the Kellog-Briand Pact, the Permanent Court of International Justice, and the International Labor Organization. In aftermath of the World War II, the United Nations and its specialized agencies were established, the International Court of Justice resumed the work of its predecessor, regional organizations were created, and scores of international treaties and conventions of profound significance were came into force.} A great event such as the end of the Cold War again is challenging traditional readings of international law and the behavior of states. Traditional interpretations of sovereignty non-intervention in the internal affairs, and non-use of force and the doctrine of humanitarian intervention are facing great attack in the dramatic changes of the world following the end of the Cold War. There is a lively debate occurring at the UN General assembly and the Security Council about whether or not intervention by the UN or other actors to stop gross and systematic violations of human rights with grave humanitarian consequences should override the principles of national sovereignty, territorial integrity and non-intervention in the internal affairs of states. Some countries are strongly opposed to the norm of humanitarian intervention, others sympathize with it, and many other countries are trying to make up their minds about accepting or rejecting it.

In the previous chapter, an attempt was made to show that the principle of humanitarian
intervention coexisted with the development of state sovereignty, and that customary international law permitted intervention in support of humanity under certain circumstances. The promulgation of the United Nations Charter following World War II affirmed a set of principles and norms that are directed towards governance of the international system, or at least, aimed at influencing interactions among states. If the UN Charter, a document intended to be the primary basis for international relations, created a new international order, then did the right of humanitarian intervention survive into this order? The legal principles that guided the early evolution of the humanitarian intervention doctrine, according to some commentators, are no longer valid with the prohibition of the use of force under the Charter. However, a school of thought holds that the institution of humanitarian intervention still exists. This chapter investigates the evolution and

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72 Robert Gilpin, for example, notes that a necessary “component of the governance of an international system is a set of rights and rules that govern or at least influence interactions among states.” He argues that these rules are negotiated at the conclusion of great wars, where the negotiated treaties serves as the constitution of the state system. See Gilpin, War and Change in World Politics (Cambridge: Cambridge University Press, 1981) at 34, 36. In a similar vein, Goodrich, Hambro and Simons write: “it is necessary to think of the Charter not only as treaty embodying the maximum limitations on a state’s freed of action, that nations at that stage of history and in light of experience were prepared to accept as consistent with their national interests, but also as a constitutional document setting forth the guidelines for future development. The exact nature of this development was to be determined not only by the Charter itself but also by the way in which the members of the United Nations interpreted these guidelines and made use of the organization in dealing with the eve-changing problems of an ever-increasing world. The Charter thus provided the constitutional basis for achieving international peace, security, and well-being, and pointed the way—but the ultimate verdict was to rest with the actors themselves.” Goodrich, Hambro, and Simons, Charter of the United Nations, 3rd ed. (1969) at 1.


74 It should be noted that it is sometimes difficult to put scholars in straight jacket categories of proponents for and against the doctrine. Some advocates against the right of intervention for humanitarian purposes prefer collective
strength of humanitarian intervention in the UN Charter during the Cold War era. Specific Charter
provisions relating to non-intervention and human rights as well as international legal instruments
beyond the Charter such as conventions, resolutions and declarations are examined. It is argued
that the international human rights regime, at least in principle, constitutes limitations on the
sovereignty of states which have accepted the respective agreements. This however, does not
suggest the non-importance of sovereignty since the conclusion of these covenants are themselves
acts of sovereignty. Thus a norm of justified intervention is grounded in the UN Charter, the
human rights declarations and covenants. In addition, the extent to which state practice
recognized the legitimacy of humanitarian intervention is examined.

2- Evolving Norms

A- Principles of State Sovereignty and Non-intervention
The UN Charter provides in Art. 2(1) that the "Organization is based on the principle of the sovereign equality of all its members." This underlines the importance of the principle of state sovereignty in daily intercourse between states. The complementary principle of state sovereignty in international law is non-intervention. This principle provides that no state should be subject to interference in its internal affairs. This follows directly from the assumption that each state is a sovereign actor capable of deciding its own policies, internal organization and independence. Thus, the principle has played a great role in the evolution of the international order which now exists. However, the desirability of this order has come under increasing challenge during the 20th century. An international community of independent and sovereign states is no longer unquestioningly regarded as the most appropriate or even the most desirable.

The sovereign equality of states is a concept of law that must be distinguished from the political equality of states. The concept is an umbrella category that includes within its scope the recognized rights and obligations which fall upon states. The 1970 declaration on Principles of international law which recognizes this provides that: "all states enjoy sovereign equality. They have equal rights and duties and are all equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following: (a) states are juridically equal; (b) each state enjoys the rights inherent in full sovereignty; (c) each state has the duty to respect the personality of other states; (d) the territorial integrity and political independence of the state are inviolable; (e) each state has the right freely to choose and develop its political, social, economic and cultural systems; (f) each state has the duty to comply fully and in good faith with its international organizations and live in peace with other states". These are what Robert Jackson characterizes as the constitutive rule of sovereignty game. See Jackson, 'quasi-states, dual regimes, and neoclassical theory: International Jurisprudence and the Third World" (1987) 41 International Organization 519.

As far back as 1749, Wolf articulated the principle of non-intervention by stating "If the ruler of a state should burden his subjects too heavily or treat them too harshly, the ruler of another state may not resist that by force. For no ruler of a state has a right to interfere in the government of another, nor is this a matter subject to his judgment". Wolf, Jus Gentium Methodo Scientifica Pertractum (1749), Secs. 255-257. Quoted in Benneh, "Review of the Law of Non-intervention" (1995) 7 African Journal of International and Comparative Law 139 at 140. Both Wolf and Vattel recognized the observation of the non-intervention because acts of intervention necessary infringe upon state sovereignty (although Vattel carved out an exception by allowing intervention in a civil war for a just cause). Their conclusion was reached by drawing an analogy between individuals have a right to their independence. By analogy, states have a similar right. Intervention was thus seen to be a violation of that right. On this basis Vattel identified an international legal order comprising independent states "closed or sealed off from one another. See Vincent, Non-intervention and International Order (Princeton Univ. Press, 1974) 27-31; Carty, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (Manchester, 1986) at 89. The development of rules of non-intervention was historically linked to the response of Latin American states in the 19th century to intervention by the United States and European powers.

mode of organization for the future of humanity. Given the significance of the non-intervention principle in sustaining this order, it is no wonder that the principle is now being placed under close investigation.

Support by states for adherence to a broadly formulated principle of non-intervention can be found in their reading of the UN Charter and other international legal instruments. The most vigorous adherents of a policy of non-intervention have been the weaker states, mostly the Third World states, apprehensive of severe limitation on their sovereign rights by the more powerful states in the international system.

The starting points for analyzing this principle have been Articles 2(4) and 2(7) of the UN Charter. Art. 2(4) states "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the UN", while Article 2(7) states that:

"nothing in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matter to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." This prohibition or apparent prohibition of the threat or use of force is subject to a number of limitations provided for in the Charter. Specific exemptions from Article 2(4) and other

78 Ibid.
79 There is a general tendency here of Western states emphasizing the importance of human rights and Third World and former socialist states emphasizing a policy of non-intervention. See for example, Robert & Kingsbury eds; United Nations, Divided World: The UN's Roles in International Relations (Oxford: Clarendon Press, 1988) at 16.
80 Incidentally, there has been considerable controversy surrounding the precise meaning of these provisions. While a comprehensive discussion of the provisions is beyond the scope of this study, I shall adopt a viewpoint that, in my opinion, is consistent with the aims and purposes of the UN in light of the principle of humanitarian intervention. For further discussions of these articles see for example, Gordon, "Article 2(4) in Historical Context" (1985) 10 Yale Journal of International Law 279. But see Asrat, supra, note 2.
international instruments prohibiting the use of force, however, do exist. These are: actions taken or authorized by the UN in certain circumstances; the use of force in individual or collective defense; military action against a former enemy state; and certain actions taken pursuant to regional arrangements or agencies authorized by the Security Council. It is sufficient to note for

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81 See Chapter VII of the Charter which contains provisions for self-defense or forceful measures authorized by the Security Council.
82 Art. 51 of the Charter states: "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security". While some commentators regard as questionable whether the protection of nationals abroad falls within the ambit of Art.51, other have argued humanitarian intervention should be seen as a legitimate category of self-defense. Thus, other states could act singly or in concert to protect individuals or groups against their own state. Commenting on this provision, Thomas and Thomas contend that "a plea can be made that where it is legal to protect one's nationals, it is an extension of this legality to protect the nationals of others. The so-called principle of nationality is not inflexible" for them, self-help to protect one's own nationals in included in the inherent right to self-defense preserved by Art. 51. This concept is then extended to situations where the nationality link is missing. Thomas & Thomas, in Carey ed; The Dominican Republic Crisis (Dobbs Ferry: Oceana Publications Inc; 1967) at 20. Although Bowett admits that intervention for protection of a state's own nationals still exists as part of the traditional right to self-defense, he contends that its use must meet the normal conditions of self-defense. These requirements include failure by the territorial state to extend protection for aliens in accordance with international law; the existence of an actual or imminent danger requiring urgent action; and lastly, the actions taken must be proportionate and confined to the necessities of freeing the nationals from danger. However, he expresses doubt as to the validity of a right of intervention on behalf of aliens, grounded on purely humanitarian reasons as a category of self-defense in the absence of a link of nationality. Supra, note 2 at 45. See also, Bowett, "The use of Force for the Protection of National Abroad" in Cassese ed; The Current Regulation of the Use of Force (Dordrecht: Martinus Nijhoff PublisherS, 1986) AT 39-55, Hassan holds the conviction that "even if the protection of nationals was guaranteed under self-defense, extending this rationale to the protection of foreigners is a distortion of the Charter's language". Supra, note 2 at 888. Scheffer however, laments the "paradox of international law that while this customary rule to permit missions to rescue endangered nationals has been recognized, armed intervention to rescue thousands or even millions of people whose lives are at stake because of a government's repressive conduct somehow has not met the test of legitimacy under the UN Charter." He argues the "conventional characterization of rescue operations as acts of self-defense or self-help is an artificial distinction that should be scrapped. Interventions to rescue nationals from life-threatening dangers in another country are humanitarian in nature and should be recognized strictly for that purpose, and not as some extended application of national self-defense". Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention" (1992) 23 University of Toledo Law Review 253 at 272. Although Teson does not explore the interrelationship between the principles of self-defense and intervention for the protection of a state's nationals abroad, he notes since "the law of human rights has a universal reach, it extends to nationals and aliens" and that "there is no reason in principle why protection of nationals of the intervening state should be, by definition, less humanitarian than the action undertaken to protect nationals of the target state". Supra, note 3 at 6. The distinction between rescuing nationals abroad as flowing from the right of self-defense on one hand which is considered legal, and humanitarian intervention on the other, which some writers considered illegal, should be scrapped since humanitarian considerations are involved in both situations. There would have been a row if, for example, as in the Entebbe case, both nationals and aliens were affected and only Israel's own nationals were rescued, leaving behind Jewish nationals of other countries.
83 See Chap. VIII of the UN Charter.
now that, leaving aside the exceptions mentioned, the interpretation of Article 2(4) for some scholars indicate a total and complete prohibition of force in international relations. The majority of states during UN debates favored an absolute interpretation of the Charter’s prohibition of intervention. This view appeared to have been articulated in other international legal instruments. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted by the General Assembly in 1965, it has been argued, did not only outlaw "armed intervention" but went beyond, condemning also "all other forms of interference or attempted threats against the personality of the state." In addition to that declaration there is the more fundamental Declaration of Principle of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the UN adopted in 1970. This resolution, while approving the principles articulated in the 1965 Declaration as the "basic principles" of international law, and laying down a broad non-intervention principle, perhaps merely restating Article 2(7) in detail, ended with the

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85 See Fonteyne, "Forcible Self-help to protect Human rights: Recent Views from the UN" in Lillich ed; supra, note 2 at 209-211.
86 The Declaration reads in part: "no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic, or cultural elements are condemned. No state may use or encourage the use of economic, political, or other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights, or to secure from it advantages of any kind. Also no state shall organize, assist, foment, finance, invite or tolerate subversive terrorist or armed activities directed towards violent overthrow of the regime of another state or interfere in civil strife in another state.
88 G.A. Res. 2625, 25 UN GAOR Supp. (No.28) at 121, UN Doc. A/8028 (1970). Reproduced in (1970) 9 International Legal Materials 1292. See also, the 1974 UN Definition of Aggression, G.A. Res.3314, UN GAOR, Supp. No. 31, at 142, UN Doc. A/9631 (1974). Reprinted in (1975) 69 American Journal of International Law 480. This document defines aggression as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state". It further specifies no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. Opponents of humanitarian intervention have also used this resolution as a springboard to argue any first use of force is aggression unless the Security Council (and nor other state actors removes this label. See Verwey, supra, note 2 at 389.
usual caveat that "nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security." It should be noted that, despite the general pronouncements of non-intervention both in the General Assembly debates and in statements of the various state delegations, there were fewer opinions expressed and little condemnation of humanitarian intervention during the course of the UN debates. At the General Assembly debates on the "question of defining aggression, and on principles concerning friendly relations and cooperation among states," representatives of Mali, Jamaica, Senegal, Chile and the Netherlands spoke out in favor of intervention to remedy gross violations of human rights such as genocide. Opposed to such a doctrine were China, Israel, Panama, Mexico, Romania and a handful of others.

Similarly, general prohibitions of intervention have been written into the Charter of the African Union, the Charter of the Organization of American States, and in the principles of the Final Act of the Helsinki Conference in 1975 (Helsinki Accord) following on from the conference on Security and Cooperation in Europe process. These declarations, however, are not ordinary treaties or conventions, and like general assembly resolutions do not create binding obligations on states. Nevertheless, Fairley argues "there is a wide consensus that these declarations actually established new rules of international

89 Franck & Rodley argue that the Resolution brooks no exception, not even for the protection of human rights and that its clarity is not obscured by the addition of a paragraph reiterating the obligation of states to respect the right of self-determination and human rights" Franck & Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force 1973 67 American Journal of International Law 275 at 299-300.
90 See, supra, note 14 at 216; Ronzitti, supra, note 2 at 106-107.
91 Ibid.
law binding on all states" and that the support generated for this idea certainly enhances its persuasive value..."94

However, it is impossible to identify in a set of comprehensive rules the difference between permissible and impermissible acts of intervention.95 Most interactions between states occur under pressure and inducement, thus the non-intervention norm stands little chance of affecting behavior if it excludes what occurs everyday as normal world politics.96 Indeed, the inconsistency between states’ pronouncements on the prohibition of intervention and their actual responses to the use of force is evident. India’s use of force in East Pakistan in 1971, Tanzanian intervention in Uganda in 1978, Vietnam's intervention in Cambodia in 1979, and India's use of its air force to drop supplies to Tamils in 1987 are some examples. There is clearly a longstanding contrast between what is preached (non-intervention) and what is actually practiced.

Beyond state rhetoric and practice this complex subject matter has received little scholarly consensus.97 The issue of what is permissible and impermissible intervention, however, is a relative one. As far back as 1923 the Permanent Court of International Justice, in its advisory opinion in the National Decree case pointed out:

"the question whether a certain matter or is solely or not within the jurisdiction of a state is an essentially relative question; it depends on the development of international relations. It may well happen that, in a matter which is not in principle regulated by international law,

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94 Ibid.
96 Ibid.
the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such a case, jurisdiction which in principle belongs solely to a state is limited by the rules of international law.\(^98\)

Therefore, what was once an internal matter for states may become issues subject to international inquiry and thus for international concern. This is the case with the internationalization of human rights issues.

It is pertinent to rethink the prevailing assessment of the non-intervention principle due to its unsatisfactory nature. The context of intervention practice has changed; thus, the principle needs reformulation and some coherence to take account of developments in international relations. The identification of international law with society conceived in terms of states emerged largely with the growth of positivist theories and the ascendance of the nation-state as the predominant actor in the global arena. This development is rapidly changing with the emergence and influence of non-state actors in international relations. Modern practice demonstrates that individuals have become increasingly recognized as participants and subjects of international law. They possess certain rights which the states must accept, and states are subject to international scrutiny regarding their human rights practices. If the increase in and growing concern about violations of human rights is taken into account, which the principle of non-intervention fails to take into account, then a justification for reexamining the principle will be in order and of the utmost importance.

Also it has been argued that the major concern of the UN in 1945 was to identify ways of prohibiting the use of force which in large measure accounted for the significance attached to the principle of non-intervention. But the consequence of this blanket prohibition of the use of force

\(^{98}\) Nationality Decree in Tunis and Morocco (1923) PCIJ, Series B no.4, 24, 27.
is that there is no possibility of discriminating on a normative basis between divergent uses of force. For example, as currently constituted, it is difficult to distinguish between the Soviet Intervention in Czechoslovakia in 1968 or the Tanzanian intervention in Uganda in 1977. In the former case, the human rights of the citizens were clearly violated by the intervention, whereas in the later case, the effect of the intervention was to promote the human rights of the citizens. From this perspective, therefore, the principle of non-intervention is becoming increasingly irrelevant. According to Levitin, the concern with war was legitimate after the Second World War; today, however, the danger of world war has receded, while grave violations of human rights have become a routine feature of international politics. Therefore, the principle of non-intervention needs to be revised. If international law is to be more relevant in these circumstances, it must become "more nearly congruent with its moral bases."  

An argument to similar effect is also made by Teson, who, however, identifies a "congenital tension between the concern of human rights and the notion of sovereignty- two pillars of international law." This tension generates a major dilemma for all concerned about the normative dimensions of international relations because, if intervention is prescribed to promote human rights, then the door will be opened to "unpredictable and serious undermining of world order." But if intervention is prohibited even to check human rights violations, then the principle of non-intervention involves a "morally intolerable proposition whereby the international community is impotent to combat massacres, acts of genocide, mass murder and  

99 Little, supra, note 6 at 24.  
101 Ibid.  
102 Teson, supra, note 3 at 3.
widespread torture." 103 He asserts that it is only individuals who have rights. Sovereignty therefore, does not constitute an inherent right of the state. In other words, a sovereign derives its rights from its citizens and has no separate identity. He associates international legal theories that attempt to defend the autonomous moral standing of states and government with the ‘Hegelian Myth’ that states have inalienable rights. For him, the legitimacy of the state can only be justified if it promotes the rights of all its citizens. Where the state fails to perform this duty, it loses its legitimacy and the protection afforded by the principle of non-intervention. Other states under these circumstances are entitled to intervene in order to remedy the human rights violations which have taken place. Teson’s argument can be viewed in two ways: either opening up an exception to the non-intervention norm, or returning to the Grotian position of permitting intervention provided the cause is just. 104 This builds on other theorists who have taken an increasingly permissive attitude on intervention, and who are not concerned about the traditional justification underlying non-intervention. 105

B- The Internationalization of Human Rights

Before 1945, the protection of human rights was predominantly a matter of domestic jurisdiction. Customary international law contained no limitations upon the freedom of the state to treat its own citizens at its own discretion. Treaty obligations in the field of human rights were scarce and limited in scope (slavery, minorities etc).

One of the goals of the allied powers during World War II was the realization that only

103 Ibid.
104 Little, supra, note 6 at 25.
105 See, for example, the articles cited in ibid; at 30-31, footnote 47.
international protection and promotion of human rights can achieve international peace and progress. This was a reaction to the atrocities of the Holocaust, which provided the impetus for the struggle for human rights. The Charter thus provided initial principles for the protection of human rights. One of its basic purposes, as stated in Article 1(3), is "promoting and encouraging respect for human rights". Similarly, under Article 55, the members of the UN reaffirm a commitment to promoting universal respect for and observance of human rights and fundamental freedoms for all. Under Article 56, all members of the UN "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In the view of some legal scholars these provisions in themselves establish a legal obligation for states to observe human rights and, consequently, human rights issues are a matter of international concern outside the scope of Article 2(7). Other legal scholars consider this view as too far-reaching in light of the broad wording of the Charter provisions on human rights and the fundamental character of Article 2(7). However, it is probably generally recognized that states have in any case legal responsibility under the Charter for gross and systematic violations of human rights. This view finds support in the practice of the International Court of Justice. In 1971 the Court held that the South African policies of apartheid in the territory of Namibia constituted

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

107 Article 55 provides: "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the UN shall promote: "among conditions universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

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"a denial of fundamental human rights and a flagrant violation of the purposes and principles of
the Charter."

In spite of differing opinions on their legal effect, the actual practice of the UN has that it
has not been prevented from investigating, discussing and evaluating human rights abuses and
today even taking action despite the numerous constraints which the Organization faces. It would
seem that the Charter provisions regarding human rights represent binding legal obligations for all
states.108 The cumulative effect of these provisions is that intervention to prevent human rights
abuses is still valid.109 While it may be doubtful whether states can be called to account for every
alleged violation of the general Charter provisions, there is little doubt that "responsibility exists
under the Charter for any substantial infringement of the provisions, especially when a class of
persons, or a pattern of activity are involved." 110

Elaborating and supplementing the Charter provisions on human rights is the Universal
Declaration of Human Rights which was adopted by the General Assembly on 10th December
1948. The Declaration became the objectives of the UN Charter after the atrocities that followed
the Second World War. It proclaims a whole gamut of civil, political economic, social and
cultural rights pertinent to human existence. The Declaration at the very least serves as a yardstick
in measuring the degree of respect for, and compliance with, international standards of human

108 See for example, Ramcharan, The Concept and Present Status of the International Protection of Human Rights- 40
years after the Universal Declaration of Human Rights (Dordrecht: Martinus Nijhoff Publishers, 1988) at 59.
109 Reisman & McDougal conclude that the effect of these Articles "in regard to the customary institution of
humanitarian intervention is to create a coordinate responsibility for the active protection of human rights: members
may act jointly with the organization in what might be termed a new organized humanitarian intervention or singly or
collectively in the customary or international common law of humanitarian intervention" They add that :in the
contemporary world there is no other way the most fundamental purposes of the Charter in relation to human rights
can be made effective:. Reisman & McDougal, supra, note 3 at 175. Teson also argues "the promotion of human
rights is a main purpose of the UN. The use of force to remedy serious human rights deprivations, far from being
against the purposes of the UN serves one of its main purposes. Teson, supra, not 3 at 131.
rights.

The International Covenant on Civil and Political Rights,\textsuperscript{111} and the Optional Protocol on communication petitions, were adopted by the General Assembly and entered into force on March 23, 1976. The Covenant defines and sets out in much greater detail than the Universal Declaration a variety of rights and freedoms. In addition it contains a number of rights that are not listed under the Declaration. It imposes an absolute and immediate obligation on each of the states parties in Article 2(1) to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind...."

Under Article 2(2) each party "undertakes to take the necessary steps.... to give effect to the rights recognized in the present Covenant" where a right is not already protected by existing legislation.

The International Covenant on Economic, Social and Cultural Rights adopted in 1966 entered into force in 1976. It contains 31 Articles and is divided into five parts. It elaborates upon most of the economic, social and cultural rights provided for under the Universal Declaration, and frequently sets out measures that should be undertaken to achieve their realization. Under the Covenant, the duties of state parties are merely to take steps "to the maximum of its available resources" aimed at achieving "progressively the full realization" of these rights. This provision seems realistic given the fact that economic constraints on states, (especially Third World countries) may prevent the immediate enjoyment of those rights.\textsuperscript{112} However, the question is


\textsuperscript{112} It is be noted that a general argument can be made to the effect that the richer parties are obligated to aid poorer countries economic, social and cultural efforts. This argument can be maintained, if the Economic Covenant is read in conjunction with Article 55 and 56 of the UN Charter which creates an obligation on all members of the UN to assist in these efforts; although no specific provision can be found in the text of the Covenant or in its legislative history. See Turbek, "International Protection of Social Welfare in the Third World; human Rights Law and Human Needs
whether it is within the discretion of state parties do determine when available resources permit their realization. It has been suggested that:

"the principle of progressive realization really means that a state is obligated to undertake a program of activities including but not limited to specific measures listed in the Covenant indicates that priority should be given to this area and that the level of effort should increase over time." 113

On the issue of standards to be applied under the Covenant, it is maintained that different measures would have to be adopted as a matter of practical reality, since no two states are likely to have the same "available resources." 114

Despite these instruments, there are also a host of declarations, conventions and instruments adopted by the General Assembly explaining specific obligations pertaining to particular human rights. 115 The General Assembly in 1970, for example, expressed the general position of the international community by stating “the international conventions and declarations concluded under the UN auspices give expression to the moral conscience of mankind and represent humanitarian standards for all members of the international community.” The UN by and large plays only a supervisory role in the implementation and enforcement of action. One writer suggests it may be classified as "weak" to "strong" depending upon how directly and quickly it acts in response to complaints. 116

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113 Ibid; at 217.
115 These instruments address a broad range of concerns that include: the prevention and punishment of the crime of genocide; the human treatment of military and civilian personnel in time of war; the status of refugees; the protection and reduction of statelessness; prevention of discrimination and the protection of minorities; the promotion of the political rights of women; the elimination of all forms of discrimination of women; the rights of children; rights of indigenous people; and the promotion of equality of opportunity and treatment of migrant workers, among others.
116 See, Claude & Weston, Human Rights in the World Community-Issues and Action (Philadelphia: Univ. of
A number of institutional arrangements have been established which are designed to deal with the promotion and protection of human rights. These arrangements constitute the international human rights regime. The UN's efforts in this regard have been through the use of committees, commissions, sub-commissions, specialized agencies and working groups. The main techniques employed in their enforcement measures have been communications, inquiries, investigations, periodic reports, advisory services, global studies of specific rights or groups of rights, and recommendations. It uses global and regional conferences and seminars on various specialized topics, open to individuals and organizations, to make them aware of human rights values articulated in international instruments.117

The Human Rights Committee is the principal organ responsible for implementing the International Covenant on Civil and Political Rights.118 It has adopted a dynamic approach to protection by reminding state parties that their obligation under the Covenant is not only limited to respect for human rights, but also to ensure the enjoyment of those rights.

The Commission on Human Rights, under Article 68 of the Charter, is mandated to establish "commissions in economic and social fields and for the promotion of human rights." The commission is instructed to report its recommendations on violations to the Economic and Social Council. The commission has created various programs for the promotion of human rights, as well as developing international machinery to deal with violations, such as special rapporteurs

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117 Topics covered in such conferences have included: human rights in developing countries; the participation of women in the economic life of their states; human rights and scientific and technological development; women, equality, development and peace; and human rights teaching. The significance of these topics help to promote penetrating discussions of deeper issues of injustice underlying human rights violations.

Despite the efforts of the UN aimed at promotion and protection, there are still widespread human rights violations. Apart from weaknesses in the implementation procedures, the main problems encountered relate to: governmental commitment; problems of perspectives and priorities; problems in the field of fact-finding; problems stemming from institutional structures; the primitiveness of remedial responses, methods and procedures; responsibilities in the information process; and problems of resources. As presently constituted, these mechanisms fail to deal with situations involving massive human rights violations, as past practice has shown.

In their survey of the UN Human Rights machinery, Pease and Forsythe indicate most states not only allowed these treaties to originate from UN bodies, but also that more than half of the international community became legal parties to them. About a quarter of the international community have accepted monitoring systems of differing strengths for the supervision of the implementation of these internationally recognized norms. Although few states objected to the overall process, "there is an overwhelming official consensus that at least the discussion of human rights is a proper international subject matter, even if many disagreements remain over definition and implementation." 

Apart from the UN human rights machinery, it also worthwhile noting that most of the world's regional organizations have enacted treaties supporting the protection of human rights. Example of these treaties are the European Convention for the Protection of Human Rights, the

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119 For details of the work of the commission since its inception see report of the commission on human rights. (annual). See
120 See, for example, the volumes of the Human Rights Internet Reporter.
121 For a detailed discussion of these problems see for example, Gotlieb, "Global Bargaining: The Legal and Diplomatic Framework" in Onuf ed.
122 Supra, note 24 at 295.
American Convention of Human Rights and the African Charter on Human and People Rights.\textsuperscript{123} The strongest universal testimony to the development in the field of human rights was adopted by the World Conference on Human Rights in Vienna on June 25, 1993. In the concluding document—the Vienna Declaration and Program Action—, which was unanimously adopted by all the members of the UN, it is unequivocally stated in paragraph 4 that “the promotion and protection of all human rights is a legitimate concern of the international community.” These instruments have helped in crystallizing legal norms in favor of human rights so that everyone is now entitled to certain basic human rights under UN Conventions, regional treaties and bilateral agreements.\textsuperscript{124}

The various developments on human rights outlined above have had a significant effect on the status of individuals in international law. Each step of progress made in terms of concepts, standards setting, procedures and mechanisms leads to a realignment of the position of individuals in relation to states.\textsuperscript{125} If the above examination broadly speaking is correct, then it portends or indicates a gradual shift in thinking about absolute notions of state sovereignty and its corollary principle of non-intervention.\textsuperscript{126} It is becoming increasingly accepted that human rights violations within states will not preclude the taking of international action to redress those situations of abuse. Gross systematic violations of human rights have become a concern of the whole international community and not just a matter exclusively within the domestic purview of states, constituting infringement on their sovereign rights. These human rights treaties not only create

\textsuperscript{123} For a detailed discussion of these treaties see for example, Weston, Lukens, & Hnatt, "Regional Human Rights Regimes: A Comparison and Appraisal" (1987) 20 Vanderbilt Journal of Transnational Law 585.


\textsuperscript{126} See for example, Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 American Journal of International Law 866-876.
binding legal obligations among states parties, but they also provide evidence of state practice and new attitudes regarding human rights. Particularly significant is the trend reflected in the Preamble to the Additional Protocol to the American Convention on Human Rights, which suggests that human rights treaties merely codify what is intrinsic in the human condition.

It "recognizes that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."\(^{127}\)

The extension of this principle into the international arena suggests a theoretical shift in the conception of human rights.\(^{128}\)

Although there were significant developments regarding human rights prior to the Charter, the human rights provisions of the Charter and the international human rights instruments discussed above were a watershed. Since the inception of the UN human rights regime, human rights issues have become important, and their internationalization has been increasingly recognized. Even though this is the case, and one finds an ethos of moral universalism underlying the international human rights instruments, one does not find any explanation why the human rights provided for are in fact human rights and why they should be accepted as universal. Taking action in support of human rights necessarily confronts objections of cultural relativism. Supporters of cultural relativism point out that it is impossible in a culturally diverse world to have universal notions of human rights. While the objective here is not to resolve the debate one way or the other, although a universal conceptualization of human rights is preferred, it tends to


\(^{128}\) See, for example, ibid.
explain the issues at stake in the international human rights discourse. The significance of arguments about moral universalism should therefore serve to support the examination of the universality of the UN human rights instruments. Thus, some remarks about the concept of human rights and the debate it engenders will be appropriate.

The concept of human rights does not lend itself easily to any precise definition. Although the concept eludes any precise definition, it can be argued that human rights are our entitlements as human beings, which we may demand from one another and from our societies. The idea of human rights is tied to the idea of human dignity: rights are essential for the maintenance of human dignity. They are based on elementary human needs as imperatives. Human rights are universal and inalienable. They exist by virtue of the right-holder's existence. They are not created or granted by the state or some agent and, therefore, cannot be taken away. The practical effect of this would be that rights are not creations of society, state or any political authority, legitimate or not, and thus cannot be limited or taken away by them. If this were the case, then it would follow that all human beings have rights in the same way and to the same extent regardless of race, culture, political system or any other distinction. The conviction that human beings have certain rights, which governments have a duty to respect, essentially, is a reaction or response to a feeling of revulsion occasioned by acts of political, religious or economic repression. The universality of human rights is a feeling of moral outrage. This consciousness draws on the moral resources of humankind's belief that there is an underlying

universal humanity, and that it is possible to achieve or strive to achieve a type of society that ensures that fundamental human needs and reasonable aspirations of human beings all over the world are effectively realized.  

The renaissance of natural rights and its consequent influence upon international human rights is regarded as a product of Western liberal thoughts and its justifications for claims about the truth, immutability and universality of rationally accessed moral dictums. This conceptual approach, however, does not necessarily have universal acceptance throughout the world. The concept of human rights can assume different meanings to different societies, and is influenced depending on a particular society's perception by culture, economics, politics and religion among other factors. Polis and Schwab, for example, criticized the establishment of human rights norms by expressing an objection to ethnocentrism thus:

“unfortunately not only do human rights set forth in the Universal Declaration reveal a strong western bias, but there has been a tendency to view human rights historically and in isolation from their social, political, and economic milieu.”

This particular moral-cultural relativist position which presents theoretical obstacles to human rights activism essentially asserts, firstly, that rules about morality vary from one place to another. Secondly, the way to understand this heterogeneity is to place it in its cultural context. Thirdly, it asserts that moral claims derive from, and are enmeshed in, a cultural context which is itself the source of their validity. There is no universal morality because the history of the world is the

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134 Supra, note 60 at 8.
history of the plurality of cultures. The attempt to assert universality is more or less a well-disguised account of the imperial practice of making the values of a particular culture general. 137

In this respect, the United Nations human rights regime, as enshrined in such documents as the Universal Declaration of Human Rights, are futile proclamations derived from the moral principles valid in one culture and thrown out into the moral void between cultures. 138 In effect the particular is presented as the universal.

In practice, most governments accused of human rights violations often resort to the doctrine of state sovereignty to deny the legitimacy of external criticism. This defense, however, is commonly strengthened by some form of cultural relativism. This relativism underlies the assertion of non-interference in the internal affairs of states. The argument usually goes that outsiders are not competent in matters relating to solving problems internal to another culture. Thus, a particular interpretation or even the basic idea of human rights may be alien to a particular culture so that such a culture should not be judged by standards emanating from external sources. 139

There are few relativists, however, who advocate the extreme position that whatever is, is right, reducing relativism to subjectivism where, in the absence of grounded criteria, every individual may determine what is right or wrong, good or bad, for himself. 140 According to Puchala, the most readily defendable moral relativist position is the one provided for in the Bangkok Declaration, adopted at the World Conference Regional Preparatory Meeting in April 1993. In that Declaration, the Asian states agreed that human rights need to be considered in a

137 See Vincent, Human rights and International Relations (Cambridge: Cambridge University Press, 1986) at 38.
138 Ibid. See also the literature cited in supra, note 65.
139 Freeman, "The philosophical Foundations of Human Rights" (1994) 16 Human Rights Quarterly 491 at 495.
140 Supra, note 60 at 9.
context that takes into consideration "the significance of national and regional particularities and various historical, cultural and religious backgrounds". Puchala argues that the moral relativist position turns out to be unsustainable for the following reasons:

"First, relativism tends to confuse empirical facts of difference in moral codes with philosophical justification for differences. Simply because there are differences does not mean that all the alternatives are right or acceptable. Second, the justification for relativism itself has to be philosophically located beyond relativism. That is, moral relativism can only be right if we all accept the universality of dictums such as mutual tolerance and noninterference in one another's affairs. Third, and at a more practical level, even the relativists balk in the face of the morally atrocious human rights sacrifice, ritualistic mutilation, slavery, genocide, apartheid, concentration camps, gulags and gas chambers. To explain why such atrocious behavior is immoral invariably requires reaching for universals, and when presented with such behavior most relativists accordingly reach out. Finally, there also exists the damning assertion that relativism is itself immoral because, in the name of community standards, noninterference, political correctness, or the like, it leads to the condoning of principles and practices that are widely distasteful." 142

He argues for the reassertion of moral universalism by pointing out that if moral relativism is unjustifiable and is unsustainable, then it would seem that the contemporary debate about the universality of human rights, if engaged philosophically, would result in an impasse. And if this

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were the case, the question of whether the UN human rights regime is to remain intact or to be
done away with would become an issue of politics, power and money only, which could well be
for the benefit of Western countries. 143

According to Puchala, a strong case for moral universalism which does not depend for its
justification upon either the will of God or the immutability of natural law can be made. He
employs the aid of anthropologists who argue that scholars usually find what they seek. Those
who have sought differences among cultures have found them. By the same token, those who
have sought similarities among cultures in recent works have also found many, especially in the
realms of morality. 144

Furthermore, studies in contemporary psychology have reinforced the proposition that:
"human beings are genetically wired and cognitively equipped to behave morally." 145 These
studies conclude that all human beings are similarly constituted regarding their moral capacities.
The differences among them have only to do with different attainments of moral maturity.
Accordingly, human beings achieving similar levels of moral maturity, irrespective of culture,
have similar conceptions about the bases of right and wrong. 146 Also, sociologists of religions
have found that the ethical contents of the major religions of the world are similar in their
emphases upon such ideals as charity, civility, humility, piety and non-violence. 147

Perhaps the international community's inability to agree on a universal concept of human

143 Ibid.
144 One scholar, for instance, has found twenty-two moral dictums that appear empirically trans-cultural. These dicta
include: the prohibition of murder or maiming without justification; economic justice; reciprocity and restitution;
provision; for the poor and destitute; the right to own property; and priority for immaterial goods. See Bies, "Some
145 See Kohlberg, The Philosophy of Moral Development: Moral stages and the Idea of Justice (Notre Dam Press,
146 Ibid; at 12-13.
147 Ibid.
rights stems from the failure of perceiving what the most basic human needs are according to just priorities of each society. Individual and societal needs may vary from one environment to another at any given period of time. It is probably best that the international community perceives and recognizes this. However, concerns of humanity as a whole should outweigh any cultural preferences of different societies. As Puchala points out:

"our entitlement is not a claim on God or nature, but a claim on one another. The basis of our morality is in our obligation as human beings (individuals and in our societies) to allow and help one another to flourish as human beings. And since the human essence is universal, requirements for human flourishing are universal, obligations to promote such flourishing are universal, and therefore, so is human morality." 148

In sum, the status of humanitarian intervention is linked to the status of human rights. Greater respect for human rights will make the international community more likely to engage in actions to protect those rights when violated.

3- The UN Charter's Effect on Humanitarian Intervention

A consideration of the relevant principles of the Charter will now be undertaken to determine the justification for humanitarian intervention. 149 In arguing the survival of the right of humanitarian intervention, the domestic jurisdiction norm becomes pertinent. The starting point is the interpretation of Article 2(4) of the UN Charter. According to some scholars, emphasis must be placed on the need to interpret that provision broadly and consistently with its plain language.

148 Ibid; at 14.
149 Although the Charter does not expressly mention unilateral or collective humanitarian intervention by states, at the same time it does not specifically invalidate the doctrine. Lillich, "A Reply", supra, note 3 at 236.
It is the fundamental provision of an organization established to "save succeeding generations from the scourge of war". It cannot therefore be subject to an interpretation that would negate its true meaning and content. The conclusion reached for an absolute prohibition of use of force in any manner, it is argued, is further reinforced by an examination of the travaux preparatoires that led to the drafting of Article 2(4). Support has been also found by commentators in international case law such as the Corfue Channel Case. While this case can be distinguished on the ground that it did not touch directly on the principle of humanitarian intervention, arguments have been made to the effect that the Court's "judgment should be interpreted as condemning all intervention, self-protection or self-

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

152 1949 ICJ Report 4. In that case, the United Kingdom government argued that its use of force in Albanian territorial waters was consistent with its Charter obligation because it "threatened neither the territorial integrity nor the political independence of Albania". The court in rejecting this argument, stated: "to ensure respect for international law, of which it is the organ, the court must declare that the action of the British Navy constituted a violation of Albany sovereignty". It went on further to state "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever, be the present defects in international organization, find a place in international law". Ibid. at 35. It is claimed that this case reaffirms the unassailability of state sovereignty as an essential foundation of international relations. See Hassan, supra, note 2 at 883; Oglesby, "A Search for Legal Norms in Contemporary Situations of Civil Strife" (1970) 3 Case Western Reserve Journal of International 30. This view is also shared in the US V. Nicaragua decision. In that case the court inquired whether there was a "general right of states to intervene, directly or indirectly, with or without force, in support of an internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified". In answering this question in the negative the court stated: "no such general right of intervention, in support of the opposition within another country, exists in contemporary international law". See, Military and Paramilitary Activities in and against Nicaragua (US v. Nicaragua) 1986 ICJ 14 (judgment of June 27). At para.208. While this statement did not deal with humanitarian intervention, it has been suggested that it is broad enough to preclude any right of humanitarian intervention under international law. For a detailed discussion of the decision in this case see, for example, "Appraisals of the ICJ Decision: Nicaragua V. US (Merit)" (1987) 81 American Journal of International Law 77; Teson, supra, note 3 at Chap. 9; Rodley, "Human Rights and Humanitarian Intervention: The Case of the World Court" (1989) 38 International and comparative Law Quarterly 321 at 327-330.
help involving the use of force— including humanitarian intervention." 153 Therefore, according to this interpretation of the Charter, the ban on the use of force was provided to preserve territorial integrity and political independence of states, its collective security measures were to ensure peace, and therefore unilateral humanitarian intervention is rendered illegal. 154

However, a qualification must be placed on the prohibition of the use of force under Article 2(4). 155 Intervention for human rights purposes would not contravene that provision if it is confined within the conditions for its exercise. 156 It is argued that Article 2(4) is not an absolute prohibition of the use of force; for, if force is used in a manner which does not threaten the "territorial integrity or political independence of a state, it escapes the restriction of the first clause." 157 Thus, Schachter observes that: "if these words are not redundant, they must qualify the

154 Verwy, supra, note 2 at 377. Bowett notes that quite apart from the legal incompatibility of humanitarian intervention with Article 2(4), policy considerations suggest allowing the institution under that provision will "introduce a dangerous exception to these prohibitions". Supra, note 2.
155 The Article 2(4) norm does not prohibit all kinds of use of force. But see Brownlie, who argues on the contrary that "the conclusion warranted by the travaux preparatoires is that it was not intended to be restrictive but, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect". Supra, note 13 at 267.
156 Reisman & McDougal, relying upon a major purposes interpretation of the Charter, indicate that article 2(4) "is not against the use of coercion per se, but rather the use of force for specified unlawful purposes". They further argue: "since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with purposes of the UN but is rather in conformity with the most fundamental peremptory norms of the Charter, it is distortion to argue that it is precluded by Article 2(4). In so far as it is precipitated by intense human rights deprivations and conforms to the general international legal regulations governing the use of force economy, timeliness, commensurability, lawfulness of purpose and so on it represents a vindication of international law, and is, in fact, substitute or functional enforcement". Supra, note 3 at 177. In a similar vein, Mullerson argues that even though humanitarian intervention may constitute a threat to the survival of the government of the target state, it does not necessary mean that it constitutes a threat to the independence of the target state. Government is only one of the three elements (government, population, territory) of statehood. He continues: "when the government and the population are fighting each other, or the government is trying to exterminate a part of the population and the survival of the later is at stake, an outside intervention on behalf of the population does not violate The independence of the target state. To think otherwise would be to equate the state and the government, leaving other components out of the equation. Mullerson, Human Rights Diplomacy (London: Routledge, 1997) at 156.
157 Jessup, a Modern Law of Nations (New York: MacMillan, 1948) at 162. According to Stone, "Article 2(4) does not forbid the threat of use of force, it forbids it only when directed against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the UN". Stone, Aggression and World Order (London: 1958, reprinted 1976) at 95. Teson also argues: "a genuine humanitarian intervention does not result
all-inclusive prohibition against force.\textsuperscript{158}

In essence, Article 2(4) does not cover territorial inviolability so that a state's territorial integrity may be preserved even though there is a limited armed force in that state's territory.\textsuperscript{159} On the contrary, views have been expressed to the effect that even in situations where a rapid withdrawal by the intervener takes place when its mission is accomplished without a dissolution of the existing authoritative structure, that intervention will still temporarily violate the target's territorial integrity and political independence. Akehurst argues: "any humanitarian intervention, however, limited, constitutes a temporary violation of the target state's political independence and territorial integrity if is carried out against that state's wishes."\textsuperscript{160} On the same subject matter, Higgins notes "even temporary incursions without permission into another state's air space constitute a violation of its territorial integrity."\textsuperscript{161} Levitin opines that a more sensible reading of Article 2(4) is that "a state's political independence is compromised whenever another state attempts through armed force to coerce it, to limit its choices on the international plane, or to interfere with its domestic political regime."\textsuperscript{162} Nanda, however, advocates a cautious approach by arguing for a limited use of force for humanitarian purposes, which he suggests is permissible in

\textsuperscript{158} Schachter, "The Right of states to Use force" (1984) 82 Michigan Law Review 1620 at 1625. In this context, Green also shares the view that "ipso verba the Charter is referring to threats against attacks upon the territorial integrity or political independence of a state and not to exercises which may be necessary but not directed to this end". Green, "Humanitarian Intervention-1976 Version" (1976) 24 Chitty's Law Journal 217 at 222; see also, Stone, ibid; at 95; Moore, "the Control of Foreign Intervention in International Conflict" (1969) 9 Virginia Journal of International Law 205 at 262.

\textsuperscript{159} See, D'Amato, International Law: Process and Prospect (N.Y: 1987) at 37.

\textsuperscript{160} In Bull ed; supra, note 26 at 95, 105.

\textsuperscript{161} Higgins, The Development of International law Through the Political Organs of the UN (London: Oxford Univ. Press, 1963) at 183.

\textsuperscript{162} Supra, note 3.
international law, even though a temporary breach of a state's territorial integrity is occasioned.\textsuperscript{163}

In any case, it is argued that, provided conditions and limits set out under international law are met, there would be no violation of the territorial integrity or political independence of the target state.\textsuperscript{164} Since humanitarian intervention does not seek to challenge attributes of sovereignty, or territorial or political independence of a state, it will not fall within the scope of the Article 2(4) prohibition of force norm.

The other Charter provision deserving consideration in dealing with the right of humanitarian intervention is Article 2(7), which as mentioned earlier establishes the principle of non-intervention in the internal affairs of states. This Article, it seems, protects states against international action and activities occurring strictly within their territorial boundaries. Thus, it becomes significant to determine whether human rights issues and their protection are matters lying essentially within the domestic jurisdiction of states. For, if they are, then any right of intervention for whatever purpose would appear to be precluded.

The interpretation of this clause has been qualified despite its assertive nature.\textsuperscript{165} In the past, the UN has found that matters lying within a state's domestic jurisdiction provided no impediment to de-colonization\textsuperscript{166} or anti-apartheid actions.\textsuperscript{167} In the same vein, some state treaty

\textsuperscript{163} Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti-Revisiting the Validity of Humanitarian Intervention Under International Law-part 1" (1992) 20 Denver Journal of International Law and policy 305 at 311. See also, Hassan, supra note 2 at 887.


\textsuperscript{165} See for example, Brownlie, supra, note 39 at 553-554; supra, note 90 at 64-90, 118-130. Falk, for instance, argues that states have not exercised the autonomy which is traditionally attributed to them: in fact, the domestic order has never enjoyed autonomy in any strict sense. It is now commonplace to accept the interdependence of economic, cultural, and military affairs. In fact, nations have always had a vital concern with what goes on elsewhere, even if elsewhere is a foreign state. Sovereignty only confers a primacy competence upon a nation; it is not, and never was, an exclusive competence". Falk, "The Legitimacy of Legislative Intervention by the UN" in Stanger ed; Essay on Intervention (Cleveland: Ohio State Univ. Press, 1964) at 36.

\textsuperscript{166} See for example, declaration on Granting of Independence to Colonial Countries, G.A. Res. 1514, (1960); G.A.
obligations affecting sovereignty and territorial boundaries cannot be regarded as matters "within
domestic jurisdiction." As states make commitments "to a larger and more intrusive regime of
international treaties and conventions, and as customary international law expands its reach, the
concept of "domestic jurisdiction" shrinks. If the further condition of essentiality mentioned in
Article 2(7) is taken into account, issues subject to international inquiry become considerable,and call for reorientation of priorities. Fundamental human rights must take precedence over any
norms of non-intervention in the internal affairs of states.

In stressing the need for balancing the rights of states (as mentioned in the Charter) against
individual rights affirmed by the Universal Declaration of Human Rights and other human rights
conventions, Javier Perez de Cuellar, former Secretary-General of the UN, challenged the
traditional construction placed on Article 2(7). He maintained that a new balance must be struck
between sovereignty and the protection of human rights.

Res. 1805, (1962). There are in addition other Declarations on the subject-matter, culminating in General Assembly
Resolution 2288 (1967) which called for global decolonization.

See for example, Res. 1904 (XVIII), Nov. 20, 1963; Res. 3068 (XXVIII), Nov. 30, 1973; UN SC Res. 418 (1977)
Security Council action imposing a mandatory arms embargo against South Africa's government-imposed policy of
apartheid.

Article 27 of the Vienna Convention on the Law of Treaties of 1969 affirms the principle recognized by several
international tribunals that a "party may not invoke the provisions of internal law as justification for failure to
perform a treaty". Brownlie points out that "the reservation in Article 2(7) is inoperative when a treaty obligation is
concerned" and that "the extent to which states can now rely on some type of formal interpretation of the provision, is
in doubt. Supra, note 39 at 552-553.

Scheffer argues "domestic jurisdiction" does not exempt everything within sovereign borders from scrutiny of the
international community any more than the domestic jurisdiction of the city of Toledo shields its government and
residents from the reach of Ohio state law, federal law, or for that matter international law". Scheffer, supra, note 11
at 261. See also, supra, note 27.

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

It is now interestingly felt that the principle of non-interference within the essential domestic jurisdiction of states
cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated
with impunity. The fact that, in diverse situations, the UN has not been able to prevent atrocities cannot be cited as an
argument, legal or moral, against the necessary corrective action, especially where peace is also threatened.

Omissions or failures due to a variety of contingent circumstances do not constitute a precedent. The case for not
As already mentioned, it is now increasingly accepted that human rights issues are no longer strictly within the domestic purview of states. It is a matter of concern for the whole world community. Consequently, human rights abuses prompting humanitarian action are no longer a "matter essentially within the domestic jurisdiction of a state", and so will not amount to a violation of the non-intervention principle. It should also be noted that Article 2(7) ends with a critical provision: "this principle shall not prejudice the application of enforcement measures under Chapter VII," which deals with enforcement actions to maintain international peace and security. It should be noted that the Security Council is now engaging in more Chapter VII enforcement actions in matters that were previously considered within the domestic jurisdiction of states. The practice of the Security Council can be seen to have modified the concept of "international peace and security" to include grave humanitarian crises, and it is generally recognized among Western legal scholars that the Security Council now has an exclusive right to impinging on the sovereignty, territorial integrity or political independence of states is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection. With the heightened international interests in universalizing a regime of human rights, there is a marked and most welcome shift in public attitudes. To try to resist it would be politically unwise as it is morally indefensible. It should be perceived as not so much welcome shift a new departure as a more focused awareness of one of the requirements of peace". J Perez de Cuellar, Report of the Secretary- General on the Work of the Organization: 1991 at11-13. Quoted in Scheffer, supra, note 11 at 262-263.

See Fonteyne, supra, note 3 at 241. According to Lauterpacht, "human rights and freedoms having become the subject of a solemn international obligation and of one of the fundamental purposes of the Charter, are no longer a matter which is essential within domestic jurisdiction of the members of the UN". Lauterpacht, International law and Human Rights (Praeger: N.Y., 1950) at 178. Another writer has also concluded that massive human rights violations "are no longer essentially within the domestic jurisdiction of states, and therefore the principle of non-intervention is not applicable". F. Ermacora, "Human Rights and Domestic Jurisdiction (Art. 2(7) of the Charter) "(1968) 124 Recueil Des Courrs bk.II, 371 at 436. Beyerlin states that although this issue is still highly debatable, "the scope of domestic jurisdiction in human rights matters seems to be narrowing". See , supra, note 2 at 214-215. Asrat contends that while unilateral humanitarian intervention does not appear to be valid under contemporary international law, it does not mean states do not have the legal option of compelling governments to redress human rights abuses. They could resort to non-violent reprisal since respect for basic human rights has been held to be the "concern of all states and to constitute an obligation erga omnes. He cites the ICJ decision in the Barcelona Case to support this position. Asrat, supra, note 2 at 185. The Court stated that obligations of this type "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of the human person, including protection from slavery and racial discrimination. See Barcelona Case Judgment 1970) ICJ Report 3 at 33. This case therefore lays down the proposition that obligations of a state towards the international community as a whole derive from, among others, the principles and rules concerning the rights of the human person.
authorize the use of force for the purpose of preventing or stopping widespread deprivations of internationally recognized human rights.

Article 2(7) does not affect the right of humanitarian intervention.\textsuperscript{173} For, if the most basic rights are not protected, governments will engage in gross violations of human rights without fear of punishment. Attempts by other states aimed at protesting the occurrence\textsuperscript{174} of human rights violations will only meet with rebuff under the cloak of non-intervention in domestic matters.

In addition to the above considerations, some proponents express their concern over the preservation of humanity, arguing that the value of human life takes precedence over legal principles. Thus, basic humanitarian feelings lend credence to the view that states cannot remain indifferent while massive human rights violations take place.\textsuperscript{175}

Another reason for continued justification of the right of humanitarian intervention lies in the failure of the UN in realizing its original aims. The founding fathers of the organization expected states would take collective action under the aegis of the UN in situations of "threats to the peace", "breaches of the peace" or acts of aggression, rather than rely on unilateral state action.\textsuperscript{176} The Security Council under Chapter VII of the Charter is seized with mandatory

\textsuperscript{173} Ganji states "with regard to action pertaining to the international protection of human rights and fundamental freedoms that the provisions of the Article 2(7) cannot be invokes". Ganji, supra, note 59 at 135. Lillich asserts the UN definitely has the legal right to intervene for humanitarian reasons if a state violates fundamental human rights an actual threat to the peace. Lillich, "Intervention to protect human rights" (1969) 15 McGill Law Journal 205 at 212. It has been further suggested that human rights concerns have been placed outside the scope of article 2(7) even in cases not amounting to a threat to the peace. See Reisman & McGougal, supra, note 3 at 189, 190-191.

\textsuperscript{174} Lillich writes: "to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress black letter at the expense of far more fundamental values". Lillich, "self-help", supra, note 3 at 344.

\textsuperscript{175} Leff, "Food for the Biafrans" N.Y. Times, Oct. 4, 1968 at A46, Col.3, quoted in Farer, "Humanitarian Intervention: The View from Charlottesville" in Lillich, ed; supra, note 2 at 151. Leff puts it tersely in context of the Biafrans war thus: "I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra. Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death". Ibid.

\textsuperscript{176} see articles 39-51 of the Charter. On the issue of the appropriateness of unilateral intervention by a state in the interest of humanity. See Westlake, International Law, Part I; Peace (London: Cambridge Univ. Press, 1910) at 318-
jurisdiction to take action in those situations.\textsuperscript{177} This machinery for collective security and enforcement has, however, proved to be largely ineffective.\textsuperscript{178} Thus, if the Security Council failed to act under such circumstances, "the cumulative effect of Articles 1, 55 and 56 would be to establish the legality of unilateral self-help." In effect, "the deterioration of the Charter security regime has stimulated a partial revival of a type of unilateral \textit{jus ad bellum}\textsuperscript{179} (recourse to war). This "contemporary doctrine relates only to the vindication of rights which the international community recognizes but has, in general or in a particular case, demonstrated an ability to secure or guarantee."\textsuperscript{180} Included in this category of rights is humanitarian intervention.\textsuperscript{181}

Thus, individual states may undertake humanitarian intervention for there exists "a coordinate responsibility for the active protection of human rights: members may act jointly with

\begin{footnotesize}
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\item Articles 39-44 of the Charter. Also, by the "Uniting for Peace Resolution", where the Council is unable to function, the secondary authority of the General Assembly becomes operative. The Assembly may thus perform duties and powers of the Council. See also Green, "The Little Assembly" (1949) 3 The Yearbook of World Affairs 169.
\item Soon after the Charter regime came into effect, Jessup observed, "it would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take sometime before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international actions shall be timely as well as powerful". Jessup, supra, note 86 at 170. McDougal and Behr, in a comment that is still valid today, note "the most difficult problem still confronting the framers of the United Nations" Human Rights Program is that of devising effective procedures for enforcement". McDougal and Behr, "Human Rights in the United Nations" (1964) 58 American Journal of International Law 603 at 629. Lillich points out that the UN's inability to function effectively in intervening for humanitarian purposes by citing Friedmann's comments that "a combination of the failure to establish a permanent international military force and existence of the veto power, has effectively destroyed the power of the United Nations to act as an organ of enforcement of international against a potential lawbreaker" and concludes: "the effective power of using military lesser forms of coercion in international affairs essentially remains with the nations states". Supra, note 3 at 170-171. Bazylar observes that "when mass slaughters occur, and the United Nations fails act, the possibility of the individual state action must remain open". Bazylar, supra, note 3 at 577, footnote 130. Examples of the UN's inability to act swiftly abound in state practice, which will be discussed in the next section. An examination of the UN's role in the 1990s in so far as humanitarian purposes are concerned will also be undertaken in the next Chapter.
\item Reisman, "Criteria for the Lawful Use of Force in International Law (1985) 10 Year Journal of International Law 279 at 281.
\item Ronzitti, supra, note 2 at xi.
\item Ibid.
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the organization…. or singly or collectively.” 182 Were this not the case, as McDougal and Reisman contend, it "would be suicidally destructive of the explicit purposes for which the UN was established.183

In sum, the argument here is that the provisions of the UN Charter, declarations and covenants constitute an elaborate international human rights regime that provide justification for intervention in the protection of those rights.

At least in principle, the basis for humanitarian intervention is grounded in prior agreement about the internationalization of human rights as appeared in articles 55 and 56 of the UN Charter and the International Bill of Human Rights. The international human rights regimes are gradually having the effect of changing the treatment of its own citizens from an issue of domestic concern to matters within the domain of the international. Thus action to support them is not impermissible intervention contrary to article 2(7).184 The advent of the UN Charter suggests that the customary humanitarian intervention still exists, and is not inconsistent with the purposes of the UN. Thus, in the event of the failure of collective action under the Charter, there is a revival of forcible self-help measures to protect human rights. This is supported by the doctrinal writing.

182 McDougal & Reisman, "Response by Professors McDougal & Reisman" (1969) 3 International Lawyer at 438-444
183 Ibid; at 444.

184 For critics who make the argument that even if customary international law recognized humanitarian intervention prior to 1945, the Charter’s general prohibition in Article 2(4) has had such an impact on customary international law that the doctrine can no longer be valid, Teson responds by arguing that: first, one has to prove that subsequent state practice is consistent with the absolute prohibition”. This, he demonstrate, is not the case. Furthermore, he argues “those who take that view—that the Charter radically changed the law in 1945-must also deal with the equally revolutionary impact of the law of human rights upon traditional international law”. He concludes: “any one who in the face of the impressive rise of human rights concerns simply asserts that post 1945 international law must be seen as containing a rigid prohibition of war, even to remedy serious human rights deprivations carries a considerable burden of proof. There was a customary principle prohibiting the use of force at the time the Charter was adopted. In contrary, the human rights articles of the Charter opened the door to a much more innovative development; a concept of the law of nations as centered on the individual, not the nation-state”. Teson, 2nd ed; supra, note 3 at 157.
As Reisman and McDougal argue, the UN Charter not only confirmed the legitimacy of humanitarian intervention but also strengthened it. They state that "the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in motion a continuous authoritative process of articulating international human rights." 185

185 Reisman and McDouglas, supra, note 3 at 171. Even though Wolf in this regard favors the survival of the right of humanitarian intervention under the UN Charter, he arrives at that conclusion via a different route. Although he admits that the prohibition on the use of force was intended to be absolute, and that the original intent of the framers of the UN Charter was not to strengthen humanitarian intervention, nevertheless, he demonstrates that state practice can modify the Charter, and such modification for him, is legitimate because it is not inconsistent with the general purposes of the Charter. See Wolf, supra, note 199 at 363, footnote 168.
CHAPTER FOUR

Case Studies of State Practice of the Right of Humanitarian Intervention during the Cold War Era (1945-1989)

I – Introduction

Interventions during the Cold War era were limited and episodic, and might be considered humanitarian. The competing arguments will be examined in relation to state practice in cases where intervention by a state ended gross violations of human rights and the international community's responses to such intervention. Since the UN Charter was established, states have undertaken a number of interventions which have been justified on the basis of humanitarianism or characterized as humanitarian interventions. In examining the extent to which state practice supports the right of humanitarian intervention or otherwise, it is important, however, to keep in mind the facts relating to gross human rights violations, the extent to which humanitarian considerations were a factor in the decision of one's state intervention in another, and the humanitarian outcomes achieved by the intervention. Examples of these interventions constitute relevant state practice in so far as they involve making compelling cases for humanitarian intervention. Force has been used, arguably, for humanitarian purposes in the following cases: the Congo intervention (1964); the Dominican Republic intervention (1965); the East Pakistan intervention (1971); the Tanzanian intervention in Uganda (1979); and the Vietnam intervention in Cambodia (1978). Even though these cases have been frequently cited as supporting the right
of humanitarian intervention, in assessing these cases, I am trying to find out whether the intervening state’s main reason for intervening was to prevent the severe and widespread deprivation of human rights. If this is not the case, then the intervention is not humanitarian in nature. Due to the level of human rights violations which had occurred, the reasons given, and the humanitarian outcomes achieved, it appeared that a case for unilateral humanitarian intervention could be made.

1-Belgium and the United States’ Intervention in the Congo (1964)

On July 30, 1960, Belgium granted the Democratic Republic of the Congo its independence. In September 1964, rebels fighting the Congolese central government took 2000 foreigners living in Stanleyville as hostages, with the objective of pushing for certain concessions from the government. When the government rejected their demands, they started to kill the hostages. The situation was made worse by threats of more killings. Efforts to secure the release of the hostages failed. As a result and by the consent of the central government, Belgium with the United States’ assistance intervened in the Congo, evacuating the endangered persons on a mission that lasted four days. Some 2000 people were evacuated to safe areas, and all of them were foreigners. The intervening forces withdrew from the country upon completion of their mission.

The intervention was condemned in the Security Council by many African states, as well as the Soviet Union. The African states insisted at the time that even as the operation went on - with the

186 A telegram from a rebel general to an officer in charge of the hostages was allegedly intercepted which read: “in case of bombing region, exterminate all without requesting further orders”. United States Department of States Bulletin (1965), at 18. Quoted in Lillich, Self-help, supra, note 3 at 339. See also, ibid at 185.
187 Lillich, ibid.
rescue of the white foreign residents - innocent blacks were being killed in the process, which smacked of racism.³ Perhaps this point was driven home to emphasize the idea that the rescuers valued the lives of one particular group of people (white) more than another (black). While an accurate account of whatever took place during the operation is still lacking,⁴ there is some degree of certainty that its fundamental purpose was aimed at saving lives given the dangerous situation posed by rebel activities in the region. This was evident in the fact that Congolese (including other Africans) as well as people of other nationalities were rescued.⁵

Belgium and the United States justified their intervention as a humanitarian rescue mission carried out with the authority of the legitimate government of the Congo. A statement by the US Department of State read:

“This operation is humanitarian not military. It is designed to avoid bloodshed not to engage the rebel forces in bloodshed. Its purpose is to accomplish its task quickly and withdraw, not to seize or hold territory. Personnel engaged are under orders to use force only in their own defense or in the defense of the region and Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished.”⁶

Supra, note 18 at 288. Some African delegate expressed their dislike for the whole operation at the UN. The Congo Brazzaville delegate for example had this to say: “why, in a conflict in which the Congolese are fighting between themselves, should there be no concern for the safety of the civilian population in general and why should the fate of the whites to be the sole consideration?” ¹⁹ UN SCR, 117ᵗʰ meeting 14 (1964), Quoted in Weisberg, “The Congo Crisis 1964: A Case Study in Humanitarian Intervention” (1972) 12 Virginia Journal of International Law 261 at 267.

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

While the primary aim of the intervening forces was to rescue their own nationals, the overall humanitarian consideration was not absent. This is evident, for example, from the statement f the US ambassador to the UN that “while our primary obligation was to protect the lives of American citizens, we are proud that the mission rescued so many innocent people of 18 other nationalities from their dreadful predicament”. United States Department of State Bulletin (1965) at 17. Quoted in Lillich, “Self-help”, supra, note 3 at 340.

Similarly, the Belgium official stated that:

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

What is noted about the mission is that it was undertaken with express authorization of the Congolese government. It was understood that the intervening forces would withdraw as soon as the operation was completed, which was done. Thus, it could be argued that this satisfied the requirement of consent by the de facto government of the target state in a situation in which it was unable to protect the lives of the endangered nationals. While this consent factor adds to the legitimacy of the intervention, it should, however, not be treated as the necessary prerequisite in the circumstances of this case.

This intervention, however, is subjected to criticism. It was motivated by some broad political and economic objectives. Some African states, Czechoslovakia, Ecuador, Poland and the Soviet Union considered the mission as a pretextual humanitarian intervention intended to support the central government of Tshombe's power. References were made to colonialism and the fact that the Stanleyville operation was a dangerous precedent which might threaten the independence

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of African states.\textsuperscript{10} Perhaps these criticisms were launched due to the fact that by the time the foreign troops withdrew, Tshombe’s position \textit{vis-à-vis} the rebels had been strengthened. One writer thus concludes that “the combined military operation was enough to destroy the rebel stronghold. It is clear that this had been the prime objective of the United States and Belgian policy from the beginning.”\textsuperscript{11} It suggested that, if the central government gained any advantages from the mission, that would possibly be pure coincidence. Of course, the rescue operations would necessarily have involved some kind of conflict with the rebels in the process of releasing the hostages.

Despite these criticisms other countries, such as the United Kingdom and France, supported the Belgian intervention at the UN. The United Kingdom stated that the intervention was only humanitarian and that the international community should commend it.\textsuperscript{12} France declared that Belgium could not be considered an aggressor since the purpose of the action was that of saving human lives. The French delegate noted that “The Belgium mission of protecting lives and property is the direct result of the failure of the Congolese authorities and is in accord with a recognized principle of international law, namely, intervention on humanitarian grounds.”\textsuperscript{13} Italy held that Belgian troops had intervened to keep law and order and to prevent more serious incidents from occurring. Argentina supported the Belgian intervention, calling it legally justifiable, and finally the Ecuadorian position was not one of outright condemnation of the intervention.\textsuperscript{14}

A possible legal justification for this intervention is that this intervention was conducted at

\textsuperscript{10} Ibid. at 96.
\textsuperscript{11} Verwey, supra, note 2 at 401.
\textsuperscript{12} 15 UN SCOR, 873\textsuperscript{rd} Meeting, 13 July 1960, para. 130. Cited in Ronzitti, supra, note 2 at 31.
\textsuperscript{13} 15 UN SCOR, 873\textsuperscript{rd} Meeting 13 July 1960, para. 144. Quoted in ibid.
\textsuperscript{14} ibid.
the invitation of the Congo government and it involved the rescue of endangered nationals. With regard to the consent factor, some writers, such as Professor Brownlie, have suggested the legality of the intervention was grounded in the fact that it was undertaken at the request of the Congo government and thus was not based on the principle of humanitarian intervention. With regards to whether the central government of the Congo was in effective control of the country at the time, one writer argued that "if a customary principle of international law that intervention is permissible if requested or authorized by the legitimate government survives the Charter" then "there is little reason humanitarian intervention, which is also a principle of customary international law, cannot be regarded as having survived the Charter." If the total context of the mission is taken into account, the argument would be that "the United States treated the Congolese invitation as just another factor permitting it to participate in a humanitarian intervention, rather than as the sine qua non of such intervention's legitimacy." In addition, the Congo action was not only undertaken to protect its nationals since the United States justified its action, in part, as an intervention to protect the lives of citizens of the Congo, its own nationals and those of other foreign countries. The majority of scholars who have examined this case have deemed it to be lawful.

The Stanleyville operation was undertaken in situations in which both the UN and Organization of African Unity (OAU) were unable to act quickly because of the urgency of the situation in the Congo. It is quite clear that circumstances justifying humanitarian intervention were present. This justification for the operation confirmed its humanitarian character in addition to the fact that humanitarian outcomes were achieved. Significantly, this intervention was not

condemned by the Security Council, which could be interpreted as an implied approval of the legitimacy of humanitarian intervention in this case.\textsuperscript{16} Lillich, for example, reaches the inescapable conclusion that "if ever there was a case for the use of forcible self-help to protect lives, the Congo rescue operation was it."\textsuperscript{17}

2-The United States' Intervention in the Dominican Republic (1965)

The events preceding and following the Dominican Republic intervention seem to be much more complicated than the Congo situation. Briefly, the interim military government which toppled the constitutional government of President Bosch in a coup in 1963 was subsequently challenged by a revolt on April 24, 1965.\textsuperscript{18} As a result, civil strife broke out which left the Republic without an effective government. This was followed by the breakdown of law and order. On April 28, 1965 the United States intervened in the Dominican Republic in order to protect US nationals and nationals of other countries in the wake of spreading events.\textsuperscript{19}

In justifying its intervention after the first 500 marines were sent in, US President Johnson said "for two days American Forces have been in Santo Domingo in an effort to protect the lives


\textsuperscript{17} Supra, note 127.


\textsuperscript{19} Prior to sending its forces into Santo Domingo, a note had been sent to the US Embassy signed by Colonel Benoit, president of the Military Junta to the effect: "regarding my earlier request I wish to add that American lives are in danger and conditions of public disorder made it impossible to provide adequate protection, I therefore ask you for temporary intervention and assurance, in restoring order in this country". (1965) 4 International Legal Materials at 565. It is, however, doubtful to rely on this note as a request for intervention since it appears that at the time there was no effective government in control of affairs in the country. However, Lillich notes that the US, torn between inaction or going in to help one of the contending factions, "chose instead a more complicated and,... more constructive course. It landed troops in the Dominican Republic in order to preserve the lives of foreign nationals-nationals of the United States and many other countries". Meeker, "The Dominican Situation in the Perspective of International Law" United States Department of State Bulletin (1965) at 62. Quoted in Lillich, "Self-help", supra, note 3 at 340.
of Americans and nationals of other countries in the face of increasing violence and disorder."\textsuperscript{20}

He further indicated in greater detail that:

"We didn't intervene. We didn't kill anyone. We didn't violate any embassies. We were not perpetrators. But we had to go in the Congo to preserve the lives of American citizens and haul them out when they were being shot at, we went into the Dominican Republic to preserve the lives of American citizens and citizens of other nations. While some of the nations were denouncing us for going in there, their people were begging us to protect them."\textsuperscript{21}

Given the situation in the Dominican at the time, the reasons given for the intervention, and the fact that thousands of foreigners were indeed evacuated,\textsuperscript{22} it is not difficult to point out the humanitarian rationale involved here. Action by the UN or the Organization of American States (OAS) in terms of consultations and negotiations would have proved costly in terms of lost lives given the time span within which some immediate action was needed.

The situation in the Dominican Republic, however, runs into problems when, inconsistent with their earlier objectives, the United States declared later that its aim was to prevent a communist take-over.\textsuperscript{23} It didn't leave the Dominican Republic but remained for a year, with a troop build up of over 20,000 military personnel. The reasons offered for this presence was that the breakdown of law and order necessitated the preservation of a situation for a period of time

\textsuperscript{20} New Times, May 1, 165, at 6, col.4.


\textsuperscript{23} See, Nanda, part II, supra, note at 225 and accompanying notes 6-16. President Johnson had declared in connection with the crisis that "the American cannot, must not and will not permit the establishment of another communist government in the western Hemisphere. This was the unanimous view of all American nations when, in January, 1962 they all declared, I quote: "the principles of communism are incompatible with the principles of the American system". Documents on American Foreign Relations, 1965, at 245.
which would enable the OAS to act collectively. Subsequently, an Inter-American Peace Force was established aimed at maintaining, among other things, the security of Dominican Republic nationals, the protection of human rights and the restoration of conditions to normal. This drew criticisms from some states that the establishment of this force was a prohibited intervention in a situation of domestic conflict.

Some states, such as the United Kingdom, France, the Netherlands, and China, supported the Dominican Republic action on humanitarian grounds. The OAS, despite approving the American action in the Dominican Republic, actually replaced the American forces with its own peacekeeping troops. Cabranes, for example, argues that the norm of non-intervention in the Inter-American system has undergone a “profound metamorphosis” as a result of OAS approval of the Dominican action.

A purported or possible basis for justification of the intervention in the Dominican situation, has been on the more narrow grounds of intervention to protect nationals abroad. A

\[\text{Footnotes:}\]

25. See, Thomas & Thomas, supra, note 11 at 49-52.
26. 20 UN SCOR (1198th mtg.) at 37 (1965) (United Kingdom); 20 UN SCOR (1198th mtg.) at 111-112 (1965) (France); 20 UN SCOR (12043rd mtg.) at 4 (1965) (Netherlands); 20 UN SCOR (1202nd mtg.) at 19 (1965) (Nationalist China).
28. See ibid; at 1171-1175.
29. See, for example, Fenwick, “The Dominican Republic: Intervention or Collective Self-defense” (1966) 60 American Journal of International Law 64; Meeker, supra, note 131, at 60-63. The principle of self-defense to protect nationals abroad was also subsequently used as basis for US involvement in the Mayaguez incident of 1975, and the Israeli raid on Entebbe in 1976. In the Mayaguez incident, Cambodian forces, on 12th May, 1975, seized an American vessel—the “Mayaguez—and its crew in what Cambodian claims to be her territorial waters. Diplomatic efforts to secure the release of the ship and its crew having proved futile, president Ford authorized US Forces to board the illegally seized ship and land on a Cambodian island, with the object of rescuing the crew and the ship, and also to conduct strikes against nearby Cambodian military installations. For factual details and comments on this incident see for example, Digest of United States Practice in International Law (US Government Printer’s Office: Washington, 1975) at 777-783; Rowan, The Four Days of the Mayaguez (1975); Paust, “Comment: The Seizure and Recovery of the Mayaguez” (1976) 85 Yale Law Journal 774; Note, “pueblo and Mayaguez: A Legal Analysis” (1977) 9 Case Western Reserve Journal of International Law 79. In the Entebbe rescue operation, an Air France plane with over 250 passengers aboard en route from Tel Aviv to Paris via Athens was hijacked on June 27, 1976 after leaving Athens. The hijackers, claiming to be members of the Popular Front for the Liberation of Palestine, forced the
requirement of the right of self-defense to protect nationals abroad is the removal of troops once one’s nationals have been evacuated. As mentioned earlier, however, the United States not only remained in the Dominican Republic despite the completion of the evacuation of its nationals and the nationals of other countries, but engaged in a further troop build-up in the Dominican capital, justifying its action on the basis of helping to maintain and restore law and order. This state of affairs suggested the presence of other motives on the part of the United States.

Nevertheless, it can be said of the Dominican situation that the initial US response showed a commitment to intervene based on humanitarianism. Explaining further the circumstances in which the United States took forcible action, Ambassador Stevenson stated in the Security Council:

“We could have decided not to do anything at least for the time being. But the lives of thousands of people from 40 countries hung in the balance... The United States initially landed troops under these emergency conditions to preserve the lives of foreign nationals and nationals of the United States and any of many other countries. Such action is justified both on humanitarian and legal grounds.” 30

Ultimately, the Security Council did not condemn the Dominican Republic intervention. Although one can agree that this example confirms the legality of the principle of humanitarian intervention, the subsequent presence of the United States cannot be justified for the same reason. This example, perhaps shows the limits within which the doctrine can be applied. The initial aim

plane to Entebbe Airport in Uganda where it was given permission to land. The hijacking ended on 4th July, 1976 with an Israeli commando raid on Entebbe Airport freeing 105 hostages held by the hijackers. For comments on this case see Green, supra, note 3; “Rescue at Entebbe-Legal Aspects” (1976) 6 Israel Yearbook on Human Rights 312; Note, “Entebbe: Use of Force for the Protection of Nationals Abroad” (1977) 9 Case Western Journal of International Law 117.

30 (1965) 52 Department of states Bulletin 877, quoted n Nanda, “part 1”, supra, note 130 at 462, Several other statements by United States officials stressed the humanitarian aim of the operation. See ibid; at 472-473.
of saving lives having been accomplished, the United States should have withdrawn its troops. However, maintaining its presence beyond that limited objective gives credence to the view that motives other than purely humanitarian considerations were involved.

3-India's Intervention in East Pakistan (1971)

The Indian intervention in East Pakistan, which resulted in the creation of the state of Bangladesh, provides an incident of humanitarian intervention. The origins of this intervention date back to the partition of India in 1947, and as a result of which Pakistan came into being composed of two separate nations divided by ethnic, cultural and linguistic differences. The two common factors, namely Islam and alienation from India, which held these parts together, were, however, not sufficient to ensure stability. 31 By the late 1960s, political and economic domination of East Pakistan by West Pakistan had resulted in increasing political discontent.

The Pakistani general elections of December 1970 resulted in an overwhelming victory for Sheikh Mujibur Rahman's East Pakistani Awami League party, which campaigned for political and economic autonomy. 32 Following the results of the elections, there were fears in West Pakistan, given the demand for autonomy and the possibility of being ruled by the Awami League Party. The National Assembly having been postponed indefinitely, 33 the situation degenerated into mass demonstrations with the East Bengalis demanding total independence. With no

31 For details of events leading to the breakup of Pakistan and comments on the India intervention in East Pakistan see for example, International Commission of Jurists, The Events in East Pakistan, 1971 (Geneva, 1972); Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis" (1972) 49 Denver Law Journal 53; Teson, supra, note 3 at 179-188.
32 International Commission of Jurists, ibid; at 12.
33 Ibid. At 13-14.
possibility of a peaceful settlement of the political crisis on the horizon, the Pakistani army moved into Dacca on March 25, 1971, unleashing a reign of terror. There were reports of cases of mass murder and other human rights atrocities committed by the Pakistani army.\textsuperscript{34} The report of the International Commission of Jurists observed:

"The principal features of this ruthless oppression were the indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of the Hindu population; the arrest, torture and killing of Awami League activists, students, professionals, businessmen and other potential leaders; the raping of women; the destruction of villages and towns; and the looting of property. All this was done on a scale which is difficult to comprehend." \textsuperscript{35}

The result of these atrocities saw the death of at least one million people and the influx of over ten million people seeking refuge in India.\textsuperscript{36} This flow of refugees put severe strains on India's economy. The refugee situation thus made it impossible for India to remain indifferent to the conflict. Prior to the intervention, the Indian Prime Minister had appealed to other states and, in vain, to the UN to do something about the situation in which "the general and systematic nature of inhuman treatment inflicted on the Bangladesh population was evidence of a crime against humanity." \textsuperscript{37} But no international action was taken. Relations between India and Pakistan deteriorated, and broke into full scale war on December 3, 1971, a war that lasted 12 days and

\textsuperscript{34} Ibid. 24-27.
\textsuperscript{35} Ibid; at 26-27.
\textsuperscript{36} The precise number of refugees is in dispute. While the Pakistani government claimed there were no more that 2 million people, the Indian government claimed otherwise. What is certain is that this influx of people put a severe strain on India's economy. See Teson, supra, note 3 at 182.
\textsuperscript{37} Quoted in Verwey, supra, note 2 at 401.
ended with the surrender of the Pakistani Army. In the aftermath of the intervention, political prisoners were released, refugees returned to East Pakistan and, finally, Bangladesh was established as a new independent state.

In justifying its intervention, India claimed it had reacted to the aggression committed by Pakistan, in effect, that it was the lawful exercise of the right of self-defense. It also claimed the action was necessary for the protection of Bengalis from gross and persistent violations of human rights by the Pakistani army, while at the same time addressing the problem of over 10 million Bengali refugees that crossed into its territory. India's representative to the Security Council stated that:

"Refugees were a reality. Genocide and oppression were a reality. The extinction of all civil rights was a reality. Provocation and aggression of various kinds by Pakistan from March 25 onwards were a reality. Bangladesh itself was a reality, as was its recognition by India. The Security Council was nowhere near reality." 39

Elsewhere, India's representative noted again "that we have on this particular occasion absolutely nothing but the purest of intentions: to rescue the people of East Bengal from what they are suffering." 40 Thus, in India's opinion, its presence was necessary to put a stop to the atrocities and to prevent further massacres.

India's point of view was supported by the Soviet Union. It pointed to Pakistan's attack on

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38 International Commission of Jurists, supra, note 143 at 43-44.
40 Statement of Ambassador Sen to the UN Security Council, UN Doc.s/pv. 1606, 86(1971). Cited in Franck & Rodley, "The Law, The United Nations and Bangla Desh" (1972) 2 Israel Yearbok on Human Rights 142 at 164. Some writers claim India did not invoke humanitarian considerations as a reason for intervention. Others note that it did not claim the doctrine as her main line of defense. See for example, Hassan, supra, note 2 at 884 footnote 167; Akehurst n Bull ed; supra note 26 at 96; Ronzitti, supra, note 2 at 96. But as Teson correctly observes, whether India invoked it or not is not important. The significant thing to note is the totality of the circumstances which called for intervention on grounds of humanity. Teson, supra, note 3 at 186.
India as an invasion of India's territorial integrity. It also drew attention to the refugee situation as having created security problems for India, but emphasized the fact that the main causes of the conflict were the "inhuman acts of oppression and terrorism" committed in East Pakistan, and that a ceasefire was only possible after Pakistani atrocities had come to an end.\(^{41}\) Other states, such as Czechoslovakia, Poland, Hungary, Bulgaria, Mongolia, and Bhutan, who supported India's point of view, emphasized the severe violations of human rights and the atrocities committed by Pakistan.\(^{42}\)

Some states reacted negatively to the intervention. Pakistan, China, and the United States accused India of aggression and argued that India had no right to intervene in Pakistan's treatment of the East Pakistani population.\(^{43}\) In the Security Council, Saudi Arabia, Argentina, and Tunisia opposed the intervention by condemning "aid given by one state to secessionist movements in another," "secession, subversion and interference in the internal affairs of a state," and "intervention by a third party in the internal affairs of a state."\(^{44}\) In the General Assembly, most delegates deemed the situation in East Pakistan as an internal one, asserting that India had to respect Pakistan's sovereignty and territorial integrity.\(^{45}\)

The validity of India's intervention has been the subject of considerable debate. First, the justification for the Indian action, in part, was on the basis of self-defense. This was a direct response to the earlier preemptive air strike launched by Pakistan. India's action, therefore, can be explained by its being a victim of a full scale war initiated by Pakistan and using proportionate

\(^{41}\) 26 UN SCOR, 1606\(^{th}\) meeting, 4 December 1971, paras 253,267,268,270,271. Cited in Ronzitti, supra, note 2 at 97.  
\(^{43}\) Supra, note 151 at 5, 7-8, 10-11.  
\(^{44}\) Ibid; at 32, 37.  
\(^{45}\) Ibid; at 90. The delegate from Ghana, for example, declared that one permitted oneself the higher wisdom of telling another Member State what it should do with regard to arranging its own political affairs, one open a Pandora 's box.  
Ibid.  

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force in reacting to the aggression. Thus, in principle, the right of self-defense was involved and claimed.

Second, the Indian action can be justified on the basis of humanitarian intervention. Teson, for example, characterizes it partly as one of rendering foreign assistance to a people struggling for their right to self-determination—a collective human rights, and secondly, as intervention with the objective of ending acts of genocide, that is, humanitarian intervention proper. For Teson, the strength of India’s claim to legality is that these two aspects of humanitarian intervention are present in the Indian example. The majority of writers have echoed a viewpoint somewhat similar to the conclusions of the East Pakistan Staff Study which stated:

“In our view the circumstances were wholly exceptional; it was becoming more and more urgent to find a solution, both for humanitarian reasons and because the refugee burden which India was bearing had become intolerable with no solution in sight. Events having been allowed to reach this point, it is difficult to see what other choice India could have made.”

It must be emphasized that humanitarian intervention is not the grounds of justification which India itself put forward. As we have seen, India claimed to have acted first in self-defense, and secondly, in giving support to the new government of Bangladesh, which it recognized when hostilities began. We have given our reasons for not accepting the validity of these claims. If India had wished to justify its actions on the principle of humanitarian intervention, it should have first made a preemptory demand to Pakistan insisting that positive action be taken to rectify the

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46 See Teson, 2nd; supra, note 3 at 206-207. But see Clark and Beck, International Law and the Use of Force: Beyond the UN Charter Paradigm (London: Routledge, 1993) at 119 (rejecting Teson’s argument and making a case for taking into account India’s motivations in a legal assessment of this intervention).
violations of human rights. As far as we are aware no such demand was made.

In conclusion, therefore, we consider that India’s armed intervention would have been justified if she had acted under the doctrine of humanitarian intervention, and further, that India would have been entitled to act unilaterally under this doctrine in view of the growing and intolerable burden which the refugees were casting upon India, and in view of the inability of international organizations to take any effective action to bring to an end the massive violations of human rights in East Pakistan which were causing the flow of refugees. We also consider that the degree of force used was no greater than was necessary in order to bring to an end these violations of human rights.”

Contrary to the East Pakistan Staff Study and comments to a similar effect by some writers, however, India did invoke humanitarian reasons for her action in East Pakistan. India’s representative in the General Assembly had stated that:

“The reaction of the people of India to the massive killing of unarmed people by military force has been intense and sustained. There is intense sorrow and shock and horror at the reign of terror that has been let loose. The common bonds of race, religion, culture, history, and geography of the people of East Pakistan with the neighboring Indian state of West Bengal contribute powerfully to the feelings of the Indian people.”

Indeed, many commentators, citing the widespread slaughter of East Bengalis by the West Pakistani army, have considered this intervention to be a leading case of humanitarian

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intervention. Others, however, have taken a different view of the Indian action and considered it to be unlawful. Comments have been made to the effect that, more importantly, the operation was a strategic one undertaken by a partisan actor. India was interested politically in the secession of East Pakistan. It thus seized the opportunity to curtail Pakistan’s power and to diminish the territory of its political and military rival. It is probable that taking into consideration the overall political dynamics for control of the region, it was in India’s interest to take some form of action to cause the break-up of Pakistan and thus reduce the threat posed by its neighbor. If that happened, then predictably India would have emerged as a dominant power in the region.

However, if one brings into focus the entirety of the crisis, there was no doubt that given the massive scale on which human rights were being violated, India’s action could be looked upon as intervention to stop the human rights atrocities that were being committed. India’s “various motives converged on a single course of action that was also the course of action called for by the Bengalis.” As Somarajah argues, “the existence of self-interest should not affect the legality of humanitarian intervention. Therefore, at least on occasions where political expediency coincides with the existence of humanitarian grounds for intervention, human rights may be

49 See for instance, Ronzitti, supra, note 2 at 95. Fonteyne hold the opinion that “the Bangladesh situation probably constitutes the clearest case of forceful individual humanitarian intervention in this century’’. Fonteyne, supra, note 3 at 204. Walzer supports this intervention as humanitarian by arguing :it was a rescue, strictly and narrowly defined”. Walzer, supra, note 34 at 105.
40 See for example, supra, note 18; Brownlie, “thoughts on Kind-Hearted Gunmen” in Lillich ed. Supra, note 2 at 139. Frank and Rodley have commented: “The Bangladesh case does not constitute the basis for a definable, workable, or desirable new rule of law which, in the future, would make certain kind of unilateral military interventions permissible”. Frank and Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force” 91973) 67 American Journal of International Law 275 at 276.
51 See Verwey, supra, note 3 at 589.
52 Teson points out this action could also be viewed as rendering foreign assistance to a people engaged in a struggle for their right to self-determination, which is a collective human right. However, he notes that it is not necessary to draw those distinctions since claims of self-determination and human rights violations both converge in this example. Teson, supra, note 3 at 185.
53 Walzer, supra, note 34 at 105.
protected." The Bengali people welcomed the intervention which not only freed them from the massive scale of repression but also enabled them to obtain their independence through the creation of Bangladesh, which was quickly recognized by the UN and subsequently admitted to that body.

Another possible basis for justification of India's actions relates to the UN's inability to deal with the situation over the period in which these massacres were going on. There was no doubt that the massacres were a matter of international interest, yet no action was taken. India interested itself in the situation, went to the rescue and then withdrew its forces promptly. The fact that the UN did not condemn the intervention could also be interpreted as an implied recognition of the doctrine. Given the extraordinary circumstances in East Pakistan, which some writers view as being of genocidal proportions, this case fits into the category of acts "shocking the conscience of mankind" for which intervention to redress the situation was necessary.

Despite the self-interested nature of the Indian action, this intervention nevertheless, ultimately achieved the task of protecting human rights and was not condemned by the Security Council.

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54 Supra, note 127 at 70.
55 According to Nanda "there was no doubt regarding the nature or extent of the Pakistani military's atrocities. The United Nations's inaction is equally well documented". Nanda, supra, note 92 at 319.
56 The International Commission of Jurists suggested that the Security Council, inter alia, could have investigated the allegations of atrocities being committed prior to the Indian attack under the authority of Article 34 of the Charter. Further, it found that had the Security Council investigated, it would have discovered a "threat to the peace" in accordance with Article 39. In conclusion, it pointed out that the Council had an array of measures it could have taken to stop the carnage, from recommending dispute resolution methods under Article 36 to using force under Article 42. International Commission of Jurists, supra, note 144 at 488-489.
57 Teson, after studying this case, states the action "directed toward rescuing the Bengalis from the genocide attempted by Pakistan, is an almost perfect example of humanitarian intervention". Teson, supra, note 3 at 185. See also Reisman, comment in "Conference Proceedings" Lillich ed; supra note 2 at 17-18; Farer, "Humanitarian Intervention: The View from Charlottesville" In ibid; at 149-157; Nawaz, "Bangladesh and international law" (1971) 11 Indian Journal of International Law 459.
58 Somarajah maintains that "the absence of condemnation of the Indian intervention by the international community amounts to a condonation of intervention" to prevent mass atrocities against the Bengalis. Supra, note 127 at 73.
4-Vietnam's Intervention in Cambodia (1978)

The Vietnamese intervention in Cambodia gives another illustration of the use of force for the protection of human rights. In April 1975, the Khmer Rouge forces led by Pol Pot took over power from the Republican government. Soon thereafter it embarked upon a program of total reorganization of the country. In the process of this reorganization, massive violations of human rights by the regime against its own citizens took place. There were reported cases of starvation, torture, mass killings and deportations. In a three year period, an estimated number of over two million people were reported dead through starvation, disease and slaughter. The enormity of the human rights violations in Cambodia at the time has been described as of genocidal proportions.

The Khmer Rouge killed Vietnamese civilians living in Cambodia and began destroying Vietnamese villages and killing Vietnamese civilians in a series of raids along the Cambodia-Vietnam borders, in some cases penetrating inside Vietnam.

Despite the international community's expression of outrage at the human rights atrocities, no effective measures were taken to stop what was happening in Cambodia. In December 1978, Vietnamese forces accompanied by the Cambodian United Front for National Salvation invaded...
Cambodia and overthrew the Pol Pot regime and established a Vietnamese-supported government. 63

In the UN Security Council debate following the intervention, Vietnam set out its justification for undertaking military action against Cambodia. Its official position was that the Cambodian affair comprised two distinct conflicts: first, the conflict between Vietnam and Cambodia; and second, the civil war in Cambodia. Vietnam had become involved in the former conflict only after prior Cambodian aggression. Thus, its use of force had been undertaken only in self-defense. Regarding the latter, its cause originated from the inhuman conditions which the citizens of Cambodia were being subjected to by their government. The civil war was fought by the Cambodian people themselves, who eventually overthrew the inhumane Pol Pot regime. 64

In the Security Council, the Soviet Union, Cuba, Czechoslovakia, Germany, Hungary, Mongolia and Bulgaria supported the Vietnamese position. These states pointed to the inhuman conditions in which the Cambodian people were being held and stated that the Pol Pot regime had been overthrown solely by the United Front for National Salvation. 65

Other members of the Security Council challenged these representations. China did not comment on the inhuman conditions in which the Cambodian population were being held. Given the persistent tensions between China and Vietnam, China declared Vietnam had committed aggression against Cambodia, thus violating that country’s political and territorial sovereignty. The United Front, it contended, was nothing but a puppet organization created and run by Vietnam. 66 China, of course, had been a supporter of the Khmer Rouge. However, it is also worth

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63 Ronzitti, ibid; at 98-99.
64 Ibid.
65 See ibid; at 99-101 and the footnotes cited therein.
66 Ibid.
mentioning that those states supporting Vietnam’s action were opposed to the Khmer Rouge regime. The Non-aligned countries held Vietnam responsible for violating Cambodia’s territorial integrity. They did not explicitly condemn Vietnam but asked for its withdrawal from Cambodia. Most of these states did not raise the issue of human rights violations, except Bolivia, Nigeria and Singapore, which mentioned the issue. They were, however, of the view that such human rights violations did not justify intervention by a third state. Some Western states also condemned the Vietnamese action. The United States, however, did not declare it is prohibited to use force against a government that committed grave breaches of human rights within its territory. The Security Council, however, was unable to adopt any resolution. At its 34th session, the General Assembly adopted a number of resolutions censuring “foreign intervention” in Cambodia and called for the withdrawal of foreign forces from that country.

On the whole, it seems to be the case that international reaction to this case was shaped by bitter Cold War rivalries rather than any concern for human rights atrocities prevailing before the Vietnamese intervention.

It has been observed that Vietnam had other motives. It harbored territorial ambitions over Cambodia and seized the opportunity, given the situation, to invade Cambodia and install a puppet government. In added to this is the fact that, over a decade after the invasion, Vietnamese troops and advisors were still present on Cambodian soil. It is worth mentioning, however, that in February 1979, Vietnam had signed a Treaty of Friendship with the government of the new People’s Republic of Cambodia, formed in early January. That Treaty of Friendship

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67 Ibid.
68 Ibid.
69 See, ibid; at 101.
70 Bazyler, supra, note 3 at 608.
71 Ibid. at 609. It has been claimed that the troops departed in early 1993.
provided the legal basis for the acknowledged presence of Vietnamese troops inside Cambodia until their declared withdrawal.\textsuperscript{72} The danger here, as Thomas comments, is that while interventions may relieve the immediate reign of terror or the persecution of a particular group, they can also end up in the substitution of one oppressor by another. Alternatively, they may create new uncertainties and dangers springing from a different geopolitical configuration.\textsuperscript{73} Cambodians freed from the terror of the Pol Pot regime, for example, found themselves dependent on Vietnam on the one hand, with the added threat of the Khmer Rouge, supported by the West, on the Thai border on the other.\textsuperscript{74}

The purported basis for the Vietnamese intervention was self-defense. Cambodian aggression against Vietnam supported a proportionate response aimed at neutralizing Cambodian forces along Vietnam's border. What is less clear, according to one analyst, is whether Vietnam's response justified seizure of the capital, installation of a puppet regime and the presence of Vietnamese troops in Cambodia, although it could be argued that despite the superiority of its forces, Vietnam believed that the overthrow of the Pol Pot regime was the only option left in eliminating the Cambodian threat.\textsuperscript{75}

A possible basis for justifying this intervention on humanitarian grounds was the existence of large-scale atrocities. The Pol Pot regime had killed between one-quarter to one-third of the Cambodian population, and by so doing had lost the legal right to govern the Cambodian people. The justification for a humanitarian intervention existed, therefore, when Vietnam undertook its

\textsuperscript{72} Leifer, "Vietnam's Intervention in Cambodia: The right of state v. the Right of people" in Forbes & Hoffman eds; supra, note 6 at 145.

\textsuperscript{73} Thomas, "The Pragmatic Case against Intervention" in Forbes & Hoffman eds; supra, note 6 at 94.

\textsuperscript{74} Ibid.

\textsuperscript{75} Supra, note 197 at 104.
military action against Cambodia. As Wolf suggests, the international community's negative reaction to this case "does not constitute a negation of the doctrine of humanitarian intervention" since cold war rivalries shaped opinion either in favor of or against the Vietnamese intervention. Viewed in this light, strict issues of legality thus played only minor role in international reaction to the intervention.

On the basis of the facts discussed, it is difficult to assert whether, in fact, the objective of the Vietnamese was merely humanitarian. There is no doubt, however, that the Cambodian case was "a perfect candidate for humanitarian intervention" given the massive scale of human rights violations. The failure of the international community, including the UN, to find a diplomatic solution or to take any concrete measures of response, left the Vietnamese course of action as the viable option and the immediate solution to end the atrocities that were being committed.

5- Tanzania's Intervention in Uganda (1979)

In April 1979, the brutal rule of President Idi Amin of Uganda came to an end as a result of his overthrow by Ugandan rebels supported by Tanzanian troops. Amin's rule (1971-1979) had been consistently notorious for its gross violation of human rights. Prior to the Tanzanian

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76 Bazyler, supra, note 3 at 608. See however, 610 (arguing even though the invasion did result in the ouster of one of the most ruthless regimes in the post- World War 2 period, it cannot be justified on humanitarian grounds since Vietnam harbored other motives).
77 Wolf, supra, note 199 at 352.
78 Leifer, in his analysis of the Cambodian situation concludes that the motivation for intervention should ideally have been humanitarian. But in this particular case, intervention "was governed by strategic priorities and the international responses to that intervention by the corresponding priorities of interested parties" see Leifer, supra, note 219 at 155.
79 Ibid.
80 There had been widespread reports of executions, rape, torture, and arbitrary arrests. See, for example Amnesty International, Human rights in Uganda Report, June 1978, Doc.AFR 59/05/78. One international human rights expert testifying in 1978 of the situation in Uganda at the time said: "Since the present regime came to power in 1971 there
invasion, relations between the two countries had been very strained. There had been a series of border skirmishes between them. However, the immediate cause hastening Tanzania’s invasion stemmed from Uganda’s incursion into the former territory in October 1978. Ugandan troops moved into Tanzanian territory and occupied the Kagera Salient. Amin thereafter declared annexation of that territory and the creation of a new boundary between the two countries. Amin justified his action by saying that Tanzania previously invaded Ugandan territory. In light of this aggression, the Organization of African Unity (OAU) did nothing to condemn it but urged Uganda to withdraw its forces. Amin withdrew his troops after 15 days of plunder but continued in harassing the Tanzanians along the border. By February 1979, the Tanzanian army, along with Ugandan exiles and refugees, had launched a full-scale invasion into Uganda. In April 1979, these combined forces toppled Amin’s regime. A new provisional government of the Ugandan National Liberation Front under Professor Yusuf Lule was formed.

Initially, Tanzania justified its intervention as a reaction to the Ugandan’s armed attack on Tanzania which led to the occupation of the Kagera Salient at the end of October 1978, which in some cases was characterized as punitive in nature and at other time as self-defense. Given the

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81 For an account of prior relations between the two countries and details of the conflict see, Umozurike, “Tanzania’s intervention in Uganda” (1982) 20 Archiv Des Volkerrechts 301; Hassan, ibid.
84 Supra, note 173 at 303.
85 Ibid; at 304.
86 Hassan, supra, note 2 at 880-881.
87 Ronzitti, supra, note 2 at 102.
fact that Ugandan forces had already withdrawn from the territory in question and also that the nature of the response far exceeded the bounds of proportionality, it is difficult to sustain this claim of self-defense. 88 In referring to the intentions of President Nyerere of Tanzania, 89 as well as the length and scope of the invasion, Hassan observes that “Tanzania did not contemplate a singular objective. From the beginning, it seemed determined to pursue a military solution and the overthrow of Amin’s government.” 90 Taking into consideration the lack of goodwill between these two countries it is not difficult to imagine that other objectives were on the Tanzanian agenda during the conflict.

After the capture of Kampala, Tanzania declared on April 12 its limited objective. 91 It invoked humanitarian considerations as one of its objectives 92 Its Foreign Minister stated that the fall of Amin was “a tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity.” 93 Some writers note that Tanzania did not invoke humanitarian considerations in this conflict. 94 While it may be moot whether it did or not, it is important to realize that Tanzania did not seek any territorial expansion. Even if its objective was to remove Amin from power, that aim by itself is not inconsistent with the doctrine of humanitarian intervention.

The brutality of the Amin regime against his own people is a well known fact which does not need recounting here. One writer describes this as “the efficiency of the state’s repressive

88 See supra, note 11.
89 Nyerere metaphorically referred to “driving this snake from our house”. Quoted in Hassan, supra, note 2 at 893.
90 Ibid.
91 It should be pointed out that Nyerere declared from the outset Tanzania’s aim was not to punish Amin. “The aim of uprooting Amin was not our task he said; it was the task of the people of Uganda” (1979) 16 Africa Research Bulletin (political, social, and cultural series) at 5223. Quoted in Ronzitti, supra, note 2 at 103.
92 See Ronzitti, ibid. However, Hassan is of the view that once the war started Tanzania never even invoked humanitarian reasons for its intervention.
93 Ibid.
94 See for example, Hassan, supra, note 2 at 894.
machinery” which had become “destructive of human rights.” 95 The Ugandan people were left with no possible alternative but to seek foreign assistance in getting rid of this tyrant.

The international community expressed relief regarding the overthrow of the Amin regime. The United States supported Tanzania from the beginning, although on the grounds of self-defense. 96 Strong support for Tanzania’s intervention was from the United Kingdom, Zambia, Ethiopia, Angola, Botswana, Gambia and Mozambique. The Soviet Union announced the withdrawal of its troops in Uganda and the suspension of arms supplies after Amin’s initial invasion of Tanzania. 97 Rwanda, Guinea, Malawi, Canada and Australia also quickly recognized the new government. 98 Kenya remained neutral initially but later offered its cooperation to the new Ugandan government. 99

At the summit meeting of the Organization of African Unity (OAU) in July 1979, most African states remained silent on the Tanzania intervention. Only a few states - Sudan and Nigeria - condemned the action. Sudan criticized Tanzania for its invasion of Uganda and its interference in its internal affairs in violation of the principle of the OAU. This position was supported by Nigeria, which also expressed concern about the danger of the precedent set by the Tanzanian action. 100 In response to this criticism, President Binaisa of Uganda stated that member states of the OAU should not “hide behind the formula of non-intervention when human rights are blatantly violated.” 101 This statement gave support for the principle of humanitarian intervention.

95 Supra, note 173 at 313.
96 Teson, supra, note 3 at 165.
97 Ibid.
98 Rnzitti, supra, note 2 at 105.
99 Teson, supra, note 3 at 165.
100 Nigeria’s negative reaction might be attributed to the fact that it still bore Tanzania a grudge over the latter’s support of Biafra during the Nigerian civil war. See Thomas, New States, Sovereignty and Intervention (Aldershot: Gower Publishing Co; 1985) at 111.
101 Keesing’s Contemporary Archives, 1979 at 29669-29674, 29840-29841.
In essence, the silence of most African states was considered an implied approval of the Tanzanian intervention. Thomas, for example, writes "the general African consensus... seemed to settle at the level of tacit approval of Tanzania's action, with open praise withheld due to the knowledge that such actions could be abused." Putting aside considerations that such actions are susceptible to abuse, however, it would seem at the time that most African states refrained from explicitly endorsing the Tanzanian action during the OAU meeting for fear of becoming targets of intervention given the appalling human rights record of some of the governments.

A purported justification for the Tanzanian intervention is self-defense but the reaction of international scholars to the legality of the intervention was mixed. Some have said that once the Ugandan forces were removed from Tanzania, there was no further right to enter Uganda and dispose Amin from power. Others have rejected the claim that Tanzania was acting in self-defense. Hassan has argued that it was lawful for Tanzania to carry out an extensive counter offensive to repel the Ugandan army from within its territory, and even continued in "hot pursuit" to ensure a peaceful end of the conflict, but maintains the ultimate overthrow of the Amin regime cannot be legitimate regardless of Uganda's initial provocation. For him, the self-defense justification ceased when Ugandan troops retreated. Murphy, on the other hand, has indicated that there is widespread acceptance that a state exercising the right of self-defense may not only expel the aggressor but many pursue them into their own territory and, in some situations, overthrow their government if necessary to prevent recurrence of the initial attack. Thus, according to him, "Tanzania's claim that it was acting in self-defense is not clearly erroneous, unless it is shown that Tanzania's security would not have been further threatened if Amin

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102 Thomas, supra, note 5 at 112.
103 See Hassan, supra, note 2 at 902-903.
remained in power." However, the fact that Tanzania stayed for months following the fall of Kampala makes the argument about self-defense doubtful. As Nanda points out, the Tanzanian invasion was not "necessary and proportional" since the Tanzanian army stayed in Uganda for several months following Amin's overthrow.

Humanitarian considerations offer a further reason for the Tanzanian action. Most commentators who have examined this case, concluded that it was justified on humanitarian grounds. There is no question that the gross violation of human rights in Amin's regime, "especially the casual killings of a large number of people, provided the justification for humanitarian intervention: Amin's treatment of subjects was revolting to the human conscience, and the efficiency of the state's repressive machinery made action by the people ineffective." In that regard one writer has argued:

"if Tanzania was courageous enough to do what several other states would have wished to do and if it was acting as the "international conscience" in replacing a regime which most governments believed to be abhorrent and whose domestic policies violated all the international legal standards relating to human rights and fundamental freedoms, then its

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105 Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti-Revisiting the Validity of humanitarian Intervention under International law. Part 1(1992) 20 Denver Journal of International law and Policy at 321. Umozurike also support this view maintaining: "Tanzania's military intervention in Uganda cannot be justified as an act of self-defense" and that "it might have been so justified if Tanzania merely cleared the Ugandans from the Kagera salient". Supra, note 173, at 312.
106 See Wolf, "Humanitarian Intervention" Michigan Yearbook on International Legal Studies Annual, 1988, 333 at 350; supra, note 172 at 59; Suzuki, "A state's Provisional Competence to Protect Human Rights in a Foreign state" (1980) 15 Texas International Law journal 231 at 239-240; Teson 2nd Ed; supra, note 3 at 195 (concluding the Tanzanian intervention in Uganda was a legitimate use of force to stop ongoing serious deprivations of the most fundamental human rights). See also, supra, note 197 at 107 (maintaining the reason for Tanzania's intervention is best characterized as one involving mixed reasons of self-defense and protection of human rights).
107 Supra, note 173 at 312.
actions should be supported explicitly by that international community and by its law." 108 Bazyler, while recognizing that Tanzania's motives may not have been pure, nevertheless concludes it was guided partly by humanitarian concerns. He writes:

"the sheer brutality of Idi Amin's regime, the unwillingness of the United Nations and the Organization of African Unity to do anything about Amin despite knowledge of his brutalities, and the limited intervention by Tanzanian forces, indicate that, on balance, the Tanzanian intervention in Uganda can be justified on humanitarian grounds." 109

In sum, although one could argue that there were other motives involved in the Tanzanian intervention, if one takes into consideration the inability of the OAU and the UN to act given the massive scale of human rights in Amin's Uganda, Tanzania had no option but to intervene in the cause of humanity. President Nyerere had stated that "it is a good precedent... if Africa, as such, is unable to take up its responsibilities, it is incumbent upon each state to do so..., it is a lesson to Amin and people of his kind." 110 Thus, Tanzania was obliged to intervene given the lack of collective action on the part of the OAU.

The Tanzanian action, in effect, ended the gross human rights violations that characterized the brutal regime of Amin and resulted in an improvement of the human rights situation in Uganda. It did not exert any political influence over Uganda, install a puppet government or seek to annex any Ugandan territory after the intervention. As Teson comments, "...the widespread feeling that the human rights cause had been served caused the international community to refrain from criticizing the Tanzanian intervention." 111

108 Quoted in supra, note 172 at 74-75.
109 Bazyler, supra, note 3 at 591.
110 Quoted in Ronzitti, supra, note 2 at 103.
111 Teson, supra, note 3 at 167.
2- Conclusion

In sum, at least in principle, the whole basis for humanitarian intervention is grounded in prior agreement about the internationalization of human rights as embodied in Articles 55 and 56 of the UN Charter, as well as the International Bill of Human Rights. This impressive international human rights regime is gradually having the effect of altering treatment by a state of its own citizens from an issue of domestic concern to matters within the domain of the international. Thus, action to support them is not impermissible intervention contrary to Article 2(7). The advent of the UN Charter suggests that the customary institution of humanitarian intervention still exists, and is not inconsistent with the purposes of the UN. Therefore, in the event of failure of collective action under the Charter, there is a revival of forcible self-help measures to protect human rights. This is supported by the doctrinal writing. As Reisman and McDougal argue, the UN Charter not only confirmed the legitimacy of humanitarian intervention but also strengthened it. They state that:

"the Charter strengthened and extended humanitarian intervention in that it confirmed the homocentric character of international law and set in motion a continuous authoritative

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112 For critics who make the argument that even if customary international law recognized humanitarian intervention prior to 1945, the Charter's general prohibition in Article 2(4) has had such an impact on customary international law that the doctrine can no longer be valid, Teson responds by arguing thus: "First, one has to prove that subsequent state practice is consistent with the absolute prohibition". This, he demonstrates, is not the case. Furthermore, he argues "those who take that view—that the Charter radically changed the law in 1945—must also deal with the equally revolutionary impact of the law of human rights upon traditional international law". He concludes: "anyone who in the fact of the impressive rise of human rights concerns simply asserts that post 1945 international law must be seen as containing a rigid prohibition of war, even to remedy serious human rights deprivations carries a considerable burden of proof...there was a customary principle prohibiting the use of force at the time the Charter was adopted. In contrast, the human rights articles of the Charter opened the door to a much more innovative development: a concept of the law of nations as centered on the individual, not the nation-state". Teson, 2nd ed; supra, note 3 at 157.
Assessment of state practice in the period of 1945-1989 showed the existence of the humanitarian intervention principle in situations of gross violations of human rights. The examples of state practice discussed here revealed that states believe the right of unilateral humanitarian intervention is available to them as an option grounded in either the Charter or customary international law. Opinio juris follows from the articulation of the rule that human rights are a matter of international concern and that use of force to remedy the most serious human rights violations is not prohibited in international law. Even though there is no consensus on the validity of such sanctions, as Wolf remarks:

“abstract declarations from the General Assembly condemning intervention in the broadest terms should not be taken as persuasive evidence of opinio juris. The inconsistency between nations theoretical statements on the prohibition on the use of force and their actual, real world responses to such use of force is manifest. In the final analysis, the conviction of most of the states and scholars who oppose humanitarian intervention is

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113 Reisman and McDougal, supra, note 3 at 171. Even though Wolf in this regard favors the survival of the right of humanitarian intervention under the UN Charter, he arrives at that conclusion via a different route. Although he admits that the prohibition on the use of force was intended to be absolute, and that the original intent of the framers of the UN Charter was not to strengthen humanitarian intervention, nevertheless, he demonstrates that state practice can modify the Charter, and such modification for him, is legitimate because it is not inconsistent with the general purposes of the Charter. See Wolf, supra, note 199 at 363, footnote 168.

114 Similarly, Reisman’s assessment of the period under consideration concludes: “the post-UN practice of humanitarian intervention affirms the continuing validity of the institution and the conditions under which it will be deemed lawful, assuming compliance with these conditions, humanitarian intervention will be lawful under the Charter as well as under general international law”. Reisman, “Humanitarian intervention to Protect the Ibos” in Lillich ed; supra, note 2 at 187.

115 See Simon “The Contemporary Legality of Unilateral Humanitarian Intervention” (1993) 24 California Western International Law Journal 117 at 150. Writing in 1981, Sornarajah asserts that “in view of the many post-Charter interventions justified on the basis of humanitarian grounds, it is a bit late to argue that such interventions are illegal under the Charter”. Supra, note 127 at 75. See also Chatterjee, “Some Legal Problems of the Support role in international Law: Tanzania and Uganda” (1981) 30 International and comparative Law Quarterly 755 at 765 (indicating “should state practice be considered to be a constituent factor of international law then one might say that the UN period has, in fact, established intervention as a lawful act whether under the pretext of essential self-defense or humanitarian intervention”.

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of questionable strength. When states are confronted with real world instances of intervention to prevent mass slaughter which do not implicate intense global rivalries, they will not condemn them. And when scholars who support an absolute interpretation of the prohibition on the use of force are challenged with the moral imperative of terminating genocide, they will go no further than to label armed intervention as a meaningless technical breach of law. In light of such de facto approval by scholars and states of every ideological tendency, an argument rejecting the legality of humanitarian intervention based on *opinio juris* is unpersuasive." 116

The scale of human rights atrocities committed in the Ugandan, Pakistani and Cambodian cases, and the reasons given in these and other examples discussed, indicated the articulation of non-humanitarian and humanitarian concerns. The choice of not proffering humanitarian reasons in some of the examples as some scholars contend, it seems, was based on tactical considerations rather than legal constraints. 117

In any case, the fact that the interveners invariably had mixed motives should not be a basis for condemnation of the whole humanitarian enterprise.

It seems to be the case that the context of the Cold War dictated, by and large, support or condemnation in state practice for humanitarian intervention. The extent of approval or condemnation varied in each case depending on its impact on the wider geopolitical relationship between the superpowers, even though these interventions were into states where the respective governments were engaging in gross abuse of the human rights of their citizens, and the


117 See for example, supra, note 197 at 143 (noting the doubtful validity of an acceptance of the doctrine of humanitarian intervention by the International community since in virtually all instances (e.g the Indian and Vietnamese situations) the interventions were justified on a basis other than a doctrine of humanitarian intervention.
interventions had the effect of putting a stop to those violations. Thus, it would appear the
principle did not enjoy much support as some writers contend, mainly because humanitarian
values during the Cold War were subjected to geopolitical considerations. Even if the doctrine did
not enjoy wide support in states practice, these cases would appear not to invalidate the doctrine.
None of these cases where extreme conditions warranted intervention to protect human rights
drew explicit condemnation from the General Assembly or the Security Council, Cambodia
notwithstanding. Perhaps this was as much for political reasons as for support of the principle of
humanitarian intervention. The silent acquiescence on the part of the vast majority of states,
however, arguably may be interpreted as an implied acknowledgement of international principles
concerning the doctrine and its practice in the period under consideration. ###
CHAPTER FIVE

The Practice of Humanitarian Intervention in the Post-Cold War Era

1- Introduction

Since the end of the Cold War, many leaders, diplomats, scholars and thinkers have been urging the UN to be more activist in intervening for humanitarian purposes, that is, to put an end to human suffering, and prevent further suffering in civil wars and other forms of internal strife, and especially to end the suffering of victims of massive human rights violations in these conflict situations.

The 1990s witnessed in the international system so profound that they would have been several decades ago. The end of the Cold War, the dissolution of the Soviet Union, and the events that surrounded the Gulf War changed the perceptions of the behavior of states and international institutions at the international level. The Cold War, likewise, presented a once-in-a lifetime opportunity for the nations of the world, acting individually, collectively and through the UN...."to help achieve the two principal purposes of the UN: the maintenance of international peace and security, and the promotion and encouragement of human rights and fundamental freedoms". However, the euphoria generated in the aftermath of the Gulf War and the promise of a new world order,\textsuperscript{188} based on the rule of law they engender, which jeopardize the nation-state

system and global stability. The international community is thus presented with opportunities and formidable challenges in dealing with this state of affairs.

One of the mechanisms or instruments employed by the international community in dealing with these crises has been the use of multilateral or collective intervention. In the wake of recent humanitarian crises, the requirements of multilateral cooperation in dealing with international peace and security have led to a growing recognition among states of the obsolescence of traditional notions of absolute sovereignty. The taboo that customarily rules out of order even the discussion of civil wars, tyrannies and disasters, unless they clearly impact on other states, has begun to weaken. It is also significant that there seem to be changing attitudes among the Third World states, who have been traditionally the strong supporters of the principle of sovereignty. Childers and Urquhart, for example, see a growing readiness among these states to find "genuinely disinterested and UN-directed humanitarian intervention without formal government request or sanction." While an unprecedented level of cooperation has taken place within the UN in sanctioning post-Cold War humanitarian operations, it is also instructive to note that disagreements and hesitancy have nonetheless been evident, thereby weakening multilateral action to redress humanitarian crises.

Having made these remarks, it is important to note that there is a growing body of practice on humanitarian intervention in the post-Cold War era. Recent UN operations in Northern Iraq, Somalia, Bosnia-Herzegovina, Rwanda, Haiti, and regional efforts in Liberia and Kosovo all reveal a humanitarian dimension, whether this be the creation of humanitarian corridors, the

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189 The support this assertion by citing intimations of readiness from India and Zimbabwe to develop general principles and guidelines for intervention to create corridors of peace and tranquility during the Security Council Summit in January 1992. See Childers and Urquhart, Renewing the UN System (Uppsala: Dag Hammarskjold Foundation, 1994) at 18.
delivery of humanitarian assistance, or the establishment of safe havens. These various actions have, by virtue of their UN mandates, been formally collective in nature, adding to their legitimacy and making them stand out from earlier unilateral humanitarian interventions discussed in the previous chapter. These actions have ushered in a more vigorous approach to UN conflict management efforts, be it in situations of massive violations of human rights resulting from state collapse or civil wars.

This chapter will examine the scope of humanitarian action and the challenges and debates surrounding such intervention in their legal, moral and practical dimensions in Iraq, Somalia, Bosnia, Rwanda, Liberia, Haiti, Kosovo and East Timor in order to determine issues of legitimacy and whether a conclusion can be reached on increasing support in international practice. However, before examining these cases, a few preliminary remarks placing them in context will be in order.

The international community increasingly recognizes the interdependence of the preservation of international peace and security and the protection of human rights. This is because of many threats to or breaches of international peace and security revolving around issues of human rights. The post-Cold War era has witnessed situations in which grave violations of human rights have posed a threat to international peace and security. The demise of the Cold War removed the saliency of the ideological factor in international relations, but has witnessed the proliferation of inter-state conflicts in such places as the former Yugoslavia, Somalia, Liberia, Rwanda, Kosovo and others. These conflicts have often caused widespread human suffering and their repercussions affect international peace and security. Regarding these challenges, the post-Cold war era has shown the UN’s ability to take steps toward the development of collective mechanisms for authorizing intervention in support of human rights.
In December 1991, the UN General Assembly to this end adopted an extraordinary resolution for strengthening the coordination of the UN’s humanitarian assistance in emergencies, as well as pressuring non-consensual governments to permit aid to people in need during civil wars and internal conflicts. The favorable climate under which the UN has begun to perform its role paved the way for a Security Council meeting on 31 January 1992, at the level of Heads of State and government. Most leaders at that meeting mentioned human rights as an issue of concern for the international community. While some were in favor of a more definite role for the Security Council in human rights issues, others cautioned against intervention in the

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191 In stressing the fact that a new era has begun in which governments can no longer hide behind state sovereignty and violate the human rights of their citizens, the UN Secretary General Boutros Ghali stated: “state sovereignty takes a new meaning in this context. Added to its dimension of rights is the dimension of responsibility, both internal and external. Violations of state sovereignty is an offense against the global order, but its misuse also may undermine human rights and jeopardize a peaceful global life. Civil wars are no longer civil, and the carnage they inflict will not let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micronationalism that resists healthy economic or political integration can destruct a peaceful global existence. Nations are too interdependent, national frontiers are too porous, and transnational realities in the spheres of technology and investment on one side and poverty and misery on the other are too dangerous to permit egocentric isolationism. Now that the Cold war has come to an end, we must work to a void the outbreak or resurgence of new conflicts. The upsurge of nationalities, which includes countries with multiple ethnic groups to divide, constitutes a new challenge to peace and security. Nationalists fever will increase ad infinitum the number of communities that lay claim to sovereignty, for there will always be dissatisfied minorities within those minorities that achieve independence. Peace, first threatened by ethnic conflict and tribal warfare, could then frequently be troubled by border disputes. A new strategy will have to be adopted by the UN in order to respond to the irredentist or pro-autonomy claims of ethnic and cultural communities. It will have to take into account the abundant supply of arms, the aggravation of economic inequalities among different communities, the flow of refugees”. Security Council summit Opening Address by members US Federal News Service, January 31, 1992, at vm-5-2, 3-4, 1. Quoted in Scheffer, “Toward a Modern Doctrine of Humanitarian Intervention” (1992) 23 University of Toledo Law Review 253 at 283, footnote 128.
192 Here are what some leaders had said: The British Prime Minister states that “the opening line of our charter, the Charter of the UN, does not talk about states or governments. It talks about people. I hope, like the founders of the UN themselves, that we can today renew the resolve enshrined in the charter, the resolve to combine our efforts to accomplish the aims of the charter in the interests of all the people that we are privileged to represent. That is our role”. Russian President Boris Yeltsin stated: “now we must accomplish the most difficult task. That is the creation of legal, political, and socio-economic guarantees to make democratic changes irreversible. Our principles are clear and simple: primacy of ‘democracy, human rights and freedoms, legal and moral standards. I think that we need a special rapid response mechanism to ensure peace and stability. Upon the decision of the Security council it could be expeditiously activated in areas of crisis. My country firmly supports steps to consolidate the rule of law throughout the world”. US president George Bush stated that: “we must advance the momentous movement toward democracy and freedom and expand the circle of nations committed to human rights and the rule of law. The will of the majority must never degenerate into the whim of the majority. This fundamental principle transcends all borders. Human dignity, the inalienable rights of man, these are not the possessions of the state. They are universal. In Asia, in Africa, in Europe, in the Americas, the UN must stand with those who seek greater freedom and democracy. And that is my deep belief. That is the belief. That is the belief of the American people. And it’s the belief that breathes life into the great principle of the Universal Declaration of Human Rights”. Prime Minister Wilfried Martens of Belgium stated: “for Belgium it is essential that the Security Council and the Secretary General take full account of the importance of human rights being universally respected in international peacekeeping and security issues. They should act accordingly with the full weight of their of their authority. This new solidarity now entails the collective respect for international law, and now it should also include human rights.” Quoted in Scheffer, ibid.
internal affairs of states. They, however, declared that “the absence of war and military conflicts amongst states does not in itself insure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The UN membership as a whole needs to give the highest priority to the solution of these matters.”

The members of the Council pledge their commitment to international law and to the UN Charter. All disputes between states should be peacefully resolved in accordance with the provisions of the Charter. The members of the Council reaffirm their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression.

The Summit thus sought to strengthen the authority of the UN to negotiate peaceful resolution of conflicts and to intervene in circumstances that endanger humanity. It directed the UN Secretary General to report “on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the UN for preventive diplomacy, form peacekeeping and peacemaking.”

In his report to the Security Council subsequent to the summit, the UN Secretary General,

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193 The Chinese Prime minister Li Peng stated: “in our view, such basic principles as sovereign equality of member states and non-interference in their internal affairs as enshrined in the charter of the UN should be observed by all its members, without exception. In essence, the issue of human rights falls within the sovereignty of each country. A country’s human rights situation should not be judged in total disregard of its history and national conditions. It is neither appropriate nor workable to demand that all countries measure up to the human rights criteria or models of one or more number of countries. China is opposed to interference in the internal affairs of other countries using human rights as an excuse”. India’s Prime Minister Narasimha Rao cautioned that: “the charter is only as legitimate and secure as its underpinning by the collective will of the international community. At every step, the interpretation of the charter as well as the actions of the Security council must flow from that collective will not from the views or predilections of a few. A general consensus must always prevail. What is right and just must become transparent. Members of the Security Council should insist on this consensus. It is also important to note that the inaudible of human rights are conditioned by the social, traditional and cultural forces that inform? Different societies. While the endeavor of the UN, as being intimated in this meeting, is to gradually move towards creating uniform international norms for human rights. Such norms should not be unilaterally defined and set up as absolute preconditions for interaction between states and societies in the political or economic spheres” Quoted in ibid. at footnote 127.

Boutros Ghali, encouraged the idea of the greater institutionalization of the conflict management role of the Council. The report argued for conclusion of the military agreements envisaged in Article 43, re-establishment of the Military Staff Committee, institutionalization of peacekeeping forces, creation of "peace enforcement" units, and an increased role for the international Court of Justice. Furthermore, the report pointed out that one of the UN's security roles in the post-Cold War period was to "address the deepest causes of conflict: economic despair, social injustice and political oppression". 195

In sum, it seems clear that the UN has begun to take seriously and to address issues relating to gross human rights violations or suffering which constitute threats to international peace and security. The case for humanitarian intervention by the UN is grounded in the duty and responsibility of the Security Council to take whatever measures are necessary to maintain international peace and security. The basis for this assertion can be found in Chapter VII, and the responsibility of member states under Article 25 of the UN Charter. However, the notion that human rights violations within a state are a threat to international peace and security is a somewhat contentious one. 9 The international response and the practical measures taken in that direction will now be analyzed through the case studies.

2- The Case Studies

1- Intervention in Northern Iraq (1991-1992)

The repression of the Iraqi Kurds predates the 1991 Gulf War and its aftermath.\textsuperscript{10} It has been part of years-long policy of Arab colonial domination and the denial of the Kurds’ right to self-determination.\textsuperscript{11} Following the dissolution of the Ottoman Empire at the end of World War I, the Treaty of Sevres (1920) provided the Kurds with the prospect of an independent Kurdish state. The provision of the Treaty giving the Kurds “an absolute unmolested opportunity to autonomous development” was never implemented.\textsuperscript{12} The Treaty of Lausanne (July 1923) ignored completely the claims of the Kurds and divided the Kurdish territory between Iraq and Iran. Thus, Kurdish aspirations of self-determination with the goal of forming a separate Kurdish state never materialized due to geopolitical considerations on the part of the European powers.\textsuperscript{13}

The Kurds have continuously revolted against rule from Baghdad, and from 1961 to 1971 were engaged in armed rebellion.\textsuperscript{14} Even though agreement was concluded with Baghdad which provided some measure of autonomy,\textsuperscript{15} the reality of the situation, however, was that the Iraqi

\textsuperscript{10} The Kurdish people are estimated to be about 20 million. They are divided among four states in the Middle East region. They make up 19-24% of the Turkish population, 23-27% of the Iraqi population, 10-16% of the Iranian population and 8-9% of the Syrian population. They speak two major dialects and are predominantly Sunni. Adelman, “Humanitarian Intervention: The Case of the Kurds” (1992) 4:1 International Journal of Refugee Law 4 at 5.


\textsuperscript{12} Supra, note 13 at 6.

\textsuperscript{13} Ibid.

\textsuperscript{14} Following this decade-long conflict which claimed about 60,000 casualties and a displacement of 300,000 people, an agreement was reached which provided for Kurdish autonomy, with the seizure of power by the Arab Ba’th Socialist Party. Ibid.

\textsuperscript{15} The agreement guaranteed official recognition of the Kurdish language in Kurdish areas, non-discrimination, affirmative action, administrative autonomy, equal economic development, repatriation, and significantly, official
government marginalized and excluded the Kurds and began a colonial “Arabization” program consisting of large-scale Kurdish deportations and forced Arab settlement in the region.\textsuperscript{16} Again in the 1980s, the Kurdish population started a rebellion that was ruthless crushed. From 1985, Saddam Hussein’s regime engaged in a systematic program of destruction of Kurdish towns and villages, and the use of poison gas against the Kurdish population.\textsuperscript{17} The failure of humanitarian intervention on behalf of the Kurds by the international community was partly due to the fact that, despite his atrocities against the Kurdish population, Saddam Hussein was an effective shield against Iran in the Persian Gulf, and thus enjoyed a friendly though uneasy relationship with the West.\textsuperscript{18}

In the aftermath of the Gulf War in February 1991, the Iraqi Kurds were again subjected to atrocities committed by the Iraqi regime. The defeat of Iraq by the Allied powers in “Operation Desert Storm” and the consequent signals of support to overthrow the regime of Saddam Hussein\textsuperscript{19} gave the Kurdish rebels an opportunity to enhance their position in the region. Kurdistan was further reduced due to additional demands of containing the Shi’ite rebellion in the south. Kurdish rebels exploited this opportunity and scored some success. The situation was reversed with Saddam’s forces attacking Kurdish villages, forcing 2 million civilians to flee into the countryside.

\begin{itemize}
\item \textsuperscript{16} Supra, note 14 at 42.
\item \textsuperscript{17} Beres, “Iraqi Cries and International Law: The Imperative to Punish” (1993) 21 Denver Journal of International Law 335 at 345. For a detailed study of this systematic repression see Middle East Watch, Human Rights in Iraq (New Haven: Yale University Press, 1992).
\item \textsuperscript{18} Supra, note 14 at 43.
\item \textsuperscript{19} President Bush, at the height of the war, had made remarks to the American Academy for the Advancement of Science thus: “but the there’s another way for the bloodshed to stop and that is for the Iraqi military and the Iraqi people to take matters into their own hands to force Saddam Hussein, the dictator t step aside and to comply with the UN and then rejoin the family of peace-loving states”. Financial Times, London, 16 Feb. 1991, quoted in Koshy, “Morality and International Law” An Ethic of Intervention?” in Conference Report, The Challenge to Intervene: A New Role for the United Nations (Uppsala: Life & Peace Institute, 1992) 93 at 108.
\end{itemize}
and intentionally starving and engaging in massacres with poison and chemical gas.20 Almost one million of these Kurds fled north in an attempt to reach safety in Turkey and Iran, giving rise to tensions between those countries and Iraq. The magnitude of the repression and the refugee problem were borne out of the fact that out of a total Kurdish population of approximately 3-4 million in Iraq, over 1.5 million refugees were generated in a short period of time.21 The regional security factor led the Allied powers to reconsider the policy of non-intervention in the internal affairs of states. The Iraqi mistreatment of the Kurdish population became a matter that threatened international peace and security in the region, and subsequently provided the legal basis for Security Council action.

In taking account of these developments, the Security Council, faced with mounting atrocities committed by the Iraqi government against the Kurds, adopted Resolution 688 on April 5, 1991,22 which condemned Iraq’s repression of the Kurds and other groups and considered these developments a threat to international peace and security. It demanded that “Iraq immediately end this repression” and insisted that it “allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operation.” And it appealed to “all member states and to humanitarian organizations to contribute to these humanitarian relief efforts.” The Security Council also

21 Ibid. A report issued by the United states Senate Committee on Foreign Relations stated that more than 2 million Kurds had sought refuge on the Iraq-Iran borders and that they were dying at a rate of up to 2,000 a day at the time. The author of the report, Peter Galbraith, observe that “my visit to liberate Kurdistan, over the weekend of March 30-31 (1991), coincided with the collapse of the Kurdish rebellion and the beginning of the humanitarian catastrophe now overwhelming the Kurdish people. I was an eyewitness to many of the atrocities being committed by the Iraqi army, including the heavy shelling of cities, and the use of phosphorous artillery shells, and the creation of tens of thousands of refugees. From the Kurdish leaders and refugees I heard firsthand accounts of their horrors including ass executions and the leveling of large sections of Kurdish cities”. Staff of Senate Committee on Foreign Relations, 102d Cong; 1st Sess; civil war in Iraq 2 (Comm. Print 1991). Quoted in Beres, supra, note 20 at 347.
22 UN Doc.S/Res/688 (1991). Reprinted in (1991) 30 international Legal Materials 858. This resolution was passed by ten votes to three (Cuba, Yemen, Zimbabwe) with two abstentions (China and India).
demanded that Iraq cooperate with the Secretary General to these ends.

The legitimacy of Resolution 688 by the Security Council was hotly debated, since the participants understood the resolution would establish a precedent shaping perceptions of the proper role of the Security Council in future situations arising out of internal conflict. On the one hand, France argued that massive human rights violations, whether or not they constituted a threat to international peace and security, warranted intervention by the Security Council, which “would have been remiss in its task had it stood idly by, without reacting to the massacre of entire populations, the extermination of civilians, including women and children.” 23 Other states supporting the resolution stressed the international repercussions of Iraq’s repression of its civilian population in the flows of refugees to neighboring states. 24 The Iraqi response was that the resolution is illegitimate interference in Iraqi’s internal affairs and violation of Article 2(7) of the UN Charter. Iraq also accused the United States and Iraq’s neighbors of the partitioning of Iraq. China and other states opposing the resolution made reference to Article 2(7), stating that “the Security Council should not consider or take action on questions concerning the internal affairs of any state.” 25 The states that supported the resolution characterized it as necessary action to address a threat to international peace from the flows of refugees.

Actual intervention in Iraq to protect the Kurds “Operation Provide Comfort” was undertaken by troops from the United States, Britain, France and other countries. The United States, Britain and France first declared a “No fly zone” in the north and “Operation Southern Watch” in southern Iraq where the Shi’ite population was threatened. Armed forces were also used to create humanitarian enclaves protected from the Iraqi military. Iraq protested these

23 French representative to the UN Security Council, quoted in supra, note 14 at 44.
24 See UN Doc. S/PV 2982.
25 bid.
measures, for they were undertaken when Iraq was negotiating with the UN over access for humanitarian organizations. These countries relied on resolution 688 to legitimize their actions. Other than the military forces used in the operation, thirty other countries contributed relief supplies and some fifty non-governmental organizations (NGOs) either offered assistance or participated in the operation. 26

Overall, the UN aid efforts in Iraq relied on allied military intervention in northern Iraq in its early stages to establish a security zone; to respond to any Iraqi air operation in northern Iraq; the deployment of a UN force to provide limited protection to UN humanitarian workers; and an agreement negotiated with the Iraqi government to establish the logistics of the humanitarian effort throughout Iraq. 27

Any analysis of this action shows the ever-present tension between sovereignty and non-intervention on the one hand, and the protection of human rights on the other. Issues relating to the legitimacy of the humanitarian action in Iraq and the value of the operation as a precedent are debatable.

The moral case for the humanitarian initiative in northern Iraq is compelling. The justification for humanitarian action to redress gross and systematic abuse of human rights is imperative. The Iraqi violation of the Kurdish peoples’ rights within its own territory was directly related to the rights of the other states to intervene, and to use force as was necessary to remedy the situation where regional peace and security was threatened. In this case, the repression was so great as to cause a mass exodus of refugees into neighboring states, threatening the peace and

security of those states. The Security Council, responsible for maintaining international peace and security, would be justified in demanding intervention for humanitarian purposes and, in fact, did just that. 28

To support the dimension of moral legitimacy in this case, where the state is guilty of gross and persistent human rights violations, the consent of the governed can no longer be presumed. Similarly, the innocent victims of humanitarian crises cannot have chosen or consented to their fate. Legitimacy in this respect will mean that a government should respect the human rights of its citizens. Where the opposite happens, non-intervention will no longer be morally required, and the government would have lost its moral authority to demand that external actors remain uninvolved in its internal matters. 29 From an ethical point of view, governments are domestically and internationally mere agents of the people. Consequently, their international rights derive from the rights of the citizens who inhabit and constitute the state.

The ethical aspect of the UN action in Iraq, however, would have been strengthened if it had clearly mentioned the rights of the Kurdish people. Resolution 688 did not refer to the Kurds as a people, nationality, group or minority but instead made reference to “the Iraqi population in many parts of Iraq, including most recently in Kurdish-populated areas.” The observation has been made that in doing this “the Security Council failed to highlight the measures of the Iraqi government aimed against the Kurds as a people, measures which many considered were amount to genocidal actions.” 30 By drawing a link between action in the Kurdish-populated areas with Security Council Resolution 687 (the resolution on the ceasefire) and thus making it part of

28 Supra, note 13 at 24.
30 Supra, note 22 at 108.
package of punitive actions against Iraq, the UN further devalued the moral dimensions of this case.\footnote{Ibid.} Mayall, for example, has argued that the obligation to “do something” about the Kurds did not spring from generalized duties to protect human rights wherever they are threatened, but from specific responsibilities incurred by the Western powers from the Gulf War. Undoubtedly, had the repression occurred in any circumstances other than as a result of the Gulf War, it is inconceivable that western governments would have responded to pressures from public opinion to intervene for purposes of humanity.\footnote{Mayall, “Non-intervention, Self-determination and the “New World Order” (1991) 67: 3 International Affairs at 426-428. See also Roberts, “Humanitarian War: Military intervention and Human Rights” (1993) 69: 3 International Affairs 429 at 437 (noting “Operation Provide Comfort” occurred in the immediate aftermath of the Gulf war, and that in those circumstances the allied powers had reason to take responsibility for the plight of the Kurdish refugees).} Although one could fault the UN-sanctioned action on this score, account should also be taken of the fact that the immediate and urgent humanitarian concerns were met, demonstrating at least some moral concern for the plight of the Kurds even though the broader political question of Kurdish self-determination was not addressed.

Another scope of debate regarding UN action in northern Iraq concerns the scope of Resolution 688. Despite the debates preceding its passage, discussed earlier, some commentators, such as Malanczuk and Gordon, have argued that the resolution does not validate strictly internal human rights violations, without transboundary effects, as threats to international peace and security.\footnote{See, Gordon, “Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti” (1996) 31: 1 Texas International Law Journal 43 at 49, Malanczuk, Humanitarian Intervention and Legitimacy of the Use f Force (1993) at 18 .} They claimed that the resolution clearly provides that it is the external effects of the Iraqi repression that are threats to international peace and security. Moreover, the resolution did not authorize the Security Council to use force to protect human rights in these circumstances, since it contained no reference to Chapter VII. Chapter VII is the only Chapter in the Charter that
authorizes or permits the Security Council to use or approve the use of force.\textsuperscript{34} Although the Security Council ordered Iraq to permit humanitarian assistance, the Resolution does not mention collective enforcement measures, and thus, given its narrow scope, it should not be viewed as approving intervention for humanitarian purposes because humanitarian intervention by definition involves the use of force.\textsuperscript{35} Resolution 688 did not specifically authorize the use of force, and the Secretary General did not request it, although he did in the end acquiesce in the intervention.\textsuperscript{36}

Added to this is the issue of state sovereignty. Unlike Somalia, where there was no functioning government, and Haiti, where there were competing governments, Iraq had a single sovereign functioning government. In this regard, some states questioned the authority of the UN to intervene against a sovereign government to redress human rights violations. In this context, the Allied action of protecting the Kurds in northern Iraq posed a direct challenge to Iraq, and was a violation of Iraqi sovereignty. In effect, since Resolution 688 was relied upon to legitimize the actions in northern Iraq, as mentioned earlier, the legality of these acts becomes questionable according to this viewpoint.\textsuperscript{37}

It would seem that claims relating to Security Council action under Resolution 688 as legally binding only because it was in response to a “threat to peace” is an exercise in an excessive way. Resolution 688 was sufficiently open-ended to provide a legal basis for the allied action. According to Teson, the relevant issue here is not whether the Security Council can do anything it wants so long as it is styled a “threat to international peace and security.” As Teson argues, setting aside word games, this situation was a human rights issue about Iraq’s treatment of

\textsuperscript{34} Ibid.  
\textsuperscript{35} Ibid.  
\textsuperscript{36} Supra, note 13 at 19-21.  
\textsuperscript{37} Supra, note 38 at 49.
its own citizens. A reasonable reading of 688 is that the Security Council was essentially concerned about human rights abuses themselves. The reference to “the threat to peace and security was added for good measure.”

The key element in the UN action in northern Iraq is the revival of the sovereignty debate. Was the UN action in Iraq a violation of Iraqi sovereignty, as argued above, or does the response to the plight of the Kurds suggest a shift in international opinion towards reconstructing state sovereignty to take account of massive human rights violations? A case can be made for the assertion that there is a movement towards reconstructing sovereignty to take into consideration human rights violations.

First, although the former UN Secretary General Preze de Cuellar may have had initial reservation about the scope of the humanitarian mission in Iraq, he argued for a change in the traditional understanding of state sovereignty in light of the international community’s interest in taking action where massive human rights violations are involved. In his final report to the General Assembly in 1991, de Cuellar stated that:

“protection of human rights now involves a more concerted exertion of international influence and pressure…. and, in the last resort, an appropriate UN presence, that is what was regarded permissible under traditional international law. It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity…. We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights. What is involved is not the right of intervention but the collective obligation of states to bring

38 Supra, note 31 at 344.
relief and redress in human rights emergencies.”

The Secretary General argued that international boundaries have been erased in certain domains of concern. Chopra stated that “there is already a shift in jurisdiction from the territorial “place” of the domestic concern to the “place” of issues deemed matters of international concern, such as international crimes, which are committed against the international community as a whole, which are not distinguished by their locus delicti.” In effect, it becomes clear that the official UN view of state sovereignty underwent significant reevaluation in light of the Gulf War and ‘Operation Provide Comfort.’

Western leaders have also used ‘Operation Provide Comfort’ to change the traditional understanding of sovereignty and non-intervention in internal affairs of states. The British Foreign Minister, Douglas Hurd, in this regard remarked that “the demarcation between internal and external policies of a nation is not absolute.” French Foreign Minister, Roland Dumas, argued that the French concept of the “duty to intervene” emerged from the Iraqi oppression in a similar way in that the concept of “crime against humanity” emerged from the Holocaust. In France, he noted, it is a crime not to help someone who is in danger. Similarly, the US

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41 Supra note 31 at 347.
43 Following the lead of Bernard Kouchner, founder of Medicins sans Frontiers and French Secretary of States for Humanitarian Affairs, some French legal experts and humanitarian non-governmental organizations have formulated a theory of an international right of victims to assistance, and of an international duty to assist them, culminating in a right of international humanitarian intervention. See for example, Beigbeder, The Role and status of International humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance (Dorreccht: Martinus Nijhoff Publishers, 1991) at 353-384; Garigue, “Intervention-Sanction and Droit D’ ingerence’ in international Humanitarian Law” 9(1993) XLVIII International Journal 668.
Ambassador to the UN, Thomas Pickering, noted that:

"The response to the plight of the Kurds suggests a shift in world opinion towards the rebalancing of the claims of sovereignty and those of extreme human need. This is good news since it means we are moving closer to deterring genocide and aiding its victims. However, it also means we have much careful thinking to do about the nature of, and the limitations upon, intervention to carry out humanitarian assistance programs where states refuse in pursuit of policies of repression to give permission to such assistance." 45

Echoing similar viewpoints at the London Summit in July 1991, the G7 issued a political declaration noting:

"...the urgent and overwhelming nature of the humanitarian problem in Iraq caused by violent oppression by the government required exceptional action by the international community, following UN Security Council Resolution 688. We urge the UN and its affiliated agencies to be ready to consider similar action in the future if circumstances require it." 46

These developments effectively encourage intervention to protect human rights since the rights of individuals are often violated by their own governments. The steady erosion of traditional understandings of state sovereignty is making it easier for international organizations, governments and non-governmental organizations (NGOs) to intervene when governments refuse to meet the needs of their citizens and a lot of people are at risk. 47 As Stedman argued, "it may be

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46 Ibid.
that the international community has begun to accept the position that the interests of people come before the interests of states.”

In short, Iraq’s treatment of the Kurds shows the international community’s commitment to the view that sovereignty and nonintervention could no longer shield genocidal and other repressive acts, which are themselves forbidden by international law and treaties.

Having noted these developments, what then is the value of the Security Council action in terms of its status as a precedent? Some writers have noted the improbability of the birth of a new order, or caution against arriving at the conclusion that the case of the Iraqi Kurds sets a clear precedent for humanitarian intervention. Fine, for instance, argues “neither the United States nor the United Nations is inclined to pay any price, bear any burden, meet any hardship, support any friend, or oppose any foe under a human rights banner.” “The world will come to view the Kurdish enclaves,” according to Fine, “as a curio of international law, like Guantanamo Bay or Gibralta.” He gives a number of reasons, the coalescence of which explain the break with international law customs in Kurdish Iraq, and concludes the absence of one or more of these factors explains the lack of international militancy toward massive human rights violations in other regions of the world.

Thus, the allied action in northern Iraq, for some, is neither reassuring as humanitarian

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49 See for example, supra, note 37.
51 The reasons he gives why Northern Iraq is an exceptional action: 1. The universal revulsion against Saddam Hussein and the consequent rejection of his invocation of international law. 2. The partial responsibility of the coalition forces, especially, the United States for the plight of the Kurds. 3. The strong support of the Turkey for Kurdish enclaves. 4. The fact that Russia or China did not use the veto because of urgently needed financial and trade benefits. The impact of the ass media, especially of television, on public opinion. 6. Genocidal action by Iraq against the Kurds providing a foundation in international law for the enclaves. 7. The military impotence of Iraq to oppose the Kurdish enclaves need be there only for a short period. Ibid.
52 Ibid.
intervention, nor does it signify the emergence of a new legal norm. It reinforces increasing fears that the global order that is being structured is maintained by a self-appointed cop whose actions are post-facto legitimized by the UN. 53

Contrary to the above assertions, the intervention in the support of the Iraqi Kurds has broader importance for the following reasons. First, this case demonstrated the Security Council willingness to act in response to internal repression when the consequences of that repression resulted in transboundary refugees flows, even though the limits of the precedent are also apparent. As shown earlier, five members of the Security Council expressed doubts about a greater role for the Council in conflicts that they saw as essentially internal affairs.

Second, this case addressed the humanitarian crisis in Iraq as just that, avoiding the more contentious political issue of Kurdish self-determination. Allied leaders did not take sides on the issue of Kurdish self-determination, but saw in the creation of humanitarian enclaves the prospect or possibility of an open dialogue that would ensure that the human and political rights of all Iraqi citizens are respected. In this regard, former UN Secretary General de Cuellar argued in favor of a "collective obligation of states to bring relief and redress in human rights emergencies" rather than a more open-ended right of intervention. 54

Third, the UN action in Iraq resulted in a motivation for institutional reforms mapping out UN humanitarian responses, such as through the creation of 'corridors of peace' or 'zones of tranquility.' 55 To this end, the General Assembly adopted in December 1991 Resolution 46/182 to strengthen UN coordination of humanitarian emergency assistance. This resolution, among

53 See Koshy, ibid; at 111; Wheeler, "Pluralist or Solidarist Conceptions of International Society: Bull and Vincent n
54 Quoted in Stromseth, "Iraq's Repression of its Civilian Population: Collective Responses and Continuing
Challenges" in Damrosch ed; Enforcing Restraint: Collective intervention in internal Conflicts (New York: Council
55 Ibid; at 101.
other things, lays down guiding principles for humanitarian assistance that take account of both state sovereignty and the needs of "victims of natural disasters and other emergencies." These principles indicate a movement from the traditional focus on the primacy of state sovereignty and on state-initiated requests for assistance. The resolution also resulted in the establishment of the Department of Humanitarian Affairs which should enable the UN and other humanitarian agencies working with the UN to respond in a timely manner and effectively in future humanitarian emergencies.

2- Intervention in Somalia (1992)

The international response to the Somali crisis was more complex than the intervention in Iraq because Somalia had no functioning government. The degeneration of Somali society into civil strife and anarchy was puzzling since Somalia is one of the few homogenous states in Africa with a common language, a common culture and a single religion, which is Islam.

The roots of the tragedy in Somalia can be attributed to both internal and external factors. Internally, after its independence in 1960, "the Somali government was a mere political superstructure resting on the tectonic plates of the main organizing units of Somali society, the clans", according to Farer. Successful government depended on a delicate balancing act

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56 Resolution 46/182, annex, para. 1. Quoted in ibid.
57 Ibid; at 101-102.
58 It should be noted that although Somalia society is culturally cohesive, colonization fragmented the people, driving them among British Somaliland, Italian Somaliland, Ethiopian Somaliland (the Ogaden region) and the Northern Frontier District of British Kenya. The present state of Somalia was a result of decolonization of the former British Somaliland protectorate and Italian Somaliland in 1960, which united to establish the Somali Republic. See, Samatar, Somalia: A Nation n Turmoil (London: Minority Rights Group, 1991) at 17, cited in Crawford, "UN Humanitarian Intervention in Somalia" (1993) 3 Transnational Law and Contemporary Problems 273 at 274.
59 Quoted in Slim & Visman, "Evacuation, Intervention and Relation: United Nations Humanitarian operations in
because of a system of client and patron built upon traditional clan relationships. When Barre took over power in a coup in 1969, the principle of Somali politics remained the same but gradually lost its balance.\textsuperscript{60}

The calamity that befell Somalia began partly with the policies pursued by Siad Barre in the 1970s and 1980s. The Barre government's lack of legitimacy and imposition of centralized rule worsened the negative results of his polices. The relative stability of Somali society in the 1970s and 1980s was dependent on the skillful manipulation of domestic politics. Barre’s hold on power was sustained by the suppression of critics, detention and military reprisals against his opponents, manipulation of clan of interests and rivalries, and the occasional buying out of opposition groups with cash. By the 1980s, however, the increase in inter-clan rivalries had weakened his military base. It became increasingly obvious that he neither possessed the skill to bring together the various sectional interests nor the leadership necessary to pull the country out of its political impasse, with the worsening economic situation.\textsuperscript{61}

Externally, geopolitical considerations, such as Somalia’s strategic proximity to the oil-rich Middle East, were of great value to the superpowers during the Cold War. Both superpowers sought a military presence in Somalia and generally in the Horn of Africa. The paramount interest of both the United States and the Soviet Union was not to help Somalia but to pursue their own global and regional agendas by carving out spheres of influence. Superpower rivalry in the 1970s and 1980s thus gave Somalia leverage through which it got considerable economic and military aid. With the demise of the Cold War, the United States and the former Soviet Union lost interest.

\textsuperscript{60} Slim & Visman, ibid; at 147.
\textsuperscript{61} Makinda, Seeking Peace from Chaos: Humanitarian Intervention in Somalia (Boulder: Lynne Reinner Publishers,, 1993) at 17.
in the competition in the Horn of Africa and subsequently withdrew their presence. One consequence of Superpower competition was the acquisition and stockpiling of enormous military arsenals by states in the region. These arms acquisitions - a legacy of the Superpower rivalry - thus played a prominent role in changing the magnitude, direction and extent of the anarchic conditions prevailing in Somalia in the early 1990s.

The end of the Cold War diminished Superpower influence in Somalia. The result of this was that previously suppressed long-standing grievances were unleashed in the form of ethnic conflicts, destabilizing the Horn of Africa. Bitter clan fighting became the norm in central and southern Somalia as the twenty-one year dictatorship of Siad Barre came to an end in January 1991 and created a power vacuum. Intense fighting in and around Mogadishu quickly spread throughout the rest of the country. Heavily armed bandits, many of whom were members of the various major factions, and others with seemingly no real allegiance, took advantage of the anarchy caused by civil war to seize control of parts of the country, and become involved in looting, controlling the distribution of the food and raping women. In effect, the civil war left

\[\text{62 Ibid; at 51.}\]
\[\text{63 At the height of the Soviet-Somali relations in the mid-1970s for example, Somalia had the best equipped army in sub-Saharan Africa. By the '76, t was estimated t have more than 250 tanks, 300 armored personnel carriers, and over 52 fighter jets. Its army during this period increased from 12,000 in 1970 to 30,000 in 1977. Ibid; at 57.}\]
\[\text{64 Ibid.}\]
\[\text{65 The various political movements that had long opposed the Barre regime could not n a way of power-sharing after Barre's ouster. Ten or more clan-based factions that succeeded him thus exercised varying degrees of control. Civil strife began with militia moving from the north to fight what was left of Barre's army n the more affluent south with its trading cities f Kismayu and Mogadishu. As family members of the militia groups subsequently followed them, coupled with a lingering drought, there was a general population movement. The situation in the south degenerated into a state of chaos as traditional methods of conflict resolution failed to yield any peaceful settlement of running the affairs of the country. Violent clashes between two of political movements vying for control of Mogadishu, the capital, took place in September 1991, and again between November 1991 to February 1992. The political situation was further worsened when pro-Barre forces attempted to recapture power through invasion of the southern part of the country from their base of operation n the border with Kenya in April 1991, and subsequently, in April 1992. See Augelli & Murphy, "Lessons of Somalia fr Future Multilateral Humanitarian Assistance Operations" (1995) 1: 3 Global Governance: A Review of Multilateralism and international Organizations 339 at 340.}\]
Somalia in ruins with no functioning government.  

By the middle of 1992 it was estimated that the situation had reached a peak in the crisis with 1.2 million Somalis displaced either internally or externally in Ethiopia, Yemen and Kenya. About 4.5 million people were threatened with severe malnutrition and disease, and suffered more than 300,000 deaths. It was against this background of humanitarian catastrophe that the events precipitating international intervention should be located.

After the overthrow of Barre, various humanitarian relief efforts were frustrated by the actions of the warring factions to prevent relief supplies from reaching their enemies. There was a general atmosphere of insecurity in the country which led to the delivery of relief supplies in all parts of the country being stopped. The most important issue at the time was how to secure conditions under which various UN agencies and NGOs could distribute relief assistance to people that needed it the most. Meanwhile, several attempts to mediate the conflict had failed.

Mediation efforts had failed because the various clans and sub-clans hated each other intensely; the factions’ leaders had virtually no legitimacy, since their supporters could switch their loyalties anytime; and the number of factions and political movements kept increasing.

Given this terrible situation, the Security Council adopted Resolution 733 on January 23, 1992. It directed the Secretary General to immediately “undertake the necessary action to increase

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71 See supra, note 66 at 32-36.
72 Ibid; at 32. It was for these reasons that the UN Secretary General Boutros Ghali’s report to the Security council in March 1993 argued that: National reconciliation is a difficult process in the best of circumstances; it is particularly difficult in Somalia because of the multiplicity of parties, factions and other leaders, and the total absence of law and order in all parts of the country”. See, Security Council Document S/25354 of 3 March 1993.
humanitarian assistance to the people of Somalia," and called upon all parties to cooperate with the Secretary General and to facilitate the delivery of aid. 73

In March 1992, the major factions in the civil conflict agreed to a UN mediated ceasefire, 74 which led to the establishment in April of the United Nations Operations in Somalia (UNOSOM1) with a mandate to restore peace and protect humanitarian relief operations. The truce was largely ignored among the factions, and the delivery of humanitarian aid by the UN and other humanitarian NGOs was greatly impeded by armed gangs not only in Mogadishu, but throughout the country. 75 The deteriorating situation was followed by the unanimous adoption of Security Council Resolution 794 on December 3, 1992. 76 This Resolution went beyond a mere insistence on providing access to humanitarian relief agencies. The Council recognized the "unique" situation in Somalia and declared that it fell under Chapter VII. 77 It determined that "the magnitude of the human tragedy" caused by the conflict and the obstacles being created to "the distribution of humanitarian assistance constituted a threat to international peace and security." Furthermore, the Council authorized member states "to use all necessary means" to "create a secure environment" for the delivery of humanitarian assistance. It stated that "impediments to humanitarian relief violated international humanitarian law" and that individuals in Somalia had a right to that assistance. Finally, it stated that anyone interfering with humanitarian assistance "will

74 This ceasefire involved general Mohamed Farah Aideed of the United Somali Congress and interim president Ali Mahdi Mohamed.
75 Attacks were carried out on relief consignments and vehicles, medical and relief facilities impeding delivery of food and medicine essential for survival of the civilian population. The situation was such that the aid agencies employed members of these armed gangs to protect cargoes from theft. These guards, however, turned to steal the relief supplies.
77 Article 39 of the UN Charter states that the Security Council can "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what legally binding measures shall be taken, to maintain or restore international peace and security". Under Article 25 of the Charter, member states agree "to accept and carry out" decisions made by the Council with regard to Chapter VII.

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be held individually responsible in respect of such acts."

It is instructive to point out that, unlike Resolution 688, China voted in favor of Resolution 794 although it is not entirely clear how far humanitarian considerations played a role in its decision. Wheeler and Morris observe that the most positive explanation of China's position might be its willingness to cooperate with the international community as it explores a limited conception of multilateral intervention for the protection of human rights. However, they caution that it is easy to overstate the extent to which experiments with norms of humanitarian intervention are finding collective support in the society of states. For them, China is at best only just becoming receptive to the notion that sovereignty and non-intervention can be overridden in the protection of human rights. This stems, in part, from China's attempt at maintaining friendly relations with the West, but the extent to which it reflects the gradual evolution of consensual moral principles in the international community is debatable. 78

Following the adoption of Resolution 794, the United States deployed a humanitarian military-relief force to create a secure environment for the delivery of food and medicine to the people of Somalia. The US-led Unified Task Force (UNITAF) marked the beginning of "Operation Restore Hope", which enabled the UN and humanitarian NGOs to undertake their extensive operations. This was the most successful phase of the multilateral action. By the end of April 1993, the multilateral forces had helped in improving conditions significantly in Somalia. In May the US-led action was concluded and responsibility passed over to the UN under Resolution 814, which established UNOSOM II, allowing the use of force as envisaged under Chapter VII. The responsibility of UNOSOM II, in broad terms, was to complete, through disarmament and

reconciliation, the task begun by UNITAF for the restoration of peace, stability, and law and order in Somalia.

The operation took a turn for the worse with the UN mandate expanding to include "nation-building" which involved disarming the factions and arresting uncooperative faction leaders. Acting under this mandate, 24 members of the Pakistani UN peace-keeping force were killed on June 5, 1993. This incident seriously undermined the role of the UN peacekeeping force and its ability to control an increasingly volatile situation. In a unanimous vote, the Security Council passed Resolution 837 that called for the total disarmament and the arrest and prosecution of those responsible for the killings. In an unprecedented turn of events, US forces under UN command on June 12, 1993, carried out retaliatory attacks in the Somali capital in an effort to bring the anarchic situation to an end and to restore conditions of normalcy. In the months that followed, the search for General Aideed, who had been blamed for the killings, led to the deaths of many Somalis, members of the UN peacekeeping forces and foreign journalists. The violence intensified until early October when US forces suffered heavy casualties with 12 soldiers killed, 70 wounded and 6 missing in action.79

American policy began to shift when President Clinton announced intentions of reinforcing US military presence in Somalia and proceeding with the political dialogue that had already begun among the Somali factions. Secretary of State Warren Christopher subsequently announced that the US had made mistakes regarding the Somali operation and that the search for Aideed was no longer the main focus of the operation. The US began disengaging from Somalia with France, Italy and other Western nations following suit.80

79 Supra, note 73 at 342.
80 Ibid.
UN efforts at encouraging negotiations failed. Given the situation, Security Council Resolution 897 was passed which sought to limit UN involvement by restricting UN forces to tasks such as keeping the roads open to allow humanitarian aid channelled to the interior. When UNOSOM's mandate expired by the end of March 1995, neither the Somali factions nor the humanitarian NGOs requested an extension. It was very clear that UN peace management efforts had failed. 81 In sum, the Somalia experience evolved through four phases: conventional ceasefire observation between July and November 1992; forcible delivery of humanitarian assistance between December 1992 and March 1993; combat operations between June and October 1993; and nation-building after October 1993. 82

Since the withdrawal of UN forces in March 1995, the political situation in Somalia has remained the same. The various Somali faction leaders have failed to honor their commitments towards an all inclusive national reconciliation conference and the formation of a government. Nevertheless, while there had been no progress towards that end, the worst scenario of all out civil war had been averted. 83

The Somalia experience embodies the debate involving making a moral case for non-intervention versus intervention. Was there a moral obligation for the international community to respond to the humanitarian crisis that was Somalia? In making a case for non-intervention, some would argue that even if in practice the state, as in Somalia, is one that lacks a "general will" or is experiencing a crisis of authority because of fighting involving different factions the ultimate consequences of which will be to tear the society apart, foreign intervention is still seen as a

82 Supra, note 45 at 349.
greater evil. It is best to leave resolution of the crisis to the local people. Cynics contend that efforts aimed at promoting peace through outside intervention merely prolong conflict or result in a stalemate.

Alternatively, for others Somalia required a response, including the military means necessary to render humanitarian aid effective, and thus was morally justifiable. As Walzer argues, non-intervention is not an absolute moral rule. If what is going on locally becomes intolerable, humanitarian intervention is morally necessary whenever cruelty and suffering are extreme and local forces seem incapable of putting an end to them.\(^8\) For him, the agent of last resort to put an end to suffering is anyone near enough and strong enough to stop what needs stopping, but he realizes this is not always easy.\(^8\) In this case, the Organization of African Unity (OAU) would have been the appropriate body capable of stopping the conflict in its early stages before it took a turn for the worse, since that regional organization would have understood better what was going on, and would have been able to grapple with the dynamics of the local politics.

The OAU, however, for various reasons, and most particularly its reluctance to intervene in internal conflicts on the continent, was ineffective in dealing with the Somali conflict. One might add, however, that there is some indication towards change in the OAU’s approach in dealing with situations such as Somalia or Liberia. At its summit in July 1992, African states were prepared to sanction intervention in internal conflicts aimed at the delivery of humanitarian relief. The report presented by the OAU Secretary General to the Council of Ministers in Dakar in June 1992 is perhaps indicative of an awareness about changing attitudes in so far as the OAU is

\(^8\) Ibid.

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concerned. The report stated: 86

"It is arguable....that within the context of general international law as well as humanitarian law, Africa should take the lead in developing the notion that sovereignty can be legally transcended by the intervention of outside forces, by their will to facilitate prevention and or resolution, particularly on humanitarian grounds. In other words, given that every African is his brother's keeper and that our brokers are at best artificial, we in Africa need to use our own cultural and social relationships to interpret the principle of noninterference in such a way that we are enabled to apply it to our advantage in conflict prevention and resolution. In developing the law, in this context, account should also be taken of the need to create and maintain an enabling environment for economic development and progress.”

The tragedy of Somalia represented a real test of the ability of the international community to intervene for humanitarian reasons. As the international community was confronted with media images of starving men, women and children which had replaced pictures of wicked gunmen fighting each other, public opinion was always in favor of taking some kind of action. Western leaders clearly understood that the deplorable situation in Somalia could not be allowed to

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86 The report stated in part: “The conspicuous lack of clarity regarding norms in international law which regulate the conduct of third parties is even more acute with respect to internal conflicts, whether with respect to the prevention or resolution of the latter. When, for instance, can the Secretary General or Bureau of the Assembly of Heads of state and government intervene in a situation of escalating tensions in a Member state, to [prevent the development of a full-scale conflict? In other words, what is the entry point? The basis for intervention may be clearer when there is a total breakdown of law and order, as in the case of Liberia, and where, with the attendant human suffering, a spill-over effect is experienced within the neighboring countries. In such a situation intervention may be justified on humanitarian grounds as well as on the need to restore law and order. However, pre-emptive involvement should also be permitted even in situations where tensions evolve to such a pitch that it becomes apparent that a conflict is in the making. This would transform into real terms the OAU’s expressed commitment to conflict prevention”. Report of the Secretary General on Conflicts in Africa: Proposals for a Mechanism for Conflict Prevention and Resolution, Addis Ababa, Organization of African Unity, document CM/1710 (L.VI), presented to the Fifty-sixty Ordinary session of the Council of Ministers in Dakar (Senegal), June 22-27, 1992, 12 quoted in Veuthey, “Assessing Humanitarian Law” in supra, note 78 at 134-135. It should also be noted that the Security Council acted in Somalia at the request of African member states. See also, ibid; at 74.
continue and that humanitarian intervention was an option.

Thus, the moral legitimacy of the Somali operation was not in doubt. There certainly was a moral obligation for the UN to act and, by acting, the Organization alleviated the human suffering that was a consequence of the civil conflict. It is encouraging that member states have at least accepted this obligation. This is reflected in the resolution that established the UN Department of Humanitarian Affairs (DHA). Under the resolution there is a recognition by member states of the necessity to provide the international community with access to people in humanitarian need, and also to provide for their welfare in humanitarian crisis. According to Jan Eliasson, UN under Secretary General for Humanitarian Affairs, this resolution has been used “as a diplomatic, formal basis for various negotiations” in creating humanitarian corridors for the provision of assistance to people in need. In Somalia, the Security Council should have acted earlier than it did, as it took significant media pressure, public opinion and some prodding from the UN Secretary General to convince the Western political establishment of the necessity for initiating “Operation Restore Hope.”

What are the legal implications of the Somali action? Some commentators have expressed skepticism regarding its value as a precedent. For them Resolution 794 contains caveats. They argue that, although the Resolution was innovative in its acceptance that human suffering can

88 Eliasson, “The UN and Humanitarian Assistance” (1995) 48: 2 Journal of International Affairs 493. The experience of the UN in the delivery of humanitarian relief to vulnerable groups in conflict, however, has had mixed results. In the case of Sudan, UNICEF succeeded in negotiating “corridors of tranquility” to allow for the delivery of humanitarian aid. There was the widespread belief then that an appropriate solution had been found. It was applied in Angola and Mozambique, and attempted in Iraq. Particularly, however, the corridors of tranquility have not worked as anticipated Warring parties can still prevent the delivery of relief supplies. One opinion that the UN has used is to conduct negotiations on the ground with the parties to the conflict who are preventing delivery. See supra, note 75 at 70.
89 The UN Secretary General had observed from Bosnia how the enormous tragedy in Somalia was being eclipsed by the overwhelming international attention being paid to the rich man’s war in the former Yugoslavia. This prompted the media and the international community to reframe the crisis in Somalia in terms more accessible to western public opinion. Supra, note 64 at 148.
constitute a threat to international peace and security, its significance was undermined by the use of terms such as “unique”, “extraordinary” and “exceptional.” This has to be seen, therefore, as an attempt to differentiate Somalia from other cases of internal disorder or instability.90

It is argued that, while the case is unique because there was no functioning government, the Security Council set a precedent by placing overwhelming humanitarian needs above the traditional restraints against intervention in the internal affairs of sovereign states.91 Resolution 794 marked a significant inroad into the principle of humanitarian intervention. Unlike Resolution 688, which as some contend, did not explicitly authorize the use of force to assist the Iraqi Kurds, Resolution 794 recognized that massive human rights violations amounted to a threat to peace and security, and called for the use of “all necessary means” to secure the delivery of humanitarian aid in chaotic situations such as was the case in Somalia. Although the Resolution was couched in the language of civil war posing a “threat to peace” as a result of the massive refugee flows fleeing the fighting, the Council’s action is unprecedented to the extent that it clearly specifies the use of collective intervention for humanitarian purposes.92 Teson forcefully encapsulates the case for the Security Council action thus:

"the main concern prompting enforcement action by the Security Council was the extreme

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90 Wheeler and Morris observe that these terms were inserted specially to assuage the fears of states such as China which may have otherwise blocked a chapter VII enforcement action. See supra, note 83 at 151.
91 Teson goes even further to argue that “international law properly interpreted did authorize collective humanitarian intervention at the time the Security Council was called upon to act on the Somalian situation. That right was not created by Resolution 794”. He maintains that the language in that resolution, “to the effect that the situation in Somalia had a “unique character” of a deteriorating, complex, and extraordinary nature’ does not bar this conclusion. It is obviously true that the situation was unique and extraordinary in the sense that only this kind of extreme situation warrants the collective use of force. The is perfectly consistent with the doctrine of humanitarian intervention. The doctrine does not recommended the use of force to remedy every human rights problem, only serious human rights violations that cannot be remedied by any other means warrant proportionate collective forcible intervention for the purpose of restoring human rights, provided that the victims themselves welcome the intervention, as they did in Somalia” supra, note 31 at 354.
92 This resolution stemmed from the Secretary general’s assessment that UNOSOM was not “an adequate response to the tragedy” whose “unique character” was of a “deteriorating, complex, and extraordinary nature, requiring an immediate and exceptional response:. See, UN Chronicle 30: 1 March 1993 at 13.
situation created by a combination of famine, death and disease caused by the civil war; the breach of humanitarian law by the warring factions; and the general situation of anarchy." 93

Not only did the Resolution specify collective intervention for human rights purposes, but it went further by enunciating individual responsibility in situations of interference with humanitarian assistance. 94 The resolution sent a strong signal that the UN will no longer be prevented from interfering on humanitarian grounds in the internal affairs of member states. Even so, it probably should not be construed as giving the Security Council a broad right of intervention in less outrageous cases. 95

Somalia provides support for the legitimacy of humanitarian intervention. The overwhelming support that the intervention received 96 provides evidence of new attitudes and readiness to intervene on grounds of humanitarian concerns. However, observers have also commented on Somalia as being the turning point in the trajectory-when optimistic ideas about humanitarian intervention were replaced by realism concerning the limits of such actions. The failures of US and UN military efforts in Somalia have led to the so-called "Somalia syndrome" where collective interventions to prevent mass starvation, genocide, massive exodus of refugees and gross violations of human rights are no longer deemed either politically or operationally

93 Supra, note 31 at 351.
94 In late November 1992 for example, the UN Secretary general had reported violations of humanitarian law against UN relief workers, including attacks on Pakistani peacekeeping forces and the shelling of a World Food Program ship as it attempted to enter the Mogadishu harbor. See Letter dated 24 November 1992 from the Secretary General addressed to the president of the Security Council, UN SCOR, 47th Sess; UN Doc. S/24859 (1992). Cited in ibid; at 350. See also, Jean ed; Life, Death and Aid: The Medecins sans Frontires Report on World Crisis Intervention (London: Routledge, 1993) at 102.
95 Teson, ibid; at 355.
feasible. 97 There are obvious lessons to be learnt, as Weiss puts it, in “overcoming the Somalia syndrome.” 98

Although the successful phase of “Operation Restore Hope” provided a secure environment for relief distribution, the experience took a turn for the worse with the expansion of the UN mandate to include “nation-building” involving disarming the warring factions and arresting uncooperative leaders, as mentioned earlier. Briefly put, it seems to be the case that unclear and shifting objectives spelled failure and probably compounded the problem. This unfortunately added to neo-isolationist sentiments among politicians who in principle were disposed to support humanitarian missions. 99 However, in cases where preventive and peaceful measures have failed, the international community should muster the moral fortitude to act forcefully, argues Harff. 100

Furthermore, Weiss has commented that Somalia illustrates a situation in which the US and its Western allies “have not systematically prepared UN operations, with the result that symbols dwarf effective action.” 101 In such situations, governments are “particularly prone to crisis-induced reactions chosen for their symbolic value and ease of execution rather than their decisive effect.” 102 “Visceral reactions are to seek either magical “quick fixes” or else adhocery, hoping that warring factions will come to their senses” For Wiess, Somalia provided evidence that neither approach or reaction is the basis for a military policy that is workable and that both are

100 Ibid.
102 Ibid.
potentially counterproductive. 103

The lessons of Somalia may be important for future management of what has been characterized as “failed states”. In examining the Somalia operation, one notes the various Security Council resolutions remained unclear in prescribing the methods of political settlement and for the “re-establishment of national and regional institutions and civil administration.” The result, as Hoffmann comments, is that the operation was plagued by a rift between those who (like the US - some of the time) wanted to rebuild political life 'from the bottom up' (according to the model of encouraging institutions) and those (particularly in the UN bureaucracy) who opted for a model “accommodating existing forces”, and of working with the factional leaders, from the ‘top down’. 104 This rift specially did much to reduce the UN’s capacity to reach a political solution. Added to this is the fact that expansive mandates can also bog down the UN so much as to limit its capabilities or desire to carry out even the simple task of delivering humanitarian assistance or traditional peacekeeping when it ought to be done. 105 This problem can be resolved at the political level. 106

The significance of “Operation Restore Hope” for future humanitarian operations is that the UN succeeded in assuring the delivery of humanitarian relief to Somalis and, perhaps, saving

103 Ibid.
106 As the Report of the Independent Working Group on the future of the UN aptly suggests: “when conditions change in a country after an initial UN force deployment, and proposals are made to augment the action originally mandated by the Security Council, member states and their publics have a right to know what new operations they are being asked to support and what additional risks entailed Keeping the mandates distinct is also essential to protect UN personnel and the integrity of the mission. When the Security Council adopts a resolution authorizing the use of military force of any kind, the resolution should clearly state whether that force will be used for peacekeeping, peace-enforcement under Article 40 of the Charter, or collective security under Article 42. It should be clearly provided that forces acting on behalf of the Council will not exceeded the Council’s mandate. In addition, any change in the original mandate must be approved by the Security Council and explained to the participating member states”. See Report of the Independent Working Group on the Future of the United Nations in its Second Half-Century (New York: Ford Foundation, 1995) at 20-21.
millions of lives. It also partially succeeded in bringing the warring factions together and averting a worst case scenario of an all out civil war. In defining the scope of its humanitarian mandate, the UN will necessarily confront the problems of political institution building. Caution must, however, be exercised in terms of the unchecked use of Chapter VII powers to carry out “peace building” operations. Chapter VII should be used to authorize “peace building” missions only as a last resort.

In sum, Somalia provides an example of Security Council authorization for collective humanitarian intervention, at least in situations where there is no functioning central government, leading to civil war in which massive human rights violations occur. Resolution 794 was an explicit statement of the right of intervention in response to a humanitarian crisis. Setting aside the ultimate outcome of the Somalia operation, it represents the clearest articulation of the principle of humanitarian intervention.

3- Intervention in Haiti (1993-1994)

The case of Haiti is the most important case of supporting the legitimacy both of an international principle of democratic rule and collective humanitarian intervention. Although the

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107 It should only be used in exceptional circumstances where the Security Council finds the situation so deteriorated that it cannot wait for a peace agreement to be in place before taking action, or where the warring parties oppose an international presence but the Security Council decides that such action would constitute a threat to the peace. Han, “building A Peace that Lasts: The United Nations and Post-Civil War Peace-building” (1994) 26 New York University Journal of International Law and Politics 837 at 868.

108 Donnelly, for one, observes that international agencies have no special competence in state-building, let alone nation-building. Such task, he argues, by their very nature must be left to local actors. International agencies may be able to engage in subsidizing start-up costs and the provision of limited sorts of technical assistance. A functioning system of government, for him, must be established and maintained by the people who will operate and live under it. This is the case if the international community wants that government to respect the human rights of its citizens, otherwise the new government may become a potential cause of another humanitarian intervention. Donnelly, “Human Rights, Humanitarian Crisis, and Humanitarian Intervention” (1993) XLVIII International Journal 607 at 639.
case of Haiti is different in many aspects from the earlier cases examined, it shares with them the massive human suffering in a situation of gross violations of human and political rights. The immediate crisis inducing international action began with the overthrow of President Jean Aristide in a military coup in 1991 and the subsequent widespread human rights violations by the new military rulers.

Haiti gained its independence in 1804 and since then has had a tradition of dictatorial rule. ¹⁰⁹ This state of affairs seemed to have become more pronounced when Francois “Papa Doc” Duvalier became the country’s leader after winning elections that were considered fraudulent in 1957. His term of office was marked by violence and intimidation as tools of controlling the Haitian people. In 1971, Jean-Claude “Baby Doc” Duvalier succeeded his father as president and proceeded to govern in a similar manner.¹¹⁰ He was overthrown in 1986 and was succeeded by the National Council of Government, a civilian-military junta. In 1987, the Organization of American States (OAS) urged Haiti to move towards democratization by holding free and fair elections. However, the period from 1986 to 1991 was marked by a series of short term governments each of which came to power either through a military coup or through elections fraught with irregularities.¹¹¹ On December 16, 1990, elections were held in Haiti with international

¹⁰⁹ Violence has always been the means of settling conflicts and selecting leaders since its independence. Haiti has had over 20 constitutions and was always ruled by authoritarian rulers since its independence. See “Electoral Assistance to Haiti” UN Doc. A/45/870 at 9. Cited in Acevedo, “The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy” In Damrosch ed; supra, note 59 at 124, footnote 13.

¹¹⁰ His administration was characterized by gross human rights violations in which government forces, notably the volunteers for National Security were reportedly involved in harassment, persecution, kidnapping and killing of political opponents, labour activists, lawyers, journalists and human rights activists. Acevedo, ibid; at 124-126. Smith points out that successive United States administrations tolerated the Duvaliers as the alternative to possible communists penetration. Smith, A Journal of Contemporary World Affairs 54 at 56.

¹¹¹ See Acevedo, ibid; at 126-129.
supervision. Aristide became the first democratically elected President of Haiti on January 7, 1991.  

112 A military coup led by General Cedras overthrew Aristide on September 30, 1991.  

The Security Council held emergency meeting at the request of Haiti’s Ambassador to the UN and stated that the coup was an internal domestic matter which, did not constitute a threat to the international peace.  

114 Due to the inaction of the Security Council, the OAS on October 2, 1991, responded quickly to the coup by condemning it and imposing economic and diplomatic sanctions on Haiti. They demanded “full restoration of the rule of law and of the constitutional regime, and the immediate reinstatement of President Aristide in the exercise of his legitimate authority.”  

115 The Security Council convened formally on October 3, 1991 and condemned the coup. It strongly support the OAS action but failed to adopt a formal resolution against the coup because China and some non-aligned states considered the situation in Haiti a domestic matter which is beyond the reach of the UN concern.  

116 On October 10, 1992, the UN General Assembly strongly condemned the “illegal replacement of the constitutional President of Haiti and the use of violence, military coercion and the violation of human rights in Haiti” and affirmed as “unacceptable any entity resulting from that illegal situation.”  

117 What is noticeable here is that there is no mention of Haiti’s right to choose its political system and nor is there any reference to Haiti’s sovereignty.  

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112 Ibid; at 130.  
114 A report in New York Times stated: “Haiti’s representative to the United Nations expressed disappointment over failure of the Security Council to discuss the coup. The Haitian official said at a news conference that he was disturbed by the Security Council reaction, which he described as unfair and a denial of Haitian rights. The president of the Security Council had informed him that a majority of the delegations felt there should not be a meeting on what was seen as an internal matter. Friedman, ibid.  
116 Supra, note 31 at 355.  
117 GA Res. 46/7, October 11, 1991. On December 17, 1991, and again on December 2, 1992, the general assembly
In May 1992, the OAS ad hoc Meeting of Consultation of Foreign Ministers again passed a resolution which called upon member states to adopt whatever actions may be necessary for the greater effectiveness of the measures referred to in the ministers earlier resolutions in response to the coup. Additionally, they recommended the immediate freezing all of assets of the Haitian state held in any OAS member state. Refusal of Haiti’s de facto military dictator Gen. Cedras to reinstate the democratically elected Aristide government and the continued violent persecution of Aristide supporters led the Security Council to adopt coercive measures against Haiti in June 1993. Acting under Chapter VII of the Charter, the Security Council adopted Resolution 841, imposing an economic embargo on Haiti. The Security Council’s binding resolution clearly affirmed that the solution to the crisis in Haiti was the restoration of democracy in the country.

The strong UN sanctions imposed on Haiti compelled the Haitian military regime to accept a UN Governors Island Agreement in July 1993, which would have returned Haiti to democratic rule under President Aristide. Under the terms of Resolution 841 and the Governors Island Agreement, the UN suspended the economic sanctions on Haiti on August 27, 1993, because the regime had begun the restoration of democratic rule. The Governors Island Agreement collapsed when violence against Aristide supporters resumed in September and October of 1993 and reached a crisis point when pro-junta mobs stopped the troops assigned...
under UN Resolution 867, 121 to assist in the monitoring and modernization of the Haiti police and military. On October 13, 1993, the Security Council passed Resolution 873 which re-imposed the previously suspended economic sanctions, 122 and authorized member states, in another Resolution passed on October 16, to use military force to enforce the sanctions. 123

As the pressures for international action continued to mount in the wake of the de facto government’s brutal treatment of its people and the exodus of refugees from Haiti on July 31, 1994, the Security Council adopted Resolution 940 authorizing member states to use “all necessary means to facilitate the departure of the military leadership from Haiti.” 124 Acting under this mandate, the United States and other UN members put pressure on the Haiti military leadership. On September 15, after the diplomatic measures had been exhausted, President Clinton declared that a US-led military intervention was near to happening. 125 Fortunately, on September 18, former United States President Carter’s mission persuaded the Junta’s leadership to agree to hand over power to President Aristide and leave the country by October 15. This agreement was reached at the last moment before an invading force of US-led multinational troops was to land in Haiti. 126 As a result, President Aristide returned to Haiti, the Security Council lifted all sanctions against Haiti, the US-led Multinational Force in Haiti was replaced with the UN mission in Haiti and the crisis came to an end when foreign troops finally withdrew.

The UN authorized US-led multinational involvement in Haiti marked a precedent in the support of multinational humanitarian intervention and, for some commentators, an emerging

126 Farah, supra, note 76 at A 16.
principle of democratic governance. The moral and legal dimensions of international action in Haiti are defensible. The US-led action is justified partly by the need to put a stop the human rights violations of the Cedras regime. In justifying the intervention, President Clinton held the de facto military authorities in Haiti responsible for human rights abuses that included the execution of children, the raping of women, and the killings that were going on. President Clinton stated that “let me be clear, General Cedras and his accomplices alone are responsible for this suffering and terrible human tragedy.” Despite the horrible scenes of government brutality against the Haitian people which were regularly flashed across television screens, and repeated references by the American president to atrocities committed in Haiti, some commentators have questioned the US-led action and its legitimacy as a case of humanitarian intervention. Weber argues that the September agreement, brokered just before the intervention, suggests that human rights violations were not a priority for the United States. She writes:

“It seems ...the focus on the protection of Haitian human rights served as a false cover for an issue closer to home-immigration. Viewing human rights through immigration

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127 The case of Haiti as a paradigm of what some publicists refer to as “prodemocratic intervention” is beyond the scope of this work. In finding a basis for this kind of intervention, Scheffer, for example, argues that “where the UN or a regional organization has been instrumental in developing a democratic government such as has occurred in Haiti, there arises a legitimate basis for the UN and the regional organization to guarantee the survival of democracy in that nation when it has been overthrown by a military coup, which typically leads to internal violations of the collective human rights of the people”. He goes on to state that “we do need to understand the growing possibility that a humanitarian intervention may serve not only the purpose of responding to humanitarian crisis but also of facilitating the restoration of democracy in a state where that form of government previously has been guaranteed by the UN or regional organization. For in most cases it would be the Collapse of democracy and the rise of totalitarianism that would lead to human rights atrocities”. Scheffer, supra, note 6 at 292. For a detailed discussion of “pro-democratic” interventions against illegitimate regimes, see for example, Damrosch and Scheffer eds; Law and Force in the New International order (Boulder, Colo: Westview Press, 1991) Franck, “The Emerging Right to Democratic Governance” (1992) 86: 1 American Journal of International Law 81; supra, note 31 at 325-335.


129 See for example, Gordon, supra, note 38 at 52 (asserting that the intervention in Haiti was arguably not a humanitarian one); Regensburg, “Refugee Law Reconsidered: Reconciling humanitarian objectives with the protectionist agendas of Western Europe and the United States” (19960 29; 1 Cornell International Law journal 225 at 253 (suggesting international law played a minute, if any, role in the American decision to intervene in Haiti and that history may judge Resolution 940 to be an unwise decision).
concerns suggests that the population at risk in US-Haitian relations was not so much the Haitian population but the US citizenry.... Focusing on one issue like human rights in order to cover a concern with another issue like immigration is not a particularly new move. One finds this frequently in intervention discourses. I want to suggest that the US discourse on Haiti was an example of dissimulation understood as the escalation of the fake. US intervention justifications amounted to projecting the US population’s own fears (real or imagined) onto the Haitians (a ‘false’) location.”

The existence of mixed motives regarding the United States’ involvement cannot be ruled out in this case. The United States was certainly concerned about the continued mass exodus of Haitian refugees seeking asylum in the United States and was seeking methods to bring the refugee situation to an end. The United States’ national interests were thus affected by the intolerable situation in Haiti that created the refugee problem. The national interest must be construed broadly as being affected because the Haitian situation was morally reprehensible. The fact that mixed motives were present should not nullify this intervention since the humanitarian motive was clearly evident. Moreover, the US-led action indicates that a humanitarian crisis can become internationalized, pointing the way to action against a government in power.

The legal basis for humanitarian intervention in Haiti can be found in Resolution 940. The Security Council expressed grave concern regarding the “significant further deterioration of the humanitarian situation.” Also, it referred to the Haitian authorities’ “systematic violation of civil liberties.” The Security Council thus used the grave human rights violations and removal of the de

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130 Weber, supra, note 250 at 272.
131 See for example, supra, note 31 at 359.
facto government in Haiti as the justification for authorizing military action. The Haitian paradigm thus seems to reinforce the proposition that states have accepted grave human rights violations as the basis for action by the Security Council under Chapter VII.\(^{133}\)

Some lessons emerge from the Haiti experience. Although the OAS was less effective \(^{134}\) in taking action against Haiti, its immediate reaction in the wake of the crisis by applying diplomatic and economic sanctions must be appreciated. It suggests a willingness of the regional organization to respond to similar situations in the future. The organization's initiative prompted the UN to lend its support to find a solution to the crisis. In the same breath, this action also reveals the ambiguities that characterize the international community's efforts to reach at some point a consensus on when and how to intervene in a humanitarian crisis. It took two years for the UN to take its first decisive action. Even then, it was only after mandatory sanctions were in effect that the Haitian military dictators began taking the UN or OAS seriously. It took another year for the Security Council to authorize action that proved effective in returning Aristide to power. By the time those other remedies had proved quite ineffective, it was too late to save those who could have been rescued by an earlier intervention. The point here is that early use of force may have been desirable in preventing further worsening of the crisis.

In conclusion, it is significant to note that a number of states in the Latin American region supported various measures ranging from mediation, economic sanctions to the use of force to

\(^{133}\) Ibid; at 358. See However, Gordon, supra, note 38 at 53 (arguing Resolution 940 did not authorize the use of force specially to deal with the humanitarian aspects of the crisis).

\(^{134}\) Pastor suggests reason for failure of the OAS: First, Haiti had no prior experience with democracy, and the fact that its newly elected leaders failed to uphold the constitution in a manner that was consistent with maintaining a democratic tradition; Secondly, the OAS looked on its role as judge rather than as a problem-solver; and lastly, it failed to back its diplomacy with the credible threat of force which rather worsened the situation in Haiti rather than achieving its aim. Pastor, "Forward to the Beginning: Widening the Scope for Global Collective Action" in need and Kaysen eds; Emerging Norms of Justified Intervention (Cambridge, Mass: American Academy of Arts and Sciences, 1993) 133 at 144.
reinstall Aristide, although some of the larger states were reluctant to support military force. Despite the lack of unanimity for forceful action, the very fact of expression of support to some extent represents a shift on the part of governments in the Latin American region from their previous absolute non-intervention stance.

4- NATO Intervention in the Former Yugoslavia (1994)

The intricate and complicated conflict in former Yugoslavia created one of the most difficult dilemmas and a critical test case for the Western alliance and the UN in terms of international intervention and conflict resolution in the post-Cold War era.

Yugoslavia was created around a Serbian nucleus during a series of wars in the 19th and 20th centuries as the Ottoman Empire gradually lost its grip on the Balkan territories. The strong leadership of Marshal Tito from the end of the World War II held the state together and successfully contained ethnic tension during the Cold War. Upon Tito's death in 1980, cracks within the Yugoslav Republic began to emerge. The post-Tito period led to the rearrangement of the governmental structure which was designed to balance competing ethnic groups and interests. This was done by rotating the presidency among the six republics. One writer remarks that this arrangement in effect contained the seeds of its own destruction.

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136 Supra, note 31 at 366. For an exposition of Yugoslavia's troubled history see Steinberg, "International Involvement in the Yugoslavia Conflict" in Damrosch ed; supra note 59, 27.

137 See, Steinberg, ibid; at 31-32
Partly in response to increasing Serb nationalism and growing anticommunism, independence movements in Croatia and Slovenia gained momentum in the late 1980s. After the fall of the Communist government, the republics making up Yugoslavia started to secede. Slovenia parliament declared it would no longer follow federal legislation, and Croatia took similar steps toward greater political autonomy. Despite attempts at renegotiating the federal constitution along loose confederal lines, the political, economic and ethnic cracks between the various republics widened. Croatia and Slovenia declared their independence on June 26, 1991. They rejected what in their estimation was a situation of "economically stifling, politically outdated and nationally divisive policies of Belgrade." The result was the outbreak of warfare. Initial international response to the Yugoslav crisis came from the Conference on Security and Cooperation in Europe (CSCE), the European Union (EU) and the UN. In spite of opposition from the US, members of the EU granted recognition to both Slovenia and Croatia on January 15, 1992, under pressure from Germany.

The outbreak of civil strife in Bosnia-Herzegovina was almost predictable and inevitable. Bosnia is ethnically mixed. As Alija Izetbegovic remarks, the national groups were thoroughly mixed "almost like the colors in a Jackson Pollack painting." The rights and interests of Bosnia's mixed population had been protected under Tito's rule, which maintained their equality

138 Ibid.
139 Supra, note 114 at 569.
141 On June 27, 1991, the predominantly Serbian Yugoslav National Army (JNA) attempted to seize control of Slovenia's international borders. This attempt was rest by the Slovenes, with a consequent withdrawal of the JNA. Thus, it appeared the JNA was an instrument of Serbia policy. Ibid.
142 In 1991, Bosnia's population was estimated at 4,364,000 of which 43.7% were Muslims, 31.3% Serb, and 17.2% Croat. See Rubenstein, "Silent partners in Ethnic Cleansing: The UN, the EC, and NATO" (1993) 3:2 in depth-A Journal for Values and Public Policy 35 at 37.
143 Quoted in ibid; at 56, footnote 3.
under the multi-national Yugoslav state. As the federation was disintegrating, this unstable ethnic mix within Bosnia's borders could no longer be held together. In Bosnia-Herzegovina, a referendum was held on February 29 and March 1, 1992, in which an overwhelming majority of the voters favored independence. The Serbian population boycotted and rejected the result of this referendum. Nevertheless, the government of Bosnia declared independence on March 3, 1992. The signs of violence were clearly written on the wall in the aftermath of this declaration. The chances of violence were amplified by the EC's recognition of Bosnia-Herzegovina, a situation which the Serbs were not prepared to tolerate. 144 Immediately after the government declared independence, rebel Bosnian Serb forces tried to overthrow the government. The chaos and ethnic strife that followed resulted in widespread and massive human rights violations in which all sides to the conflict were involved. In an effort to preserve their hegemony and capture more territory for a greater Serbian state, the Serbs engaged in ethnic cleansing involving a program of genocide and forced evacuations. 145 Hundreds of thousands of people were killed and close to two million people were displaced from their homes, becoming refugees as a result of this practice. The atrocities that were reportedly committed were compared as the severity and extent of those committed by the Nazis during World War II.

As mentioned earlier, this intricate conflict meant the international community had to deal with more interlocutors. These not only included the authorities in Serbia but also the Serb Republic of Krajina; Croatian authorities in Croatia, the Croatian military and militias in Bosnia and Herzegovina; the Bosnian government and Bosnia Serb authorities in the self-declared Republic of Serbska, and the splinter Muslim faction in the autonomous zone of Western Bosnia.

144 Supra, note 123.
Given the complexity of the Yugoslav crisis, it was no surprise that the international community was cautious in its reaction and showed a reluctance to intervene. It was in this context that the international community became involved initially through the CSCE, then the EC and the UN. The EC, seized with the situation, tried to mediate the conflict which member governments saw as a European issue.\footnote{Lord Owen for example informed a British Parliamentary committee thus: “at the start of all this the United States did not want to be involved in Yugoslavia and the Europeans did not want them to be involved f truth be told. The European community were very happy this s should be a very a European event to the extent of us developing our peacekeeping operation and we were not too keen to involve the UN”. Lord Owen, Testimony before the Foreign Affairs Committee of the House f Commons of the United Kingdom, 10 December 1992, 108. Quoted in Keating & Gammer, “The New Look in Canada’s Foreign Policy” (1993) XL VIII International Journal 720 at 729-730.} After attempts to arrange a series of ceasefires and bring about a peaceful resolution of the conflict had failed,\footnote{The Vance-Owen plan, for example, did not meet the minimum conditions for the achievement of a stable peace because it aimed at preservation of a multi-ethnic state, not ethnic separation. Each of the ten Cantons under the plan would have contained large minorities. Some of the Cantons would have included enclaves totally surrounded by an opposing ethnic group. The later 1994 Cantons Group proposal to divide Bosnian 51%-49% between a Muslim-Croat federation and the Bosnian Serbs would have been better, but incorporated serious instabilties such as the isolated Muslim enclaves of Zepa, Sreberenica, and Gorazde, two of which were later overrun with great loss of life. See Kaufmann “Possible and Impossible Solutions to Ethnic Civil Wars” (1996) 20: 4 International Society 136 at 164. For a more detailed analysis of the CSCE and EC response in negotiating a political settlement to the Yugoslav conflict see for example Gow & Freedman, “Intervention in a Fragmenting State: The Case of Yugoslavia” in Rodley ed; supra, note 47 at 93-131; supra, note 114 at 570-5785.} Austria, Canada, Hungary, Yugoslavia (in particular)\footnote{The Yugoslav request stated the federal presidency’s backing for a meeting especially when it seemed some members of the Security council were going to raise objections under Article 297) of the Charter. Supra, note 114 at 577-578.} and other countries requested the Security Council to become involved by sending peacekeeping forces and imposing a mandatory oil embargo on Yugoslavia.

The Security Council finally considered taking some form of action. In its initial meeting on September 25, 1991, the Yugoslav delegate pointed out that “Yugoslavia can no longer be simply repaired. It should be re-defined.”\footnote{Quoted in ibid; at 578.} India argued that consent manifested in a formal request by Yugoslavia would be needed for the Council to consider intervention. China and Zimbabwe reminded members of the significance of non-intervention in the internal affairs of
other states. Yemen cautioned that in future the Security Council would encounter similar situations requiring creative approaches. Zaire viewed the conflict as a civil war. Russia stressed the significance of a political settlement, not only for inter-governmental conflicts, but also for intra-state conflicts...showing how dangerous the growth of separatism and national extremism is, not only for each individual country but for entire regions. Britain affirmed the strong international dimension of the conflict, while the US referred to the danger of escalation and the dangerous impact on Yugoslavia’s neighbors, who faced refugee flows, energy shortfall and the threat of a spillover of fighting as a matter of primary concern.

In response to these concerns, Resolution 713 was unanimously passed. The initial mandate of the UN expressed concern that the continuation of the war constituted a threat to international peace and security. Acting under Chapter VII of the Charter, it decided that all states implement a general and complete embargo on all deliveries of weapons and military equipment. Following from that, the Council also adopted Resolution 743 on February 21, 1992 which established the United Nations Protection Force (UNPROFOR). This force was created following the Secretary General’s recommendation that in the context of the ceasefire then in effect, such a force could become successful in consolidating the ceasefire and facilitating negotiation of a comprehensive settlement. As noted earlier, recognition of Bosnia-Herzegovina by the EC intensified the violence in that republic in the spring of 1992. As large portions of territory came under the control of the JNA and Serbian militias, reports of atrocities being committed began surfacing. Security Council Resolution 752 was adopted calling for, among other things, both

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150 Ibid.  
151 Ibid.  
152 Ibid; at 579.  
153 Ibid.  
154 Ibid.  
155 Supra, note 119 at 66.
parties to stop fighting and to respect the territorial integrity of each republic. Resolution 757 came after that, calling for economic sanctions against Serbia for its continued and grave human rights violations.

The first time that the UN Security Council authorized coercive measures in the conflict was in the summer of 1992. In its Resolution 770 the Security Council, acting under Chapter VII, called upon states “to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the UN the delivery... of humanitarian assistance... in... Bosnia-Herzegovina.” 156 While recognizing that the situation in Bosnia amounted to a “threat to international peace and security,” the Council was also “deeply concerned” by the reports of abuses against civilians imprisoned in camps, prisons and detention centers” which had so shocked the international community that it referred to the use of all necessary measures to have them closed. This resolution further expanded the mandate of UNPROFOR to deliver humanitarian assistance, and in performing this task to use “all measures necessary.” 157 To this end, several thousand UN peacekeepers were put on the ground to protect humanitarian convoys with totally inadequate military back-up. These forces relied almost entirely on negotiations to get humanitarian assistance to where it was needed the most, which frequently resulted in delays and disruptions. Added to this was the fact the UN and NGO officials were not immune from attack.

Faced with the failure of several attempts at protecting the Bosnian Muslims, the Security Council passed Resolution 781, which directed the imposition of a “no-fly zone” over Bosnia to prevent Serbian attacks from hindering the delivery of humanitarian relief supplies. Not only were

157 UNPROFOR II’s mandate according to the UN Secretary General was to “support UNHCR’s efforts to deliver humanitarian relief throughout Bosnia and Herzegovina, and in particular to provide protection, at the UNHCR’s request, where and when UNHCR considered such protection necessary”. Quoted in ibid; at 68.
the Bosnian Muslims vulnerable to Serb attacks in the UN declared safe zones, even UN peacekeepers and humanitarian aid workers became hostages to the whims of local combatants. One commentator remarks that the Bosnian Serbs in those circumstances viewed the UN Resolutions as attempts by the US and EC to give the appearance of protecting the Muslims while doing nothing. As it became clear that the so-called UN designated “safe zones” were anything but safe and enforcement action proved difficult, the Security Council, under Resolution 816, authorized member states to “take all necessary measures in the airspace of the Republic of Bosnia-Herzegovina in the event of further violations to ensure compliance with the ban on flights.” Unlike the disagreement regarding the interpretation of resolutions concerning Iraq, the Security Council this time specifically approved the enforcement by NATO fighter planes. Acting under authority of these Resolutions, NATO fighter planes embarked on a series of bombing campaigns against Bosnian Serb positions that violated the “safe havens” designated by the UN to deter further attacks. NATO’s use of force may have ended the commission of further atrocities in Bosnia and facilitated more realistic proposals towards ending the war. In December 1995, the warring parties started negotiations designed to bring the war in Bosnia to an end. The initialing of the agreements known as the Dayton Peace Accord in November 1995 culminated in a peace settlement signed in Paris on December 14, 1995.

159 The Dayton Accord consists of a set of international treaties, the General Framework Agreement for Peace in Bosnia and Herzegovina, twelve Annex (each consisting an international treaty) and the Agreement on Initialing, which deals with the modalities of conclusion and entry into force of the other agreements. Most of the general Framework agreement, concluded by the Republic of Bosnia and Herzegovina, the Republic of Croatia and federal Republic of Yugoslavia, obliges the parties to “respect and promote fulfillment” of each annexed agreement. This annexed Agreements set forth conditions for peace in Bosnia and Herzegovina and are concluded mainly by Bosnia and Herzegovina and two entities directly involved in the conflict (which are not parties to the general Framework Agreement) i.e. The Republika Srpska and the Federation of Bosnia and Herzegovina. The General Framework Agreement thus guarantees the implementation of the annexed agreements from both political and juridical viewpoints. See Geata, ‘The Dayton Peace Agreements and International Law” 91996) 7: 2 European Journal of International Law 147. See also, The General Framework Agreement for Peace in Bosnia and Herzegovina:
The Dayton Agreement, despite paying lip service to a unitary Bosnia, ratified and sought to strengthen existing territorial divisions. It gave grounds for qualified hope for a stable, relatively peaceful Bosnia. It required the withdrawal of all Bosnian Serb forces from the Sarajevo suburbs as well as from a corridor stretching from Sarajevo to Gorazde, and assigned these areas to the Bosnian government. It also establishes a NATO-led Implementation Forces for Bosnia (IFOR) to oversee the implementation of the military part of the peace plan.

The war in the former Yugoslavia raised particularly difficult questions and dilemmas for the international community on the issue of intervention in its moral, legal and practical dimensions. Morally, there was a sense of revulsion occasioned by atrocities committed in the course of the conflict as images of emaciated prisoners held in Serb-controlled concentration camps, the shelling of cities with women and children dying or wounded with no food or medical supplies, and accounts of murders and rape filled television screens around the world. In those circumstances, international public opinion certainly favored taking action to redress this abhorrent state of affairs. Some critics argue that foreign policy or international response should not be driven by emotional reactions fostered by the media. In line with this mode of thinking, hesitation characterized involvement in the Yugoslavian civil war in its early stages as Western governments believed military intervention in Bosnia would pose unacceptable risks to the lives of soldiers committed to such an endeavor, and that intervention would not end the fighting. Indeed, some policymakers in the US, for example, argued against the commission of ground

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160 For a brief review of NATO’s role under the Peace Plan see for example, Solana, “NATO’s role in Bosnia” (1996) April 15, Review of International Affairs 1-3. See also, Talamanca, “The Role of NATO in the Peace Agreement for Bosnia and Herzegovina” (1996) 7: 2 European Journal of International Law 164.
troops in Bosnia for fear of becoming bogged down in a quagmire, and of sustaining casualties of major proportions\textsuperscript{161} in an enterprise that would have, in the end, been difficult to justify to their domestic constituents. The Somalia syndrome reinforced this view and led to a cautionary approach. Yet the unwillingness and inability to act in the early stages of the conflict had a crippling effect on the UN and put its credibility at stake. Resolution 770, for example, promised more than member governments were willing to do. "All measures necessary" were never taken to ensure that humanitarian aid was delivered. In the words of Higgins, "we have chosen to respond to major unlawful violence not by stopping that violence, but by trying to provide relief to the suffering. But our choice of policy allows the suffering to continue."\textsuperscript{162}

The provision of humanitarian assistance surely alleviated human suffering and saved lives. Under the protection of UNPROFOR, much needed relief supplies were brought to alleviate the hardship endured by besieged communities. But this provision of humanitarian relief also had serious military and political consequences. Some Bosnian Muslims, for instance, considered the delivery of inadequate relief as merely sustaining them until they could be killed by the Serbs. UNPROFOR came under shelling and sniper fire; the declaration of "safe havens" meant nothing as Serb gunners pounded those enclaves; and agencies like the UNHCR were compelled to escort

\textsuperscript{161} There is a view current in American military circles termed the "Powell Doctrine" which suggests US intervention should only be undertaken if, and only if, success can be achieved decisively and with minimal losses through the employment of overwhelming force. This thinking poses problems for American military intervention, even if it is solely for humanitarian purposes. See Krauthammer, "Drawing the line at Genocide" The Washington Post, December 11, 1992. Quoted in Lewy, "The Case for Humanitarian Intervention" (1993) Fall Orbis 621 at 623. In 1992, for instance, Lieutenant-General Barry McCaffrey, representing the Joint Chiefs of Staff, told the US Congress that between 60,000 and 120,000 soldiers would be needed just to ensure the delivery of relief supplies, and pointed out that as many as 400,000 troops would be needed to implement a cease-fire. Similarly, General Lewis Mackenzie of Canada cautioned the US Senate that "if you get involved with the delivery of humanitarian aid, you will have Americans killed" Gordon, "Conflict in the Balkans: 60,000 Needed for Bosnia, A US General Estimates: New York Times, August 12, 1992, at A8. Cited in Eisner, "Humanitarian Intervention in the Post-Cold War Era" (1993) 11 Boston University International Law Journal 195 at 219.

\textsuperscript{162} Higgins, "The New United Nations and Former Yugoslavia" (1993) 69 International Affairs at 469.
refugees from Serb-held areas. The UN was seen by many of the war victims as accomplices to the atrocities that had been committed.

The Security Council, as mentioned earlier, gave UNPROFOR a humanitarian mandate without the necessary military backup given the situation on the ground. Although Resolution 776 authorized UNPROFOR to support UNHCR efforts in the delivery of humanitarian aid, UNPROFOR's use of force was deemed politically undesirable due to the increased risk of troop casualties. Moreover, the unwillingness to use force in delivering humanitarian assistance may be partly viewed as the desire to remain neutral or impartial. Indeed the very deployment of a UN force on the ground gave Western governments a justification for not undertaking air strikes for fear of hitting their own troops or turning them into Serb hostages. As the former UN Under-Secretary General for peacekeeping operations, Kofi Annan, admits “The reality is there are situations when you cannot assist people unless you are prepared to take certain military measures.”\(^{163}\) The UN assistance program was used as an excuse for the lack of military intervention. Weiss argues that humanitarian assistance combined with an inadequate military force was a “powerful diversion” substituting for more creative military strategies to end the war.\(^{164}\) Taking action in providing inadequate military support for the delivery of humanitarian assistance to people in need, while neglecting responsibility for protecting those people against murder, ethnic cleansing and rape, led to a deep moral crisis in the UN’s humanitarian action.\(^{165}\)

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\(^{163}\) Quoted in Weiss, “UN Responses in the former Yugoslavia: Moral and Operational Choices” (1994) 8 Ethics and International Affairs 1 at 6.

\(^{164}\) Supra, note 105 at 166. See also, Roberts, supra, note 37 at 443.

\(^{165}\) Robert Jackson observes with regard to interpreting the international response that “the involvement in Bosnia did not indicate moral indifference or a lack of humanitarian concern on the part of those leaders of states who were in a position to do something. Nor did it indicate the easiest choice in the circumstances—that would have been to wash their hands of Bosnia and do nothing at all. It indicated anguish and frustration concerning what, if anything, could be done about the human suffering the conflict was causing” he goes on to maintain that “it also reflected an absence of confidence that armed intervention could successfully deal with the problem; indeed, the main Western military
The Security Council Resolutions discussed earlier provided legal justification for humanitarian intervention in the former Yugoslavia. Resolution 770, among others, authorized the use of force by states to ensure the delivery of humanitarian assistance. While the Council recognized that the situation in Bosnia constituted a threat to international peace and security, it also made references to the gross human rights violations that were going on, in which civilians were subjected to murders, ethnic cleansing and rapes. In the debates preceding the passage of resolution 770, even delegates who were skeptical about authorizing individual states to act as opposed to a collective UN intervention conceded that the situation in the former Yugoslavia called for the use of force. India, for example, referred to the desperate plight of the civilian population which demanded urgent response not excluding the use of force. The Indian representative stated that India was:

"not opposed to the concept of the use of force in the present situation... ... We have no doubt whatever that the critical and desperate plight of the population demands urgent and effective response on the part of the international community and that such a response cannot and must not exclude the use of force." 166

The delegate from Zimbabwe noted the "pain and agony of fratricidal carnage that has accompanied the disintegration of what used to be the Socialist Federal Republic of Yugoslavia."

He continued by saying "Zimbabwe has consistently supported efforts within the Security Council that we believed had a chance of assisting to bring about peace and stability..." Thus, "Zimbabwe is of the view that any necessary measures taken or arrangements made to deal with..."

powers feared that it would cause an even greater loss of life to the civilian population of Bosnia and their own forces. Concerned about the humanitarian problem but worried about the safety of their own people, those leaders followed what they evidently believed was the only responsible course of action open to them at the time". Jackson, "Armed Humanitarianism" 91993) XL VIII International Journal. 579 at 603.

166 See Provisional Verbatim Record of the Three Thousand One hundred and Sixth Meeting, UN SCOR, 47th sess; plen.mtg; at 9-17. UN Doc. S/PV. 3106 (19920.
this crisis have to be undertaken as a collective enforcement measure.” The representative of Ecuador maintained “the international community cannot be insensitive to the suffering of defenseless human beings, accordingly the states that answer the Council’s call will be authorized to use every means necessary to achieve the specific aim in question because of the exceptionally urgent circumstances that prevail in Bosnia and Herzegovina.” 167 The debates show a strong endorsement for the doctrine of humanitarian intervention.

The intervention by NATO forces is partly explicable in the sense of it having a humanitarian dimension. It was an action undertaken pursuant to authorization from the UN with the aim of ending the abhorrent human rights situation as a result of the conflict. 168 Although initial UN authorization was limited to the use of air power to securing delivery of humanitarian assistance and enforcement of the “no-fly” zones, those limited purposes were exceeded in some instance. NATO, for example, responded by taking strong action against the Bosnian Serb bombing of a Sarajevo market in which 37 people were killed. 169 Situations of this kind, though, depict the difficulties involved in the insistence upon the neutrality of humanitarian interventions. Two kinds of problems are encountered here. 170 One is the territorial issue involving the merits of the dispute, claims put forward by the various parties, questions relating to who has the right to which part of the territory, and whether secession is justified, etc. These are hard cases about which any intervener must strive to be impartial. The second situation involves human rights

167 See, ibid; at 9-10, 14-16.
168 See for example, Provisional Verbatim Record of the Three Thousand One Hundred and Ninety-First Meeting, UN SCOR 48th Sess; plen.mtg. at 19-21, UN Doc. S/PV. 3191 (1993) referring to statements by delegates such as the US (pointing to the international community resolve to enforce Security Council resolutions against those who commit unspeakable violations of human rights), France (commenting on the use of force to enforce the no-fly zones), Cape Verde (maintaining that the Security Council must use its authority to put a stop to the tragedy of the Bosnian people) and Pakistan (citing the abhorrent campaign of ethnic cleansing). Cited in supra, note 31 at 368.
169 Ibid.
170 Ibid.
abuses, and violations of international humanitarian law generally. Neutrality or impartiality will
not be the issue here as intervention must target the perpetrators and compel them to put a stop to
those practices. If both sides to the conflict are guilty, then it is incumbent to stop them.\footnote{171} The
traditional UN peacekeeping approach and its insistence upon neutrality and impartiality between
the perpetrators and their victims have come under a lot of criticism. In Bosnia, the circumstances
of the war were such that the interveners had to ignore directives on impartiality and take sides in
support of the victims. Such an action, however, need not prejudge the merits of the dispute.\footnote{172}

UN involvement in the former Yugoslavia conflict could be justified on three grounds. First, there was the refugee situation. The impact of the massive exodus of refugees across
borders was evident. More than 500,000 Yugoslav refugees fled into other European countries.
Bosnian Serbs and Croats were resettled in Serbia while temporary sanctuary was found for
hundreds of thousands of Bosnian Muslims and Croats who were displaced as a result of the
conflict.\footnote{173}

Second, the humanitarian situation resulting from the war was equally severe. The
Bosnian Serb military strategy which centered on attacking Muslim communities consequently
left large segments of the civilian population bereft of essential supplies of food, medicine, power
and water. These disruptions carried with them starvation, exposure to the natural elements of the
weather and disease. Humanitarian concerns were thus significant and fell within the mandate of
the UN Security Council.

Third, human rights violations perpetrated especially by the Bosnian Serbs for instance,
mistreatment of Muslims held in concentration camps and widespread rape of Muslim women

\footnote{171} Ibid.
\footnote{172} Ibid.
\footnote{173} Steinberg, "International Involvement in the Yugoslavian Conflict" in Damrosch ed; supra, note 59, at 53.
shocked the international community. The human rights situation by itself provided the necessary justification for involvement by the CSCE as evidenced in the Moscow Declaration of October 1991. In the Moscow Declaration, leaders of the CSCE suggested their preparedness regarding intervention to enforce a member state’s obligation to respect human rights. The least that can be done in that regard will be to send rapporteurs without the target state’s consent. The CSCE proceeded cautiously regarding the former Yugoslavia, following the EC’s and the UN’s lead, though by mid 1992 it had sent human rights monitors into Serbian areas.

In sum, the situation in the former Yugoslavia showed the Security Council’s preparedness, at least in principle, to authorize the use of force for humanitarian reasons. Humanitarian concerns certainly played a prominent role in the international response to the conflict.

5- Intervention in Rwanda (1994)

The civil war and the consequent series of massacres that followed in the wake of the death of Rwanda’s President, Juvenal Habyarimana, on April 6, 1994, have been described by most commentators as constituting genocide. Rwanda is not a simple case of tribal or ethnic

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175 Supra, note 154 at 53-54.
176 The conventional sense of the word genocide indicates a human community based on ethnic, national, or religious ties is singled out for extermination. The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
   a) Killing members of the group;
   b) Causing serious bodily or mental harm to members of the group;
   c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
conflict as has been presented by some observers. The root causes of the civil war are attributable
to the impact of Belgian colonization on Hutu-Tutsi relations in Rwanda, and to political
manipulation of that cleavage by Belgian and Rwandan elites in competition in the period
preceding Belgian decolonization. As the Report by African Rights notes:

"Hutus and Tutsis existed a century ago, but were defined in very different terms in those
days. They were far less mutually hostile. Colonial rule and its attendant racial ideology,
followed by independent governments committed to Hutu supremacy and intermittent
inter-communal violence, have dramatically altered the nature of the Hutu-Tutsi problem,
and made the divide between the two far sharper and more violent. In short, the political
manipulation of ethnicity is the main culprit for today's ethnic problem." 178

Hutus and Tutsis did not have a mutual ancestral hatred for each other. The ethnic divide is
attributable to the political and social reorganization that was largely the influence of colonialism.

Throughout the period of colonial rule, support vacillated between the two groups. The
intention of the colonial powers was to "divide and rule"- a strategy that basically changed the
nature of the relationships between the two groups. Colonial Rwanda thus contributed to the
character of Rwandan society. 180

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d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group;
Millennium: Journal of International Studies 225 at 226; Destexhe, "The Third Genocide" (1994-95) 97 Foreign
Policy 3 at 5-6. For detailed studies of the background to the conflict see for example, Newbury, The Cohesion of
Oppression: Clientship and Ethnicity in Rwanda, 1860-1960 (new York, NY: Columbia University Press, 1988);
O'Halloran, humanitarian intervention and the Genocide in Rwanda (London: Institute for the Study of Conflict &
Terrorism, 19995).

179 O'Halloran, supra, note 158 at 3.
180 Destexhe, supra, note 158 at 6.
Upon attainment of independence from Belgium in 1962, violent political competition and clashes resulted in the deaths of thousands of the Tutsi minority, and forced tens of thousands more to seek refuge in Burundi, Tanzania and Uganda. In 1973, Habyarimana seized power in a military coup, establishing the National Revolutionary Movement for Development (MRND). Afterwards, Rwanda became a one-party state with the “Tutsi factor” mainly absent in Rwandese politics. Habyarimana put in place a system of ethnic quotas for jobs and educational opportunities. Power was mainly concentrated between a minority of northern Hutus. 181 Response to internal and external pressures led to the opening up of the political system and the formation of other parties in June 1991. 182

In October 1990, the Rwandan Patriotic Front (RPF), which was made up of Tutsi exiles who had sought refuge in neighboring countries after the majority Hutu overthrew the rule of the minority Tutsi following independence, initiated a military offensive into Rwanda from Uganda. For the next three years, a low intensity civil conflict was waged between the Rwandan government and the RPF, whose demands included the return of all Rwandan refugees and the formation of a government that would promote ethnic reconciliation. The RPF achieved limited success. The Rwandan government began a security crackdown. Around this time, the international community started protesting human rights violations in Rwanda and threatening Kigali with sanctions.

Pressure from the international community resulted in the signing of the Arusha Accords in August 1993 between Habyarimana and the RPF. 183 This agreement offered the prospect for

181 Jones, supra, note 158 at 227.
182 Supra note 159 at iv.
183 The Accords dealt with some of the most important issues underlying the conflict such as return of Rwandan refugees and resettlement of displaced people, power sharing, and integration of the armed forces. This UN-brokered
peace, democracy and national reconciliation. Yet it also encountered strong opposition from Hutu extremists who feared an end to their hitherto privileged status in Rwandan society. These extremists were bent on derailing implementation of the Arusha Accords and its supporters including moderates within the Rwandan government.

With the peace plan in jeopardy, on April 6, 1994, president Habyarimana and the president of Burundi died in a plane crash caused by the firing of rockets at Kigali airport.\(^{184}\) This incident not only renewed the civil conflict with the RPF, but led to the creation of a political vacuum in which Rwandan government forces, the Presidential Guard and the Hutu youth militia engaged in killing Tutsis and moderate Hutu leaders. The wave of terror unleashed resulted in the most brutal and systematic slaughter of civilians ever witnessed on the African continent.\(^{185}\) In the wake of this tragedy, the RPF launched a fresh offensive from Uganda. It finally defeated the remnants of the Hutu-dominated government forces in July 1994, and unilaterally declared a ceasefire.

Although about 2,700 troops constituting UNAMIR had maintained a presence in Rwanda at the time to oversee implementation of the Arusha Accords, they were powerless in stopping the massacres. The Rwandan Prime Minister, members of her government, along with Belgian UN guards assigned to protect her, were brutally killed. Belgium withdrew its military troops serving with UNAMIR following this incident and urged the Security Council to withdraw continuation

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\(^{184}\) Although the source of the attack has not been determined, Hutu extremists are suspected of being responsible for the attack. The Rwandan military, however, laid the blame on the doorstep of the Tutsi. Supra, note 31 at 362.

\(^{185}\) Supra, note 83 at 155.
of the UNAMIR operation given the circumstances of the chaos and mayhem in the country. 186 It is estimated that up to one million Rwandans were killed. Furthermore, an estimated 1.3 million fled to neighboring countries with a further 2.2 million people internally displaced. In a nutshell, over half of Rwanda's total population, estimated at 8.1 million before the genocide, were either killed, annihilated by epidemics or internally displaced as a result of the civil war. 187

Despite the humanitarian crisis of almost unprecedented magnitude caused by the civil conflict, the initial international response was less than enthusiastic. The initial Security Council reaction was to pass Resolution 912 on April 21, 1994, reducing the number of UNAMIR troops to 270 in order to prevent sustaining more casualties, and in the hope that the violence would end. 188 The situation, however, continued to deteriorate. On May 13, 1994, the UN Secretary General, in his report to the Security Council, stated:

"the world community has witnessed with horror and disbelief the slaughter and suffering of innocent civilians in Rwanda. While the chances for a lasting peace are fundamentally in the hands of the political and military leaders of the country, the international community cannot ignore the atrocities effects of this conflict on innocent civilians." 189

He urged the Security Council to undertake a re-examination of Resolution 912 and a reconsideration of appropriate action to end the massacres. The Security Council appeared to adjust to the reality of what was going on in Rwanda. On May 17, 1994, the Security Council unanimously passed Resolution 918, increasing the strength of UNAMIR to 5,500 troops. The Resolution called for an expanded mandate for UNAMIR, which included protection of displaced

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188 Supra, note 31 at 363.
persons, refugees and civilians. It also called for the creation and maintenance of secure humanitarian areas and the provision of support for humanitarian relief operations. However, these troops were not deployed at the time, the reason being that member states made no commitments to provide the requisite number troops for such an undertaking. The delay by member states meant little or no international action was taken that might have prevented or reduced the enormity of the refugee situation. As Robert Oakley observed "at a minimum, an earlier response would have had many more relief workers and supplies on the ground to start work at once rather than after death and debilitation from disease and hunger had taken such a heavy toll." With media coverage of the escalating outrage, the international community began to take action in what might be characterized as a typical case of "too little, too late."

Given the absence of multilateral action, France unilaterally undertook a UN-authorized intervention in Rwanda. "Operation Turquoise" began on June 22, 1994, and by July 2, the French concluded that the most that could be accomplished was the setting up of a security zone in southwestern Rwanda. Having fulfilled its duty after 2 months, and rejecting appeals to prolong its mission, French forces withdrew, handing over control of the security zone to a UN peacekeeping force composed primarily of African units. Giving reasons for the intervention France stressed the strictly humanitarian nature of the operation. At the Security Council, France maintained the aim of its:

"initiative is exclusively humanitarian: the initiative is motivated by the plight of the people, in the face of which, we believe, the international community cannot and must not

191 Martin, ibid.
192 Some 3,000 French troops were involved in the operation and close to 1.5 to 2 million people ended up in the security zone.
remain passive. It will not be the mission of our soldiers in Rwanda to interpose themselves between the warring parties, still less to influence in any way the military and political situation. Our objective is simple: to rescue endangered civilians and put an end to massacres, and to do so in an impartial manner.”

Also, the French Prime Minister argued that France was under an obligation to end “one of the most unbearable tragedies in recent history.” Similarly, the French Defense Minister emphasized that France was not in Rwanda for a national French action. It intervened to enforce a UN resolution to stop atrocities.

In spite of these statements, France’s motives for the intervention had been questioned. Posen, for example, questions how much good the intervention did for the Tutsi inside the safe zone. To what extent was the intervention a way of protecting remnants of the extremist-dominated Hutu government of Rwanda from destruction by the RPF? Skepticism was expressed about the French intervention since France had a long-standing relationship with and supported the Habyarimana government that had engaged in massive human rights violations against the Rwandans. It also supported that government militarily with troops and arms in its counter-offensives against the RPF in 1992 and 1993. Moreover, some observers argued that France was apprehensive of its credibility in Africa, particularly since an RPF victory meant a Rwanda under the control of Anglophones. The regional impact of an RPF victory would also mean curtailing the power of Mobutu Sese Sekou, a loyal ally of France, thereby weakening

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193 UN SCOR, 49th Sess; 3392d; at 5-6, UN Doc. S/pv.3392 (1994).
194 Nundy, “Balldaur Takes a Moral Stance on Intervention” The independent, 23 June 1994. He had earlier stated five criteria that would form the basis for French action: the operation must have UN authorization and support of other countries; all operations should be limited to humanitarian action; troops should remain near the Zairean border; they should not enter into the heart of Rwanda, and finally, the mission should be limited to a maximum of weeks before handing over to a strengthened UNAMIR force. Quoted in supra, note 83 at 158.
195 Ibid; at 158.
France’s hold in the Central African region— an area traditionally under its sphere of influence.\textsuperscript{197} For these reasons there was ambiguity surrounding French action given it had significant political and economic interests in Rwanda and in the region, and might not have been wholly guided by humanitarian motivations.

Operation Turquoise nevertheless, served a significant humanitarian purpose. It provided security and logistical support to humanitarian assistance operations both inside Rwanda and in refugee camps in Zaire. It was prompt action that saved the lives of several thousands of Tutsis in the period of frenzy and before the full deployment of UNAMIR\textsuperscript{11}.\textsuperscript{198}

The moral considerations involving the genocide in Rwanda with regard to taking action either to prevent or suppress it are overwhelming. Once the genocide began in the wake of the assassination of the Presidents of Rwanda and Burundi, the international community took little or no action. Yet there was evidence to suggest that an impending disaster was in the making, not forgetting Rwanda’s track record of previous massacres even dating back to its independence. Even in the period between October 1990 and April 1994 “it was possible to trace the evolution of the tragedy of mass killing. Many military and civilian institutions were largely or entirely dedicated to mass murder, including the Presidential Guard, the Rwandese Armed Forces, and the militias.”\textsuperscript{199} The UN had knowledge about and was warned that genocide was being planned but the information either got lost in the bureaucracy or the Rwandan situation was considered to be one of low priority.\textsuperscript{200}

\textsuperscript{197} See supra, note 83 at 158-159; Destexhe, supra, note 158 at 11.
\textsuperscript{198} Destexhe, ibid; at 11.
\textsuperscript{199} Supra, note 159 at 42.
\textsuperscript{200} Hindell writes that “in January 1994 the UN Force Commander General Romeo Dallaire, forwarded to the Secretariat information gained from “a very important government official” turned informer. Dallaire’s cable described a lucid but detailed plan to assistance moderate politicians at a public ceremony with the expectation that it would provide an opportunity for a murderous attack on the Belgian UNAMIR soldiers protecting the government.
Once the reign of terror began, the inability of UNAMIR to cope with the crisis prompted a withdrawal. This withdrawal could be interpreted as a renunciation of the moral responsibility of the UN with a result that diminished its credibility in Rwanda even though many humanitarian NGOs caught in the throes of violence continued to work at risk to their lives. 201 The UN Secretary General, however, cast the net widely in admitting the mistake of the UN and its responsibility. He stated that “we are all responsible for this disaster, not only the Super-powers, but also the African countries, the non-governmental organizations and the entire international community. There has been genocide and the world is talking about what it should do. It is a scandal.” 202

One of the reasons, if not the main reason, for the slow response to Rwanda lies in the lack of political will on the part of the US in showing its leadership, in terms of making any substantial commitment. As Iraq, Bosnia, Somalia and Kosovo show, American involvement was crucial. Hesitation in Rwanda was due to the absence of US geopolitical interests in the area. As well, the Somalia syndrome had a role to play regarding inaction on the part of the US. The situation in Rwanda was, however, different from Somalia. Unlike Somalia, Rwanda was not swamped with weapons, and the militias carried out attacks mainly armed with machetes. But the Somalia syndrome was still at work, so much so that America had to rethink its foreign policy. 203 It is

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The informer also estimated that his units could kill a thousand targeted Tutsi in 20 minutes” See supra, note 167 at 27-28. The former UN Secretary General Boutros Ghali has in retrospect acknowledged that the UN was slow to warn of plans for the genocide in Rwanda, and that greater notice should have been taken of the Dallaire message. He admitted that the Security Council should have been given an explicit warning about the possibility of genocide. One reason for not acting on the cable, according to him, was that “it was hard to believe, ethnic slaughter could be organized systematically in one of the world’s poorest countries”. See Knox, “Boutrus Gahli admits Rwanda errors”, The Global and Mail, September 10, 1998, at A9.

202 Supra, note 167 at 30.
203 Destexhe, supra, note 158 at 10. the result was the Presidential Decision Directive on Reforming Multilateral Peace Operations (PDD25) issued on May 3, 1994, which spelled out strict guidelines for American military
instructive, however, to note that after months of hesitation the US launched a massive emergency relief operation for the Rwandan refugees and displaced persons that involved the airlift of food, medicine and water.

Going back to the French intervention, even if the argument is made that it represents a case of selfish motives, the appalling situation in Rwanda morally required some form of action. Webster drives the point home by writing:

"when the aftermath of the Rwandan affair is analyzed and the number of days when massacres were averted are totaled up, an answer might emerge to the question of whether it was better to do something, even in self-interest, as the French have done, or whether it was better to stand aside in hesitation and indifference like the rest of the world." 204

The legal basis for the French intervention can be found in Security Council Resolution 929. This resolution authorized member states of the UN to establish “a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda.” 205 Acting under Chapter VII, it authorized “member states cooperating with the Secretary General to conduct the operation participation in multilateral operations. These guidelines for US involvement include: impact on US national interests; availability of troops and funds; the necessity of US participation; congressional approval; a clear date for withdrawal; and, acceptable command and control agreements. It emphasizes American military non-involvement in operations in places where national security is not directly threatened. But, as Natsios has forcefully argued, “humanitarian intervention applied carefully and with restraint is as much in the self-interest of the United States as is geopolitical intervention. Most of the world expects moral leadership by the United States in humanitarian crises and to fail to provide it would damage the moral authority of the United States—at untold cost”. More importantly, he continues, “great powers should not always act on the basis of their narrow geopolitical interests but should venture beyond parochialism when the moment requires it. Chaos, the distinguishing characteristic of humanitarian emergencies is the ground on which political fanaticism is built and tyrants raised. It seldom brings civilized democratic leadership to power but most often brutes who can suppress the violence but can do little else. And it is as systematically destructive to the economy and infrastructure of a country as full-sale war”. Natsios, “Food Through Force: humanitarian Intervention and US Policy” (19930 17: 1 The Washington Quarterly 129 at 143.


using....all necessary means to achieve the humanitarian objectives.” 206 This resolution authorized the use of force on the grounds that the human rights situation in Rwanda constituted a threat to international peace and security. While this threat was manifested in the large influx of refugees into neighboring African countries due to the civil strife, it was also quite clear that the French intervention was designed to end the committing of further atrocities.

The scene of carnage, desolation and deprivation in Rwanda was evidence of the commission of genocide under the Genocide Convention. The ruthlessness of the Hutu massacres against the Tutsi and the objectives of those attacks undoubtedly confirmed the gravity of the crime. Yet, quite unfortunately, the UN failed to take timely, decisive action by way of putting a stop to it. In the event of the UN or other multilateral failure to act, it is imperative that unilateral action be undertaken to assert the right of intervention for humane purposes. In this context, the legitimacy of the French action would have been enhanced if it had come earlier than later.

In sum, the issue of intervention in Rwanda seems to be one of timely reaction. It raises questions whether UN intervention in preventing internal conflict has been successful. Could it be successful if better managed? Would it have been successful in preventing genocide in Rwanda? When should the UN force have intervened and with what force? 207 Although success does not impair the legitimacy of UN or French action in Rwanda, and is not a requirement of right action, 208 it is important that such question be raised and addressed by the UN, if only in terms of lessons to guide future action.

206 Ibid.
207 Supra, note 167 at 34.
208 Supra, note 31 at 365.
The deployment of force early in a crisis situation can save not only lives but also money. In many cases it offers the best hope to prevent the escalation of violence. Major-General Dallaire, commander of UNAMIR, remarked that “in Rwanda, the international community’s inaction,...contributed to the Hutu extremists’ belief that they could carry out their genocide...UNAMIR could have saved the lives of hundreds of thousands of people....A force of 5,000 personnel rapidly deployed could have prevented the massacres that did not commence in earnest until early May, nearly a month after the start of the war.” Thus, early robust intervention could have prevented or dissuaded genocide, or would at least have prevented the heavy casualties sustained. Rwanda is a prime example for the international community to direct increasing efforts towards early warning, preventive diplomacy, and proper conflict management.

Rwanda demonstrates the tenuous commitment of states to humanitarian intervention. The French response insisted on a duty of intervention to alleviate human suffering. The rest of the international community expressed shock and condemnation of the massacres that bordered on genocide. However, there was less commitment of physical resources to undertake a humanitarian intervention when it was most needed.

209 Destexhe, supra, note 158 at 16.

210 See, Towards a Rapid Reaction Capability for the United Nations (Ottawa: Government of Canada, 1995) at 7, quoted in Schwartzberg, “A New Perspective on Peacekeeping: Lessons from Bosnia and Elsewhere” (1997) 3: 1 Global Governance: A Review of Multilateralism and International Organization 1 at 2. Hindell also notes “the Secretary-General originally recommended 7500 troops and the Canadian Commander 5500. Either figure would have saved thousands of lives if dispatched in October 1993 as originally requested, particularly if properly briefed, generously empowered and courageously led. Even a force sent after 6 April 1994 could have done more, as operation Turquoise proved. Rwanda should have rated a much stronger force, such as was sent to Bosnia and Somalia. Such an intervention would have been expensive but the bill would not have approached the $1.3 billion spent on humanitarian relief and rehabilitation in the eight months from April to December 1994”. Supra, note 167 at 35.
6- Intervention in Liberia (1990)

The civil war in Liberia, which began in December 1989, witnessed a disturbing number of atrocities and created a refugee crisis in the West African sub-region, prompting regional military intervention.

Liberia was created in the early nineteenth century as a settlement of emancipated slaves from the United States. These freed slaves, known as Americo-Liberians, are the elite that ruled the country for the next 150 years. Even though the Americo-Liberians constituted 5% of the total population, they dominated the country's political, economic and social life. In 1980, Samuel Doe seized power in a bloody military coup that was initially welcomed by the indigenous majority of the population. The military government promptly tried and summarily executed some of the country's top politicians, bringing to an end a chapter in Americo-Liberians rule.

Throughout the 1980s, the Doe regime was sustained mainly by US foreign aid. Faced with increasing pressure for political reform after five years of military rule, the regime agreed to a program of democratization. In elections that were widely believed to have been rigged, Doe emerged as the President of the new Republic. Despite the affirmation of a commitment to democratic governance, human rights abuses were rampant under the Doe civilian administration. These widespread human rights violations coupled with increasing economic difficulties quickened the outbreak of civil conflict.

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213 One observer traces the cause of the war to withdrawal of foreign aid, the demise of the cold war, and the breakdown of patron-client politics that had bound the politicians of Liberia to one man. He observes that during the 1980s US aid to Liberia amounted to some $500 million—which made that country the largest per capita recipient of American aid in Africa. With the demise of the Soviet Union, Doe’s role as host of American emergency military
The civil war broke out in December 1989 when Charles Taylor, leader of the National Patriotic Front of Liberia (NPFL), invaded the country from the Ivory Coast with the objectives of overthrowing the Doe government. By August 1990, civil authority had ceased to exist as the NPFL forces controlled the entire country except for the capital city of Monrovia. Around this time a splinter group of the NPFL emerged to form the INPFL led by Prince Johnson. This group, which initially aimed to overthrow the Doe government from power, made a deal with Doe and subsequently directed its attacks on the NPFL. As the war continued, all sides to the conflict were accused of torturing and murdering innocent civilians. Thousands of civilians faced starvation, more than 700,000 people fled the country seeking refuge in neighboring West African countries and a further 500,000 were internally displaced. The general breakdown of law and order and the increasing loss of lives led the Economic Community of West African States (ECOWAS) to intervene.

The ECOWAS intervening force, known as the ECOWAS Monitoring Group (ECOMOG) was deployed on August 23, 1990 to end the fighting. In its attempt to impose peace on Liberia, ECOMOG came under attack by the NPFL, which opposed any foreign intervention in the conflict. In September 1990, Doe was killed by INPFL forces, which then directed its attack at the NPFL. Subsequently, the fighting began among the factions and skirmishes between

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base and communications facilities no longer attracted that aid which had held together Doe's patronage network. Thus, with the invasion of Taylor's forces from the Ivory Coast in 1989, few, associates of Doe saw any personal advantage in defending his government. See Reno, "The business of War in Liberia" (May 1996). Current History: a Journal of Contemporary World Affairs at 212.


216 For a chronology of gruesome crimes committed against the civilian population see, for example, "Litany of Atrocities" West Africa Magazine, June 14-20, 1993.


218 Johnson and doe welcomed the ECOWAS intervention which they saw as an opportunity to prevent Taylor from claiming victory in the civil war. See supra, note 195 at 384.
ECOMOG and the NPFL. By November 1990, ECOMOG was in control of Monrovia and a precarious truce was made. A transitional government which controlled the Monrovia areas was established with protection from ECOMOG. In response to this, Taylor, who was in de facto control of most of the country, declared the establishment of his own government. These two governments each claimed legitimacy and struggled for control of the country. This situation led ECOWAS to look for a viable means of unifying the country under a free elected government.\footnote{Wippman, "Enforcing the Peace: ECOWAS and the Liberian Civil War" in Damrosch ed; supra, note 59 at 158.}

Liberia proved to be a frustrating experience for ECOMOG. There were cycles of cease-fire, renewed violence and negotiations. A series of agreements had been signed dating back to November 1990 between Liberian factions and ECOWAS states which over time were divided over the objectives of their action in Liberia. In October 1991, the Yamoussoukro agreement was signed, which provided for ECOMOG’s deployment throughout the country, the confinement of armed forces to camp and the holding of multiparty\footnote{For details of the Yamoussoukro Accord see Africa Research Bulletin (political Series), September 1991, at 10274-10276.} elections at the end of one year. Renewed fighting, however, shattered this cease-fire with the entry into Liberia from Sierra Leone of the United Liberation Movement for Democracy in Liberia (ULIMO), which was made up of the remnants of Doe’s army. This force attacked the NPFL stronghold in Western Liberia, which in turn provoked an NPFL attack on Monrovia in October 1992.\footnote{Jean ed; supra, note 99 at 54-56.}

In the summer of 1992, a peace agreement was reached under the auspices of ECOWAS, OAU and the UN. This became known as the Cotonou agreement. It provided for the expansion of the ECOWAS force, the establishment of a UN Observer Mission in Liberia (UNIMIL, which subsequently was created by the Security Council) to monitor the ceasefire and disarmament, the
creation of a multinational transitional government, and a peaceful environment for elections. With an increase in the number of ECOWAS troops and the involvement of the UN, it was hoped that peace would be achieved. While the three main factions continued to disagree over the agreements, two other factions emerged and started attacks on NPFL and ULIMO controlled areas. This situation breached the agreement as the factions were unwilling to disarm under the threat of force from the new factions.\(^{222}\)

The parties subsequently signed three other supplementary agreements. These were the Akosombo Agreement of September 24, 1994; Accra agreement of December 21, 1994; and Abuja Agreement of August 19, 1995. The Akosombo Agreement provided a more detailed scheme for the disengagement, disarmament and demobilization of forces. It also called for a more active role for the Liberian National Transitional Government in collaboration with ECOMOG and UNOMIL to ensure its provisions were carried out. The Accra Accord primarily called for a reorganization of the Liberian Armed forces. The Abuja Accord mainly addressed the composition of the Liberian Council of state and called on ECOWAS and the OAU to monitor the operations of the Ad Hoc Elections Commission.\(^{223}\) Prospects for peace were weakened with continuing disagreement among the parties, and within ECOMOG, on details of the peace accords and power sharing.\(^{224}\)

The initial international response to ECOMOG’s intervention in Liberia was cautious. Before Resolution 788 was passed, the UN, OAU, EC and other nations adopted a “wait and see”

\(^{222}\) The portion of the accord that was implemented related to the creation of a collective presidency, a transitional government and transitional parliament. Supra, note 196 at 387.


\(^{224}\) Reno for one, notes that the prospects for peace will remain in danger until its guarantors (especially the US) reduce what he calls “the relative advantages of warlord politics”. For him, since “illicit warlord trade is notoriously difficult to control, the most viable option is to rebuild Liberia’s non-warlord economy, and provide financial support and retraining to integrate warlord fighters into that economy”. Supra, note 194 at 215.
attitude, but nonetheless encouraged ECOWAS to find a settlement to the Liberian conflict. Apart from Burkina Faso, which had earlier condemned the action as an unlawful intervention in the internal affairs of a sovereign country, most states said little or nothing about the means employed by ECOWAS to bring about peace in that country.\textsuperscript{225} In November 1992, the Security Council adopted Resolution 788,\textsuperscript{226} which determined that the situation in Liberia constituted a threat to international peace and security, particularly in the West African region. This resolution commended efforts by ECOWAS to find a lasting peaceful solution to the conflict. It called on all the parties to the conflict to respect the Yamoussoukro IV agreement, which established a framework for the settlement of the civil strife. It also imposed an embargo on the delivery of weapons and military equipment to Liberian. An interpretation of the resolution and the subsequent collaborative efforts on the part of the UN indicated a broad approval of the ECOWAS decision to use force in the Liberian civil war. At the Security Council, the US maintained:

"we must not lose sight of what ECOWAS has accomplished through intervention and negotiation. The dispatch of a six-nation West African peacekeeping force in August 1990 demonstrated unprecedented African determination to take the lead in regional conflict resolution. ECOMOG ended the killing, separated factions, allowed relief assistance to flow to avert starvation and established a cease-fire and framework for peaceful negotiations. Although the dispatch of peacekeeping forces to Liberia was a decision taken

\textsuperscript{225} Supra, note 200 at 75.
by the ECOWAS governments on their own initiative, we supported this effort from its inception." 227

Giving reasons for the intervention, various leaders from ECOWAS cited humanitarian grounds for the action. The President of Gambia stated that ECOMOG was not an invasion force. Its task was strictly humanitarian, helping civilians caught in the civil war get relief supplies. 228 Nigerian President stated that they were “in Liberia because events in that country have led to massive destruction of property, the massacre by all parties of thousands of innocent civilians, foreign nationals, women and children...contrary to all standards of civilized behavior and international ethics and decorum.”229 The ECOWAS Standing Mediation Committee, in its final report, justified the decision to intervene as follows:

“The failure of the warring parties to cease hostilities has led to the massive destruction of property and the massacre by all parties of the thousands of innocent civilians. The civil war has also trapped thousands of foreign nationals, including ECOWAS citizens, without any means of escape or protection. The result of all of this is a state of anarchy and the total breakdown of law and order in Liberia. Presently, there is a government in Liberia which cannot govern and contending factions which are holding the entire population as hostage, depriving them of food, health facilities and other basic necessities of life. These developments have traumatised the Liberian population and greatly shocked the people of the sub-region and the rest of the international community. They have also led to hundreds

229 Ibid.
of thousands of Liberians being displaced and made refugees in neighboring countries, and the spilling of hostilities into neighboring countries.  

In effect, the basis for the ECOWAS intervention was grounded in the need to end the atrocities and mass killing of civilians in Liberia; the need to protect foreign nationals; the need to protect regional peace and security; and lastly, the need to restore some order given the anarchic state of affairs in Liberia.

Besides its mandate relating to the restoration of order, and in the long run, promoting a lasting peace, ECOWAS had also focused on the delivery of humanitarian assistance. It took practical measures to alleviate human suffering by starting and encouraging the creation of refugee camps where much needed relief supplies were distributed to refugees. Its members had also taken in a large influx of refugees as a result of the war.

The legal basis of the ECOWAS intervention in the Liberian civil conflict may be justified as a case of collective humanitarian intervention. Some commentators argued that the ECOWAS’s justifications for the intervention were contrary to principles of international law since the intervention did not satisfy many of the requirements for a valid humanitarian intervention. However, it is argued that if unilateral humanitarian intervention survived the Charter as a rule of customary international law, then a state or states, in this case ECOMOG, was legally justified in intervening to remedy the extreme human rights violations. It seemed at the time there was no viable peaceful means for resolving the conflict. Wippman for instance, has explained why intervention to put an end to the violence did not come from either the UN or the

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230 Final Report of the First joint Meeting of the ECOWAS Standing Mediation Committee and the Committee of Five, para. 6-9. Quoted in supra, note 200 at 176.
US, despite calls by Liberian politicians for intervention at the time. Apart from the fact that the international community's attention was focused on developments subsequent to the Iraqi invasion of Kuwait, the US did not see any post-Cold War strategic interest in Liberia. It also did not want to assume responsibility for assisting any of the warring factions, all of which Washington considered undesirable, into power. It thus characterized the situation as an internal matter to be left for Africans to resolve. This view was also shared by members of the Security Council, particularly, Ethiopia and Zaire, who were members of the Council and who sought to avoid the creation of a precedent for future intervention in African affairs. Consequently, the Security Council was reluctant to become seized of the matter. It was in this context that ECOWAS took the initiative to put an end to the crisis, given the prevailing disinterests by the international community in addressing the volatile situation in Liberia, a situation that threatened regional stability. "To the extent that attention was focused on the legality of the intervention" as Murphy notes, "it would appear that the intervention was not viewed as violative of international law." 

The legality of the ECOWAS action has also been subject to debate with regard to the issue of enforcement action undertaken by a regional organization acting under Chapter VII of the Charter. Article 52 states "Nothing in the present Charter precludes the existence of regional arrangements or agencies dealing with matters relating to the maintenance of international peace and security" under the condition that "their activities are consistent with the purposes and principles of the UN." It encourages states to use such arrangements before directing their conflicts to the Security Council. It also recommends that the Council make use of regional organizations. Articles 53 and 54 seek to define relations between the UN and regional

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233 Wippman, in Damrasch ed; supra, note 59 at 164-165.
234 Murphy, supra, note 208 at 163.
arrangements by prohibiting the latter from taking international peace and security measures without Council authorization, and by insisting that the Council be kept fully informed of such activities. The question is whether such organizations have an independent authority to authorize military action whenever they reach the conclusion that such a measure is necessary to avert or bring to an end a threat to peace and security, or to other collective regional interests. Some commentators have asserted that ECOWAS did not have the legal authority to determine the existence of a threat to peace and security, and to subsequently embark on an enforcement action without Security Council authorization. The Security Council, in this case, did not give its authorization for the enforcement action since the operation commenced before the Council’s involvement in the situation. However, it is argued that the ECOWAS intervention was consistent with the broad purposes and principles of the UN to restore peace and security, and to remedy gross human rights violations. Even if the initial action was considered unlawful, its subsequent approval by the Security Council conferred legitimacy on the intervention within the meaning of Chapter VIII. ECOWAS had reported its efforts to the Security Council consistent with provisions of the Charter. In fact, the Secretary General of the UN was of the view that ECOWAS did not need the consent of the Security Council before the intervention. The Secretary General noted that:

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235 Farer, "The Role of Regional Collective Security Arrangements" in Weiss ed; Collective Security in a Changing World (Boulder: Lynne Rienner Publishers, 1993) 153 at. Some scholars have even questioned whether a sub-regional organization such as ECOWAS falls within the meaning of a chapter V111 regional organization. However, it should be noted that the Charter does not define what a regional arrangement or agency is, and no consensus exists on what constitutes such an organization. It would appear that ECOWAS qualifies as such an organization since “most geographically concentrated group of states that habitually act in concert under a governing charter or similar set of rules can qualify as a regional organization”. Wippman, in Damrosch ed; supra, note 59 at 183-184.

236 See Wippman, ibid; at 184-185

237 Article 54 of the Charter states: “the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or regional agencies for the maintenance of peace and security”.

238 see da Costa, “Peacekeeping Run to UN as Mediation Runs out of Steam” Inter Press service, September 23, 1992,
“Liberia continues to represent an example of systematic and effective cooperation between the United Nations and regional organizations, as envisaged in Chapter VIII of the Charter. The role of the United Nations has been a supportive one. Closest contact and consultation have been maintained with ECOWAS, which will continue to play the central role in the implementation of the Contonu Peace Agreement.”

Given the enormity of loss of life coupled with the fact that mass starvation and deprivation were imminent, there is no doubt that intervention was required to end the horrible situation in Liberia. Moreover, continuation of the conflict posed a clear threat to regional security. This was manifested first in the conflict spreading to other countries in the region, as it did when it spread to Sierra Leon; and second, in the large exodus of refugees into neighboring countries which worsened the situation in those countries not well equipped to handle the large refugee populations.

Furthermore, the ECOWAS intervention respected the sovereignty of Liberia. It did not impose a government on Liberia but encouraged the formation of a transitional government through the involvement of all parties to the conflict. The various peace accords (discussed earlier) offered clear evidence of attempts by the intervening force to bring the parties together to finding lasting political settlement to the conflict, in the face of the intransigence of the various factions.

available in LEXIS, News Library, Inpres File. Cite in supra, note 196 at 413-414. Ofodile argues the Secretary General's statement that ECOWAS did not need the consent of the Security Council is contrary to the UN Charter. For him, ECOWAS would have been under no legal obligation to obtain the consent of the Council if the mission had been a purely peacekeeping operation. See, ibid; at 414.

239 Un department of Public Information Reference paper, the United Nations and the Situation in Liberia (April, 1995). Quoted in Murphy, supra, note 208 at 164. Murphy, however, notes the Liberian case was not representative of a “systematic and effective cooperation between the UN a regional organizations for various reasons. See ibid.
The precedential value of the intervention as an example in regional or sub-regional collective action for meeting the challenge of humanitarianism is particularly significant. This is so for the following reason: it shows many African states are becoming amenable to the idea that mass human rights violations, whether arising from the governments or the result of civil war, have become a matter of the international concern rather than the domestic one. These human rights violations and the cross-border refugee situations that they engender are significant indicators in the determination of the use of force. As Wippman correctly observes, “several prominent African leaders’ endorsement of ECOMOG’s role in Liberia would have been unthinkable just a few years ago.”

In his defense that ECOWAS’s role in Liberia was consistent with the OAU Charter, the OAU Secretary General stated that “non-interference should not be taken to mean indifference.” For him, the OAU Charter cannot be interpreted to mean ignoring massive human rights violations in member states. He continues:

“...for an African government to have the right to kill its citizens or let its citizens be killed, I believe there is no clause in the Charter that allows this. To tell the truth, the Charter was created to preserve human dignity and the rights of the African. You cannot use a clause of the Charter to oppress the African and say that you are implementing the OAU Charter. What has happened is that people have interpreted the Charter as if it means that what happens in the next house is not one’s concern, this does accord with the reality of the world.”

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240 Supra, note 200 at 181.
241 Quoted in ibid.
242 quoted in ibid.
Other African leaders, notably Museveni of Uganda and Mugabe of Zimbabwe, have voiced similar sentiments.\textsuperscript{243} Even though most African leaders would probably not endorse the Secretary General’s interpretation of the OAU Charter, the fact that such proposals receive serious attention in Africa is indicative of an important shift in thinking.\textsuperscript{244} It is a realization that an absolute norm of non-intervention does not protect, nor does little to protect the values of state sovereignty in the situation of a civil war that results in continuing anarchy with its attendant humanitarian crisis. In situations such as Liberia, intervention to restore order and to address the humanitarian problems promotes rather than undermines state sovereignty. Thus, notwithstanding the commitment of the OAU to the principles of non-intervention, the ECOWAS intervention in Liberia was hailed throughout Africa and the international community as appropriate and offering hope for the restoration of order in that country.

In the face of the continuing concern regarding the Liberian situation, a 1996 OAU summit resolution produced some serious tough talk. It had warned the faction leaders that should the ECOWAS assessment of the Liberian peace process turn out to be negative, the OAU would ask the Security Council for the imposition of severe sanctions on them, including the possibility of the setting up of a war crimes tribunal to try the leadership of the warring factions on the gross violations of human rights of Liberians. In July 1997, peaceful elections were held under the supervision of ECOWAS and other international observers. Charles Taylor won and formed a constitutional government. Whether democratic rule in post-war Liberia will be sustained and its socio-economic and political structures rebuilt remains to be seen.\textsuperscript{245}

\textsuperscript{243} Ibid.
\textsuperscript{244} Ibid.
\textsuperscript{245} “The OAU Summit”, West Africa Magazine, July 22-28, 1996 at 1139 for details of the elections result, see Butty, “Liberia-A Resounding Victory” West Africa Magazine, August 4-10, 1997 at 1252-1253
In sum, ECOMOG was a West African sub-regional initiative to end the Liberian civil war and the consequent humanitarian crisis, but it enjoyed the full regional support of the OAU and the UN. Recent proposals for a permanent ECOWAS force in light of its successful intervention in Liberia is an indication of the regional grouping’s efforts to remain at the forefront of dealing with internal conflict situations in the future. This will be a new development pointing to less dependence on the West in developing indigenous mechanisms to ending conflicts in the region.

7 - NATO Intervention in Kosovo (1999)

In the case of Kosovo (1998), the Security Council considered a pending humanitarian catastrophe brought about by civil strife and repression against civilians as a threat to international peace and security. When it became clear that both Russia and China would veto a Security Council authorization for military intervention, the Northern Atlantic Treaty Organization (NATO) carried out humanitarian intervention without authorization from the Security Council. Subsequently, the Security Council endorsed the political outcome of the NATO operation.

246 See “Salim Salim Speaks”, ibid; at 1140.
247 The North Atlantic Treaty was signed in Washington, D.C. on April 4, 1949, creating an alliance of twelve independent nations committed to each other’s defense. See North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, 34 UN T.S. 243. More than ten European nations later acceded to the Treaty. On March 12, 1999, the Czech Republic, Hungary and Poland were welcomed into the Alliance, bringing the total to more than twenty members. The North Atlantic Treaty continues to guarantee the security of its members. Further information about NATO is available on its website at www.nato.int/home.htm.
248 See S.C.Res. 1244, UN. SCOR, 54th Sess; 401 th mtg; UN Doc.S/RES/1244. (1999). According to the official NATO website: On 10 June the UN Security Council passed a resolution (UNSCR 1244) welcoming the acceptance by the Federal Republic of Yugoslavia of the principles on a political solution to the Kosovo crisis, including an immediate end to violence and a rapid withdrawal of its military, police and paramilitary forces. The Resolution, adopted by a vote of 14 in favor and none against, with one abstention (China), announced the Security Council’s decision to deploy international civilian and security presences in Kosovo, under UN auspices. NATO and Kosovo: Historical Overview, available at www.nato.int/kosovo/history.htm
The intervention in Kosovo is now cited as an example of a new transition within the international community, an unwillingness to tolerate tyranny and a strong concern for humanitarian principles. For many years, human rights lawyers have tried to focus public attention on Kosovo. They issued report after report of gross and systematic human rights abuses in the troubled region.\(^{249}\) International policy makers had overwhelming evidence that the pressure in Kosovo was mounting and that an even greater human rights disaster seemed near,\(^{250}\) yet they disregarded the warnings as the situation deteriorated without being present and failed to take the situation in Kosovo seriously. In March 23, 1999, NATO commenced an air strike against Yugoslavia. Suddenly, Kosovo became a lead story in the mass media,\(^{251}\) and then Kosovo finally came into focus.

NATO's intervention in Kosovo during the spring of 1999 aroused controversy at the time and still provokes questions about the legality of the action, its precedential effect and procedures on the international level. The Federal Republic of Yugoslavia (FRY) committed grave international crimes against the ethnic Albanians in Kosovo. However, both the ethnic Albanians and the Serbs in Kosovo engaged in aggressive and brutal actions against each other and both were blamed, legally and morally.\(^{252}\) The Kosovo Liberation Army (KLA) also committed terrorist and other brutal acts against the Yugoslav Serbs and FRY forces. The intervention in


\(^{252}\) Ibid.
Kosovo has again brought to the surface the legal, political and moral debate surrounding the doctrine of humanitarian intervention and in particular the right of states to intervene with armed force in another state, without Security Council authorization, in order to prevent gross violations of human rights and international humanitarian law.

On June 28, 1989, Serbian President Slobodan Milosevic set the stage for the contemporary clash of nationalism in the Balkans by inflaming Serbian fears of ethnic domination. His extreme speech invoked memories of the Serbs’ defeat at the hands of the Turks precisely six centuries ago. That same year, President Milosevic removed Kosovo’s autonomy and replaced it with direct rule from Belgrade. Ethnic Albanian politicians in Kosovo responded by declaring independence in July 1990. They established parallel institutions that Serbia, in control of the government in the formerly autonomous province, refused to recognize. Unrest continued through the decade, but international attention was focused elsewhere in the Balkans and Kosovo was not included in the Dayton Peace Accords. Nonetheless, United States President Bush issued a warning to President Milosevic on December 24, 1992, that “in the event of conflict in Kosovo caused by Serbian action, the United States will be prepared to employ military force against the Serbs in Kosovo and in Serbia proper.”

Kosovo was boiling in early 1998 when dozens of Albanian separatists were killed by Serb police. On March 31, 1998, the Security Council passed Resolution 1160, condemned the use of excessive force by Serbian police and terrorist action by the Kosovo Liberation Army (KLA), imposed an arms embargo, and expressed support for a solution based on the territorial integrity of the FRY, but with a greater degree of autonomy for the Kosovar Albanians. Fighting

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continued and US-sponsored peace talk between Milosevic and the unofficial President of Kosovo, Ibrahim Rugova, broke down in May.

On September 23, 1998, the Security Council adopted Resolution 1199 "affirming that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region" and, under Chapter VII, demanded a ceasefire and action to improve the humanitarian situation. It further demanded that the FRY take concrete steps to implement the Contact Group demands of June 12, 1998- including a cessation of action by security forces, the return of refugees and displaced persons, and free and unimpeded access for humanitarian organizations and supplies. The Council also decided that if these measures were not implemented, it would "consider further action and additional measures to maintain or restore peace and stability in the region." 255

In the following week, reports of two massacres by Serbian forces of 30 Kosovar Albanians strengthened NATO involvement. In a press conference on October 8, 1998, US Secretary of State Madeleine Albright said that the time had come to authorize military force if Milosevic failed to comply with existing resolutions. When questioned as to the need for a further Security Council resolution, she replied that "the United Nations has now spoken out on this subject a number of times." 256

On October 13, 1998, the NATO Council ordered an air strike against Yugoslavia. NATO Secretary General Javier Solana stated that execution of limited air operations would not begin for at least four days, to permit negotiations, but at the same time continued:

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“The Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UN Security Council Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.”

An agreement signed on October 15, 1998, by the FRY and NATO in Europe provided for the establishment of an air verification mission over Kosovo. The next day, an agreement signed by the FRY Foreign Minister and the Chair-in-Office of the Organization for Security and Co-operation in Europe (OSCE) provided for a verification mission in Kosovo, including undertakings by the FRY to comply with Security Council Resolutions 1160 (1998) and 1199 (1998). On October 25, NATO negotiated an agreement with Belgrade concerning the withdrawal of Yugoslav forces and police. Yugoslavia complied with this call until there was renewed provocation from the KLA.

There were differences of opinion as to what precisely was authorized by Resolution 1203 (1998), other than demanding that both the FRY and the Kosovar Albanians comply with previous resolutions. In statements made after they abstained from voting on Resolution 1203 (1998), both Russia and China, which had threatened to veto any resolution authorizing the use of force, made it clear that they did not see the resolution as authorizing military intervention. The US representative, by contrast, said that “the NATO allies, in agreeing on October 13 to the

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use of force, made it clear that they had the authority, the will and the means to resolve this issue. We retain that authority."

This resolution marked the Council’s final substantive involvement in Kosovo until NATO’s air operations ceased on June 10, 1999. The issue slowed for some months, until the massacre of 45 civilians in Racak in January 1999 led to a NATO warning that it remained willing to take military action. Negotiations in Rambouillet from February 6 to 23 and in Paris from March 15 to 18 concluded with the FRY’s refusal to sign the agreement that required freedom of movement for NATO throughout the whole of the FRY and a referendum on Kosovo’s independence within three years. The draft agreement included a clause comparable to the Dayton agreement, in which the parties invited NATO to constitute and lead a military force authorized under a Chapter VII of the Security Council resolution.

On March 24, 1999, NATO began air strikes against the FRY. NATO Secretary General Solana stated that the military alliance acted because all diplomatic avenues had failed. President Clinton stressed that US interests in preventing a potentially wider war if action were not taken, as well as the humanitarian concerns, led the allies to act. United Kingdom’s Blair stressed the need to protect Kosovar Albanian citizens and argued that the choice was to do something or do nothing.

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263 On May 14, 1999, the Security Council passed Resolution 1239 (1999) concerning assistance to refugees from the conflict. The only reference to the ongoing air operations was a paragraph urging “all concerned” to work toward a political solution along the lines of that proposed by the Meeting of G-8 Foreign Ministers on May 6, 1999, para. 5.
In an emergency session of the Security Council on March 24, Russia, China, Belarus and India opposed the action as a violation of the Charter. Of those states that supported the action, few asserted a clear legal basis for it. The US, Canada and France stressed that the FRY was in violation of legal obligations imposed by Resolutions 1199 and 1203. Only the Netherlands and the UK argued that the action was a legal response to a “humanitarian catastrophe”, and the “minimum judged necessary for that purpose.” Other states expressed concerns about the humanitarian situation and the failure of diplomacy. The Slovenian representative hinted to the ambiguity of earlier Council resolutions “Because of differences of views among permanent members, it was not possible to provide in those resolutions a sufficiently complete framework to allow for the entire range of measures that might be necessary to address the situation in Kosovo with success.”

On March 26, 1999, a draft resolution demanding an end to the air strikes was rejected by 12 votes to 3. Russia, China and Namibia supported it but 12 others (including 5 NATO members) did not. Few states opposing the draft advanced any legal basis for the action. The UK stated that military intervention was justified as an exceptional measure to prevent a humanitarian catastrophe. France and the Netherlands noted that previous resolutions had been adopted under Chapter VII, thus implying that the coercive powers of the Council already had been involved. For the most part, the resolution was simply seen as an inappropriate response to the situation, and one that might actually benefit Milosevic more than anyone else. In any event, the

269 UN Document s/pv.3988 (1999) p. 4 (US), pp. 5-6 (Canada), p. 9 (France). Germany, speaking as the Presidency of the European Union, stated that the members of the European Union were under a “moral obligation” to prevent a humanitarian catastrophe in the middle of Europe-UN Document s/pv.3988 (1999), p. 17.
271 UN Document s/1999/328 sponsored by Belarus, India, and Russia.
272 UN Press Release SC/6659 (March 26, 1999).
bombing initially magnified humanitarian problems. Ethnic cleansing began with revenge in Kosovo. Prior to the bombing, the United Nations High Commission for Refugees (UNHCR) estimated that there were 410,000 ethnic Albanians internally displaced as a result of Serb operations, and another 90,000 across the border. Within a matter of days, there were 750,000 refugees in Albania and Macedonia, as well as 250,000 at the border. UNHCR had prepared contingency plans for 100,000 refugees and was soon overwhelmed.

The 78-day bombing campaign was an example of escalation theory and high-tech, low-risk military warfare. Initial targets were military, but after a month the bombing extended to dual-use targets, including mass media and power lines. The war was also extended to FRY territory, including the bombing of Belgrade. Many observers are of the opinion that the destruction of Serbia's infrastructure and the threat of ground forces ended the war. The European Union (EU) estimated the cost of reconstruction at $30 billion; the FRY at $100 billion.

In May, 1999, the FRY brought a case against 10 NATO members in the International Court of Justice (ICJ) arguing that NATO intervention was an unlawful use of force in violation of Article 2(4) of the UN Charter, that the members of NATO had breached the 1949 Geneva Conventions by targeting civilians and using depleted uranium weapons, and that the attack against the Serbs constituted a form of genocide in violation of the Genocide Convention. In the course of the hearing on the FRY's requests for provisional measure, in response, Belgium presented the most elaborate legal justification for the action. In addition to relying on Security Council resolutions, Belgium claimed that a doctrine of humanitarian intervention was compatible with Article 2(4) of the UN Charter, in addition to making an argument founded on humanitarian
necessity. The US also emphasized the importance of Security Council resolutions, and together with four other delegations (Germany, the Netherlands, Spain and the UK) made reference to the existence of a humanitarian catastrophe.

Yugoslavia had requested the ICJ to issue an injunction, based in part on provisions of the Genocide Convention, calling for an immediate cessation of bombing. However, the ICJ found that it did not have *prima facie* jurisdiction to issue what it termed “interim measures,” based on those provisions. The ICJ refused to grant the relief sought for technical reasons to do with the FRY’s accession to the jurisdiction of the ICJ during the conflict. Decisions on the jurisdiction of the ICJ, on the other dimensions and a possible ruling on the merits of the case were postponed at the request of Yugoslavia until April 2002. On December 15, 2004, the court ruled that it could not hear a case brought by the former Yugoslavia and said it had no jurisdiction because the antecedent state of Yugoslavia was not an official UN member in 1999 and was not party to the ICJ statute. Immediately following the end of hostilities, NATO deployed a 200,000 strong Kosovo force to provide security within the war-torn society, which operated within the UN Interim Administration Mission in Kosovo. The UN was charged with interim civil administration and capacity building. The UNHCR was given responsibility for humanitarian affairs. The European Union took the lead in rehabilitation, reconstruction and post-war peace building, and the OSCE pursued long-term institution building.

275 Legality of the Use of Force Case (Provisional Measures) (ICJ, 1999), order of June 2, 1999.
196 See the Website: Jurist@law.pitt.edu
As Kosovo is a region of the FRY, and it was treated as such by NATO, the massive post-intervention effort constituted a military "protectorate". The desire to avoid setting a precedent was evident in subsequent statements by NATO members. US Secretary of State Albright stressed in a press conference after the air strikes that Kosovo was "a unique situation" in the region of the Balkans." 276 UK Prime Minister Tony Blair appeared to suggest that such interventions might become more routine, stating that "The most pressing foreign policy problem we face is to identify the circumstances in which we should get actively involved in other people's conflicts." 277 He subsequently retreated somewhat from this position, however, and emphasized the exceptional nature of the air campaign. 278 This was consistent with one of the more considered UK statements, by Baroness Symons in the House of Lords, made on November 16, 1998, and reaffirmed on Monday 6, 1999:

"There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1999) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the council’s express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional." 279

The UK Foreign Affairs Committee, as part of its inquiry into the legal merits of the Kosovo intervention, concluded that "NATO's military action, if of dubious legality in the current state of

278 Tony Blair, UK parliamentary debates, Commons, April 26, 1999, col. 30.
279 Baroness Symons, UK parliamentary debates, Lords, November 16, 1998, WA 140.
international law, was justified on moral grounds."  

Similarly, the Independent International Commission on Kosovo held that NATO’s military intervention was illegal but legitimate.  

The Kosovo case has important implications for the employment of international criminal prosecution. In May 1999, the International Criminal Tribunal for the former Yugoslavia indicted Slobodan Milosevic and some other senior FRY officials for crimes against humanity in Kosovo. In June 2001, these indicted criminals were extradited to the Hague, despite the fact that the constitution did not permit that. Under considerable pressure from the international donors, the government contended that international covenants outweighed national law.  

One of the persistent criticisms, even among supporters of the intervention in Kosovo, was the unwillingness of NATO to employ ground troops in Kosovo. According to this view, the presence of and the threat to use ground troops would have avoided the mass exodus of refugees. It would have also helped make a more credible moral stance, in that humanitarian intervention would have been worth the lives of Westerners and as well as Yugoslavs.  

Does international law support the decision to use force in Kosovo? The main difficulty is that, if NATO uses force without authorization from the UN Security Council, it breaches international law as codified in the UN Charter. NATO interventions in similar conflicts can place the organization outside legality. This question was given extensive discussion on the occasion of NATO’s war against the Federal Republic of Yugoslavia (FRY), which denounced the attack before the International Court of Justice. The threat or use of force is governed under international  

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282 The Responsibility to Protect: Supplementary Volume  
284 For a discussion, see Klaus Naumann, “NATO, Kosovo, and Military Intervention,” Global Governance 8, no. 1 (January –March 2002), forthcoming.
law by the UN Charter, Article 2 (4) of the Charter, which declares that “All member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations.” 285 Also, Article 2 (7) states that “nothing in the Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state…” The general prohibition on the use of force in Article 2 (4) is supported by language in subsequent General Assembly resolutions. 286

Only three explicit exceptions exist to the general prohibition on the use of force. None of these appears to apply to Kosovo. First, states may act in self-defense under Article 51 of the Charter. Even a broad reading of self-defense is not particularly applicable with respect to Kosovo. The concept of self-defense applies only to states; it does not protect individuals against their own states. 287 The self-proclaimed Albanian Kosovo has never been recognized as a state and the NATO countries undertaking the intervention were never attacked or threatened with

285 This provision is self-executing because it does not require a state to do anything; it simply prohibits the commission of certain acts.
286 The 1966 Declaration on the Inadmissibility of Intervention in the Domestic affairs of states and their independent and Sovereignty provides that: “no state has the right to intervene, directly or indirectly, for whatever reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic, and cultural elements are condemned. The practice of intervention not only violates the spirit and letter of the Charter of the UN but also leads to the creation of situations which threaten international peace and security. G.A.Res. 2131, UN GAOR, 20th Sess; Supp. No. 11, UN Doc. A/6014 (1966). This resolution was affirmed by the General Assembly in the 1970 adoption of the Declaration on Principles of international Law Concerning Friendly relations and Cooperation among states in accordance with the Charter of the United Nations. G.A. res. 2625, UN GAOR, 25th Sess; Supp. No. 28, at 121 (Annex), UN, Doc. A/8028 91971). See A. Tanca, The Prohibition of the Force in the UN declaration on Friendly Relations of 1970, in the Current Legal Regulation of the Use of Force 307 (A. Cassese, ed; 1986). The International Court of Justice has not issued a definitive ruling on the merits on humanitarian intervention in "Kosovo-like situations" Its decisions narrowly construe the right of states to use force on human rights grounds. See military and Paramilitary Activities (Nicaragua v. US), 1986 ICJ 14 (June 27) (“The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent state, which is based on the right of collective self-defense.”). id. 249. see N. Rodley, Human Rights and humanitarian Intervention: The case law of the World Court, 38 Int'l & Comp. L. Q. 321 (1989).
attack. Thus, the self-defense exception would require an extremely expansive interpretation in order to apply to Kosovo.

A second exception to the general ban on the use of force is Security Council enforcement actions under Chapter VII of the Charter. Security Council enforcement actions are limited by the requirements of the UN Charter. The sole competence of the Security Council for the maintenance of international peace and security is laid down in Article 39:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be necessary to maintain or restore international peace and security."

Consequently, any threat or use of force that is neither justified as self-defense against an armed attack nor authorized by the Security Council constitutes undeniably a breach of the UN Charter. The UN Security Council adopted three main resolutions concerning Kosovo prior to the NATO bombing. First, in March 1998, the Council issued Resolution 1160, which imposed an arms embargo on both parties and called upon the FRY and the leadership of Kosovo Albania to enter into meaningful dialogue for a peaceful settlement of internal strife. In September 1998, the Security Council adopted Resolution 1199, which found the existence of a "threat to the peace and security in the region" and enjoined the FRY to certain actions, including "ceasing all action by the security forces affecting the civilian population and ordering the withdrawal of

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288 See UN Charter, Art. 2(7) "nothing contain in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, but this principle shall not prejudice the application of enforcement mechanisms under Chapter VII."

289 So far, Article 48 of the UN Charter constituted the legal foundation which enabled the Security Council to entrust NATO with the enforcement of its mandates. It reads as follows: "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members".


security units used for civilian repression." The Security Council warned that "should the concrete measures demanded in this resolution not be taken, it would consider further action and additional measures to maintain or restore peace and stability in the region." In the third main Security Council resolution, Resolution 1203, adopted on October 24, 1998, the Council endorsed the Organization of Security and Cooperation in Europe (OSCE) and NATO agreements with the FRY and demanded once more that the FRY comply with the conditions set forth in Resolution 1199. It would be premature to contend that under any Security Council resolution the use of force was authorized or approved. On the contrary, as it was clear that China and Russia would veto the use of force, the Security Council failed to include in these resolutions the use of force language "authorization of the use of all necessary means."

While all these resolutions were premises for authorization of the use of force, the act needed to actually resort to force never materialized within the Security Council. However, the Security Council is the only body competent to authorize the enforcement of its resolutions, not of the individual states or group of states; thus, legally speaking, enforcing a resolution without enforcement provisions is unlawful. In the words of White, "where there is no authorization, there is no legal basis." At best, the strict adherence to UN Security Council resolutions offers

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292 Id. 4 (a).
293 Id. 16.
295 Bruno Simma, NATO, the UN and the Use of Force: Legal aspects, 10 EJIL 1 (1999), (visited Feb. 6, 2000) as Paul Szasz has pointed out, that the fact that the Security Council failed to act here cannot be interpreted as a rejection of any particular course of action. "in a sense, by failing to act it rejected all alternative course of action, including full support for Milosevic." Paul Szasz, letter to Julie Mertus, dated July 25, 1999.
political advantages as opposed to other unilateral action. US Secretary of State Albright also argued that the behavior of Serb forces in Kosovo was a breach of the Geneva Conventions, the Charter on Human Rights and, if ethnic cleansing continued, of the Genocide Convention of 1948. She contended that these treaties provided an alternative source of legitimization of NATO action.

Most jurists agree that the Genocide Convention was not affected. In any case, these treaties do not provide for enforcement; therefore, they do not offer a legal basis for the use of force.

After the NATO bombing began, the Security Council had at least two opportunities to approve the NATO intervention retroactively. At the height of the NATO bombing, on May 14, 1999, it issued Resolution 1239. This resolution neither supported nor condemned the NATO bombing. The resolution merely “noted with interest the intention of the Secretary General to send a humanitarian needs assessment mission to Kosovo and other parts of the Federal Republic of Yugoslavia” and “reaffirmed the territorial integrity and sovereignty of all states in the region.”

At the conclusion of the NATO campaign, the Council issued Resolution 1244. While this resolution “decided on the deployment in Kosovo, under UN auspices, of international civil and

298 As Simma puts, “a reading of the relevant Council resolutions together with the respective pronouncements of NATO members might lead an observer to conclude that the two sides are acting in concert. NATO tries to convince the outside world that it is acting alone only to the least degree possible, while in essence it is implementing the policy formulated by the international community. Simma, 1999, p. 14.
299 The pertinent articles were not specified. See for instance: Transcript of the Secretary of State press conference on Kosov in Brussels, October 8, 1998.
300 Simma, 1999, p. 1. Ambos is one of the few to dissent, arguing that the dolus specialis, a special intent aimed at the destruction of a protected group existed in the case of Kosovo. However, an intent is generally difficult to determine. See Ambos, Kai: Comment on: Bruno Simma, NATO, the UN and the use of force: Legal Aspects, European Journal of International Law, 10 (1), 1999, p. 1.
302 Id.
security presence, with appropriate equipment and personnel as required," it was wholly prospective in nature. The resolution declined to comment on previous international intervention in Kosovo. These and other Council statements fall short of offering retroactive approval of the NATO bombing and, thus, the Chapter VII exception to the use of force cannot be said to apply to Kosovo.

The third explicit exception to the general prohibition on the use of force, found in Chapter VII of the Charter, permits actions undertaken by “regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security.” Regional arrangements may undertake any action in this regard that is “consistent with the purposes of the UN.” Although NATO has never applied for recognition as a “regional agency dealing with security issues” in accordance with in Chapter VIII of the Charter, these provisions would be applicable by way of analogy.

While Article 52 allows for the existence of regional arrangements, Article 53 explicitly forbids military intervention by regional organization without a Security Council mandate:

“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be

304 Id. 5.
305 UN Charter, Art. 52(1)
306 Id.
307 This was expressly clarified in a letter addressed by NATO’s former Secretary General Claes to the UN Secretary General. Simma, Bruno: NATO, the UN and the use of force: Legal aspects, European Journal of International Law, 10 (1), Chapter 2.
308 Art. 52 of the UN Charter reads: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations”.

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taken under regional arrangements or by regional agencies without the authorization of the Security Council.”

Even if NATO is seen as a regional arrangement under Chapter VII, regional actions also require Security Council authorization, none of which was granted with respect to Kosovo. 309 Thus, the explicit exceptions in the UN Charter do not apply to Kosovo. Is this the end of the story? No. Other provisions of the UN Charter implicitly permit the use of force under certain limited circumstances. This implicit grant of authority can be said to apply to Kosovo.

By its terms, the Charter does not prohibit all threats or uses of force. Article 2 (4) prohibits force against the “territorial integrity or political independence of any states....” We need to look closely at these words. As interpreted in treaties and diplomatic history, “territorial integrity” refers not to the “territory of a state” but to the “integrity of the territory.” 310 Humanitarian intervention in such a case falls below the threshold set in Article 2 (4) since the interveners do not seek to deprive the state of its integrity but, rather, to enhance it. 311 Alternatively, intervention in such cases could be justified on a ‘waiver’ theory. Under this theory, governments that commit violations of human rights lose any claims against intervention by others for the protections normally offered by sovereignty. 312

These arguments are in line with modern conceptions of sovereignty. The doctrine of human rights restricts the ability of states to do what they want with their own citizens. Also, sovereignty refers not only to state borders, but also to political sovereignty, that is, the ability of people within those borders to effect choices regarding how they should be governed and by

309 See UN Charter Art. 53 (1).
311 Murphy, Humanitarian Intervention, supra, note 19 at 71.
whom. Accordingly, when another state intervenes to protect human rights in such circumstances, it is not violating a principle of sovereignty, but instead enhancing it.

A more complete reading of the UN Charter further supports the use of humanitarian intervention in Kosovo-like situations. Here I will suggest four points. First, the UN Charter advances central principles that could not be protected in Kosovo without intervention. The most central purpose of the organization is the maintenance of international peace and security. In situations such as Kosovo, peace and security cannot be said to exist as long as the state is free to commit gross and systematic human rights abuses against its own people.

Second, Article 1 of the UN Charter includes, as a central purpose, development of “respect for the principle of equal rights and self-determination of peoples...” Also included as a central purpose is “encouraging respect for human rights and for fundamental freedoms without distinction as to race, sex, language or religion...” Self-determination does not mean the ability of all groups of people to make their own state, but rather, the ability to participate in one’s government and enjoy basic human rights. The prohibition of the use of force in Article 2 (4) does not rule out the use of force designed in the central goals of the UN. Where, as in Kosovo, a

315 Reisman, Sovereignty and human Rights, supra, note 39, at 872.
316 UN Charter, Article 1 (1).
317 UN Charter, Article 1 (2).
318 UN Charter, Article 1 (3), see also UN Charter Art. 55.
319 Article 1(2) states that the basic purpose of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. Article 55 ties the principle of self-determination to respect for human rights. See supra, note 44-45. The principles of self-determination are also found in the International Covenant on Economic, Social and cultural Rights, G.A. Res. 2200, UN GAOR, 21st Sess; Supp. NO. 16, at 49, UN Doc. A/6316 (1967) “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue economic, social, and cultural development.” Id. At Art. 1; The International Covenant on Civil and political Rights, G.A. Res. 2200, UN GAOR, 25th Sess; Supp. NO. 28, at 121, UN Doc. A/8028 (1871) “All peoples have the right to determine, without external interference, their political status and pursue their economic, Social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter”. For an exclusive collection of documents related to self-determination See Documents on Autonomy and military Rights (Hurst Hannum ed; 1993).
government flouts respect for the principles of equal rights and self-determination and violates the most basic human rights and fundamental freedoms of individuals, the use of force may be the only way to see the goals of the UN upheld.

Third, humanitarian intervention may be required or permitted under the human rights provisions of the UN Charter. Specifically, Articles 55 and 56 of the UN Charter appeal to all members "to pledge themselves to take joint action in cooperation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all." The international community has an interest in the protection of human rights of people, regardless of state borders. Whereas in Kosovo a state is incapable of protecting human rights or is itself the perpetrator of human rights violations, the use of force on human rights grounds, that is, humanitarian intervention, may be the only solution. The grounds for intervention are particularly strong where the case at hand concerns allegations of genocide, crimes against humanity, and certain war crimes subject to universal jurisdiction and responsibility.


Convention on the Prevention and Punishment of the crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951. The Genocide Convention defines genocide as: "acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. Id. at Art. 11. See also Leo Kuper, Genocide: Its political use in the 20th Century. (1981).

Crimes against humanity are defined: "crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." 37 Colum. J. Transnational L. 787 (1999).

See the Geneva Convention, Articles 1, 3, 13-16 and 23-24 (applying to attacks on and treatment of both internationals and co-nationals) and Articles 146-147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of war.

Henry T. King, Theodore C. Theofrastous, from numbering to Rome: a step backward for US Foreign Policy, 31 Case W.
The final argument supporting NATO action in Kosovo is the UN's own failure to act. If the UN were functioning as it was intended, unauthorized intervention would not be needed. Yet, because the UN system has failed to function properly as a collective body addressing human rights and other security concerns, states retain the right to act unilaterally. 327

Article 43 of the Charter envisioned the creation of a system whereby states would make available to the Security Council "on its call and in accordance with a special agreement or, agreement, armed forces, assistance and facilities necessary for the purpose of maintaining international peace and security." 328 These agreements were to be "negotiated as soon as possible by the Security Council." 329 In this case, no such agreements have been negotiated. Article 106 of the Charter envisioned the creation of "transitional security arrangements" whereby signatories to the Charter could undertake joint action to maintain peace and security as temporary measures

328 UN Charter Art. 43(1)
329 UN Charter 43 (3).
until the signing of Article 43 agreements. The NATO action could be seen as one such temporary measure.  

All of the above arguments, taken together, provide an international legal basis for the decision to use force in Kosovo. The next problem is whether the means of intervention in Kosovo was appropriate? Did the intervention in Kosovo itself violate international humanitarian law? Where force is used for humanitarian reasons, the legal requirements of necessity and proportionality with respect to that use of force are important. As Ruth Gordon states “a humanitarian operation must be executed at a level amount to the evil it seeks to curtail.” Thus, use of force for humanitarian purposes whether it is authorized or unauthorized by the Security Council must comply with the principles of international humanitarian law. Under international humanitarian law, civilians and civilian objects may not be directly targeted and all feasible precautions must be taken to prevent civilian deaths. Incidental injuries caused to civilians or civilian objects are required to be proportionate to the purpose of the attack. Moreover, an attack is deemed illegal which “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, which would be excessive in relation to the concrete and

330 The argument for intervention by states due to the failures of the UN is not without precedent. Enforcement. Enforcement actions by the Security Council have almost always been impossible owing to permanent member veto power. To circumvent this problem during the Korean war in 1950, the general assembly exercised its own powers reserved under Article 10-11 and 14 to address “general problems in the maintenance of peace and security” and to recommend measures for peaceful adjustment of any situation.” Specially, the General assembly adopted the Charter by the Uniting for Peace Resolution, which provides that: “if the Security council, because of lack of unanimity of the permanent members, fail to exercise its primary responsibility for maintenance of international peace and security in any case where appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of breach of the peace of act of aggression the use of armed force when necessary to maintain or restore international peace and security.


333 See the Protocol Additional to Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 11) Articles 48 and 51(2) and 57.

334 See green 1993, p. 120

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direct military advantage anticipated” 335 In addition to strict compliance with the requirements of international humanitarian law, Christine Chinkin argues that human rights law imposes an obligation on the interveners by stating "Human rights give rise to responsibilities in states and in people. These must encompass a duty not to make conditions worse for a threatened population and the obligation to respect the civil, political, economic, social and cultural rights of all civilians." 336 Thus, the means of enforcement chosen must be effective to protect the civilian population and must be not endanger them or their way of life.

In the case of Kosovo, NATO’s actions were subject to strong criticism in bombings of non-military targets, such as telecommunications towers, bridges, heating plants, electric power stations, water supplies and civilian convoys. Reports published by Amnesty International (2000 a,b) and Human Rights Watch (2000), which investigated these bombings, note that some 400 to 600 civilians were killed. The reports suggest that these killings of civilians could constitute violations of the laws of war or violations of humanitarian law. In addition, the Amnesty report suggests that NATO’s “means and methods of attack” including its high altitude bombing policy caused unlawful civilian deaths and that its use of certain weapons such as cluster bombs and uranium may also “have contributed to causing unlawful deaths.” 337

In summary, a close reading of the United Nations Charter supports the decision to intervene in cases like Kosovo. While the explicit Charter provisions permitting force do not appear to be applicable to the intervention in Kosovo, the Charter may be read as implicitly permitting such actions. The strongest justifications for humanitarian intervention in Kosovo are linked to affirmative human rights concerns, subject to substantive and procedural limitations.

335 58 Protocol II, Art. 51 (5-b).
337 Amnesty International Report 2, 2000, a, Section 4.
While the intervention in Kosovo was initially within the limits of international law, it also appears that the bombing campaign was eventually conducted outside those limits.

8- Intervention in East Timor (1999)

The Island of East Timor, situated between the Republic of Indonesia and Australia, remained a Portuguese colony for over 400 years. In 1974, the new Lisbon government evinced a commitment to allowing former colonies to pursue self-determination; Portuguese governor Lemos Pires was dispatched to East Timor with decolonization as his principal aim. 338

Two main political parties emerged in the new climate of political independence: the Timorese Democratic Union (UDT) and the Revolutionary Front for an Independent East Timor (Fretilin). Fretilin desired immediate recognition of East Timor’s independence and a transition to self-rule within 10 years. The UDT favored a slower transition and continued association with Portugal. 339

The Indonesian government, led by General Suharto, found East Timor’s impending independence threatening, and the potential leadership of the Marxist-leaning Fretilin unacceptable, despite popular support. Mindful of the rich oil reserves off the cost of East Timor, and fearful that an independent East Timor might impel other ethnic groups in Indonesia to seek independence, the Indonesian military initiated a special intelligence command, (Opsersai Komodo) designed to destabilize East Timor. In April and July 1975, the head of Indonesian intelligence met with leaders of the UDT to convey the militaristic government’s concerns. In a

339 Ibid.
clandestine meeting between these UDT leaders and certain Indonesian generals, the Indonesian government succeeded in persuading the UDT to launch an anti-Fretilin coup. Instability, the government reasoned, would permit Indonesia’s invasion towards the purpose of “restoring order.”

Shortly thereafter, in August 1975, a civil war began between Fretilin and UDT forces. Between 1500 and 2000 Timorese were killed in this clash. Portugal withdrew its military and civil personnel from the Island; UDT forces withdrew into the Indonesian territory and stated that they desired integration with Indonesia. Fretilin, the victor in the civil war, assumed de facto administration in East Timor. On November 28, 1975, Fretilin declared the independence of the Democratic Republic of East Timor.

The Fretilin claim of independence for East Timor was not well-received by the Indonesian government. In 1975, Indonesia invaded East Timor in order to annex it as an integral part of Indonesia. The eastern half of the island of Timor was to become the 27th province. Both the Security Council and the General Assembly called for Indonesia to withdraw and respect East Timor’s territorial integrity and the right of its people to self-determination. The Indonesian government ignored such calls, and its occupation resulted in the death of 200,000 to 300,000 people and a longstanding insurgency.

The annexation of East Timor was not formally recognized by the majority of the UN member states; Australia was the main exception. Despite this growth in world opinion, East Timor’s independence only became possible following the replacement of Indonesian President Suharto by his vice president, B.J Habibie, who offered to hold a referendum on the territory’s

340 Ibid.
341 Ibid.
342 Ibid.

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future. An agreement dated May 5, 1999, between Indonesia and Portugal (as the administering power of a non-self-governing territory), provided for a "popular consultation" on East Timor's future, to be held on August 8. 343 The agreement left security arrangements in the hands of Indonesia's military, which had actively suppressed the East Timorese population for a quarter century.

On June 11, the Security Council passed Resolution 1246 (1999) which established the UN Mission in East Timor (UNAMET) to organize and conduct the electoral consultation. 344 A month later, with the consultation postponed until the end of August because of security concerns, the Secretary General reported to the Council that "the situation in East Timor will be rather delicate as the Territory prepares for the implementation of the result of the popular consultation, whichever it may be." 345 Despite threats of violence the majority of Timorese voted in the referendum for independence.

In the wake of the vote for independence, however, widespread violence and looting took place under the direction of the Indonesian military. 346 While the UN Secretary General was engaged in negotiations about a possible security force, the headquarters of the ICRC was attacked, several local UNAMET personnel were killed, and the UN began to withdraw its civilian staff in the face of a rampage by the military-backed militias. The humanitarian crisis was severe. Two-thirds of the island population had left their homes and were totally dependent on international aid. There was some reluctance to intervene, despite the massive international response in Kosovo only months earlier, largely because of the political and economic importance

345 UN Document S/1999/862, para. 5.
of Indonesia. Nonetheless, Australia instigated discussions, driven by domestic political pressure, concerns about a refugee crisis and regional stability, and some measure of contrition for its previous policies on East Timor. Also, the likely negative impact on UN credibility of remaining inactive seemed high. With many of the same motivations, members of the Security Council authorized, on September 15, an Australian-led multinational force under Chapter VII to restore peace and security to East Timor.

The legal necessity for requiring Indonesia’s consent was doubtful to say the least. But as a practical political matter, an outside military operation was inconceivable without Indonesian consent. No one was prepared to assume the risk of serious resistance from Indonesian troops. After substantial arm-twisting including pressure from international financial institutions and bilateral programs of military and development assistance, consent came from Indonesia. Resolution 1264 (1999) welcomed a September 12 statement by the Indonesian President that expressed readiness to accept an international force in East Timor.

On September 20, roughly 2,500 soldiers arrived in the capital Dili. Countries contributing troops included Australia, the UK, Canada, France, New Zealand, the Philippines, Thailand and the US. At the beginning, it was unclear how the Indonesian forces and militias whom they controlled would respond. Yet, over the next few weeks, skirmishes with these forces were infrequent, and the International Force in East Timor (INTERFET) ultimately supervised the largely peaceful withdrawal of Indonesian forces. Control over the territory, however, did not mean that the victims were safe. As many as 200,000 people had been pushed out of the territory by militias. They were subsequently forced into militia-controlled camps in West Timor. The

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resolution authorizing the Australian-led INTERFET noted that the multinational force should be replaced “as soon as possible” by a UN peacekeeping force. On October 25, the Security Council voted in Resolution 1272 (1999) to establish the UN Transitional Administration in East Timor (UNTAET). INTERFET transferred military control of the territory to UNTAET on February 23, 2000, and initiated an ambitious program of police and civilian assistance.

In conclusion, despite the unique international legal circumstances of East Timor, the intervention also had an undeniable demonstration effect elsewhere within the Indonesian territory. According to the definition of “humanitarian intervention”, this study has suggested, in order for an action to be an intervention, sovereignty of the state being intervened in must be breached. Thus, INTERFET action in East Timor, while motivated by humanitarian objectives, was not an intervention since the action was undertaken with the consent of the Indonesian government. Even though, the INTERFET intervention was not considered as an intervention, it can be characterized as a success.

Unquestionably, the intervention alleviate death, suffering and massive violation of human rights. It also significantly reduced the likelihood that internal conflict would recur in the future. Similarly, the stability provided by both the INTERFET and the UNTAET military forces provided the space necessary for post-conflict peace-building, while the international community developed a strategy for the completion of the transition process. It is now up to the people of East Timor, assisted by the United Nations and the international community, to create the political, economic and social conditions that will best ensure long-term peace and stability. After decades of terror, it appeared that the dark chapter in East Timor’s history had finally come to a close.
CONCLUSION

An overall assessment of the case studies discussed above suggests a number of cross-cutting issues but points to the growing support for the use of force in aid of humanitarian objectives and the debate over the conditions required for its legitimate use. Post-Cold War practice suggests that the international community is ready to implement a broader conception of the notion of humanitarian intervention. The cumulative effect of the number of Security Council resolutions relating to the cases we discussed in the chapter has reinforced the observance of human rights as a significant underpinning for international peace and security. Internal conflicts producing human rights suffering, as in most of the cases examined, and massive human rights violations by governments, as in the case of Haiti, constitute a threat to international peace and security. These situations have given the basis for international action including the imposition of economic sanctions, the use of protection forces to watch over minority enclaves, and the use of military force in securing the supply of humanitarian assistance.

These recent cases show the growing support for humanitarian intervention and a significant shift in the manner in which states respond to humanitarian crises. The degree to which this change has occurred is manifest especially in comparison to the cases of humanitarian intervention discussed in the preceding chapter where support or condemnation varied in the context of the Cold War, and state response was mainly apathetic. These cases have also shown the international community re-evaluating and taking seriously assumptions concerning human rights and state sovereignty. Emphasis on notions of absolute state sovereignty and non-intervention are beginning to give way to a more responsible view of state sovereignty. The
responsibilities which accrue to states include the protection of human rights. Thus, gross human rights violations open the state to intervention on humanitarian grounds.
CHAPTER SIX

Assessment of the Contemporary Developments in the Principles and Practice of Humanitarian Intervention in the Post-Cold War Era:

Sources of Consensus

1-Introduction

Developments in the post-Cold War era regarding intervention to protect human rights suggest a gradual change in attitudes and challenges to state sovereignty and its corollary principle of non-intervention. With the end of the Cold War, the UN has been less inclined to permit concern for human rights to end at a state’s territorial borders. In 1991, Pereze de Cuellar stated “...we are clearly witnessing what is an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents.” The idea that sovereignty is continually evolving and that absolute notions of sovereignty are no longer defensible is becoming increasingly evident. As the UN’s

198 As stated earlier, this is, not to suggest that state sovereignty and nonintervention are no longer important norms in international relations. They still are. After a comprehensive review of recent cases Damrosch, for instance, concludes “instead of the view that interventions in internal conflicts must be presumptively illegitimate, the prevailing trend today is to take seriously the claim that the international community ought to intercede to prevent bloodshed with whatever means are available, arguments now focus not on condemning or justifying intervention in principle, but rather on how best to solve practical problems of mobilizing collective efforts to mitigate internal violence”. Damrosch, “Concluding Reflections” in Damrosch ed; Enforcing Restraint: Collective Intervention in Internal Conflicts (New York: Council on Foreign Relations Press, 1993) at 364.

199 As noted in the last chapter, former UN Secretary General Boutrus Ghali, in his “Agenda for Peace”, stressed that the time of absolute and unconditional sovereignty has passed. Scholarly writings have also taken account of these developments. Esman argues “normative expectations seem to be shifting in favor of limiting absolute state sovereignty when international peace and stability are threatened, human rights are abused, and humanitarian disasters are created by ethnic conflict”. Esman, “A Survey of Interventions” in Esman and Telhami eds; International Organizations and Ethnic Conflict (Ithaca: Cornell University Press, 1995)
Independent Commission on International Humanitarian Issues has stated “sovereignty need not conflict with humanitarian concerns if states can be brought to define their interests beyond the short term..... The interests of common humanity which transcend national boundaries are not a menace to the vital interests of states.”\textsuperscript{200} This position is also supported by the International Court of Justice (ICJ). \textsuperscript{201} Sovereignty is and will remain an important organizing principle in international relations, but as Nanda noted “to insist on adherence to its ‘absolute’ dimensions flies in the face of international realities.”\textsuperscript{202} The conclusions of a 1992 international conference on human rights protection for internally displaced persons, which consisted of human rights experts, humanitarian organizations officials from the UN and regional organizations, international lawyers and government representatives, are that sovereignty confers responsibility

on governments to protect the people within their territories. Failure to meet those obligations means that governments risk undermining their legitimacy.\textsuperscript{203} In essence, there is the tendency to restore notions of responsibility to state sovereignty.\textsuperscript{204} When humanitarian tragedies of grave amounts occur, be they in situations of civil strife or when a government persistently and systematically abuses the human rights of its citizens, which causes outrage in the international community, outside intervention is often one of the most important instruments that can be employed to stop these tragedies. Yet, it remains unclear whether the international community will support such action in every case.

The trend towards collective intervention discussed in the last chapter, and as reflected in statements and decisions of the UN Security Council, while a welcome development, has sometimes, to use the words of Weiss, tended to be surrounded by more heat than light. In light of the varying international responses to the various humanitarian tragedies, the debate surrounding the legitimacy of humanitarian intervention continues unabated. In 1993, Roberts was prompted to observe that “humanitarian war is an oxymoron which may yet become a reality. The recent practice of states, and of the UN, has involved major uses of armed force in the name of humanitarianism...These humanitarian activities in situations of conflict raise many awkward questions.” More important, he highlighted two questions:

\textsuperscript{203} See Refugee Policy Group, Human Rights Protection for Internally Displaced Persons: An International Conference (Washington, D.C.: 1991) cited in Deng, “reconciling Sovereignty with Responsibility: a basis for International Humanitarian Action” in Harbeson and Rothchild eds; Africa in World Politics: post Cold war challenges (Boulder: Westview press, 1995) 295 at 298. This view is consistent with an approach that maintains that “sovereignty carries humanitarian duties and responsibilities that, when breached, evince sovereignty and open the state to intervention on humanitarian grounds”. See Amison, “International law and Non-intervention: when Humanitarian Concerns Supersede Sovereignty?” (1993) Fletcher Forum 199 at 207. See also Caney, “Human rights and the Rights of States: Terry Nardin on Nonintervention” (1997) 18: 1 International Political science Review 27-37 (arguing human beings as human beings have certain entitlements and interests which are not contingent on national origins, and a state that denies them forfeits its rights to autonomy. Thus, intervention is justified when it has the aim of protecting these rights).

\textsuperscript{204} Deng, ibid; at 299.
1- Is humanitarian involvement in conflicts -in the form of the provision of food, shelter and protection under international auspices- a step on a ladder which can or should lead to much more direct military involvement, even to participation in hostilities?

2- Can we conclude from recent and contemporary practice that a new consensus is emerging on humanitarian intervention, that is, military intervention in a state, without the approval of its authorities and with the purpose of preventing widespread suffering or death among the inhabitants? 

It is in this context that differing views have been put forth. Some observers argue a significant change seems to be underway in terms of the establishment of precedents in the post-Cold War era regarding intervention to protect human rights. Others maintain the possibilities for collective action under Security Council authorization will not be forthcoming in every case. Yet still, for some, this is an errant period that is unlikely to continue in the future. This chapter assesses contemporary developments in the principle and practice of humanitarian interventions in the post-Cold War era and argues that a notable shift seems to be underway.

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205 Roberts, “humanitarian war: Military Intervention and Human Rights” (1993) 61 International Affairs 429. Similarly, Nanda has posed the question whether there is “an emerging rights, and perhaps even a duty, on the part of the world community to intervene in the internal affairs of a state when egregious violations of basic human rights occur.” Nanda, Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti-Revisiting the Validity of Humanitarian Intervention under International law –Part 1” (1992) 20 Denver Journal of International Law and Policy 305 at 306. Ramsbotham and Woodhouse have observed that core issues regarding human rights violations during the Cold War remain the same now, although “the center of gravity has shifted. The fundamental question during the Cold war was: if governments violate the basic human rights of their citizens, should other governments intervene forcibly to remedy the situation? In the Post-Cold war period the basic question has been: if internal wars cause unacceptable human suffering, should the international community develop collective mechanism for preventing or alleviating it?” Ramsbotham and Woodhouse, Humanitarian Intervention in Contemporary Conflict: A Reconceptualization (Cambridge: Polity Press, 1996) at 139. WITH REGARD TO Robert’s remark about humanitarian war being an oxymoron, Weiss and Campbell contend that military humanitarianism as part of a new agenda for international security in the post-Cold war is not an oxymoron. See Weiss and Campbell, “military Humanitarianism” (1991) 33: 5 Survival 451 at 463.
2- Assessment of the Post-Cold War Practice

Recent practice seems to suggest a shift that has implications for sovereignty and humanitarian intervention. Humanitarian crises resulting either from governmental acts or internal conflict have become amenable to outside intervention. What emerges from these cases in terms of the various UN Security Council resolutions, as Damrosch puts it, “evidence a newly emerging consensus that the Security Council's enforcement powers may be invoked...in...purely domestic situations.” On the basis of these developments, significant conclusions can be reached on the principles of humanitarian intervention and their application in the post-Cold War era. First, these emerging principles suggest that massive or widespread violations of human rights or humanitarian law resulting from governmental acts or internal conflicts and the magnitude of human suffering that they engender can constitute a threat to international peace and security that governments can no longer afford to ignore. These are matters that do not fall within the domestic domain of states. The Security Council, in those circumstances, can take appropriate measures, including the use of force grounded in Chapter VII of the Charter for the protection of humanitarian relief operations and the creation of a secure environment for such operations.

Second, abandonment of victims of man-made or natural disasters, especially the

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206 Damrosch, “Changing Conceptions of Intervention in International law” in Reed and Kaysen eds; supra, note 3 at 105. Writing in 1973, Reisman and McDouglas, had argued that “both natural and analytical international legal jurisprudence cojoin, in humanitarian intervention, in viewing the jurisdictional exclusively of any nations states as conditional rather than absolute. The conditionality of the jurisdiction is most obvious in respect to minimum human rights”. Reisman and McDouglas, “Humanitarian Intervention to Protect the Iboos”. In Lillich ed; Humanitarian Intervention and the UN (Charlottesville: University of Virginia Press, 1973) at 169. Rodley has commented “while there remain protagonists, especially among affected governments, of the traditional strict doctrine that a human rights problem concerns none but the state where it takes place, this according to him “is becoming an increasingly eccentric position”. Rodley, “Collective Intervention to Protect human Rights and Civilian Populations: The Legal Framework” in Rodley ed; To loose the Bands of Wickedness: International Intervention in Defense of human rights (London: Brassey’s, 1992) 14 at 21-22. But see Donnelly, who argues “Human rights are ultimately a profoundly national-not international issues” (emphasis in original). Donnelly “Human Rights, Humanitarian Crisis, and humanitarian Intervention” (1993) XLVIII International Journal 607 at 639-640.

deliberate withholding or impeding of food and medical supplies necessary for survival of civilians trapped in the throes of internal conflict, constitutes a threat to human life, and ultimately peace security. In those situations, necessary measures including force can be employed to get much needed humanitarian relief supplies to such victims.

Third, states have a duty to lend support to international organizations or humanitarian organizations working to provide humanitarian assistance to the victims of complex emergencies like situations of starvation, widespread suffering and death.

Fourth, state sovereignty will not bar action to protect and sustain the lives of large numbers of civilians trapped in situations of internal conflict. Added to this is the principle of individual responsibility for war crimes and grave breaches of international humanitarian law, including interference with humanitarian assistance.²⁰⁸

Although these principles emerge from the cases, international responses to the various humanitarian tragedies were less consistent. Multilateral response to one situation “serve as a benchmark for evaluating the response or lack of response to others.” The emerging picture has thus been varied international responses and mixed results. For some, this casts doubts on the legitimacy of humanitarian interventions. Nonetheless, the various responses have been grounded in the principle that massive human rights deprivations constitute a threat to international peace and security either through transboundary refugee flows or spillage of internal strife across borders. On this basis, international action, including the use of force, can be justified to address these problems.

However, the euphoria generated in the aftermath of the Gulf War subsided with the expression of frustrations and disillusionment by the mid-1990s regarding vigorous international action to deal with these humanitarian crises. This problem was concluded by Boutrus Ghali when he admitted that “we are still in a time of transition… unforeseen or only partly foreseen difficulties have arisen… the different world that emerged when the Cold War ceased is still a world not fully understood.”

Even though there is a clear indication that the post-Cold War era is still unfolding, it is important that the emerging international principles and practice be sorted out if only to serve as signposts into the future.

Various actors and writers have sought to place interpretations on these trends. First, an increasing number of scholars view these developments as establishing the right to international intervention for human rights purposes, and thus establishing significant precedents. In a comprehensive survey of state practice, UN law and most commentators, Ajaj reaches the conclusion that humanitarian intervention has never enjoyed as much legitimacy as it does today. Scheffer interestingly summarizes the new sense of urgency with regard to the need for international response by stating that:

“In the post-Cold war world a new standard of intolerance for human misery and human atrocities has taken hold. Something quite significant has occurred to raise the consciousness of nations to the plight of peoples within sovereign borders. There is a new commitment expressed in both moral and legal terms to alleviate the suffering of oppressed or devastated people. To argue today that norms of sovereignty, non-use of

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force and the sanctity of internal affairs are paramount to the collective human rights of people, whose lives and well-being are at risk, is to ignore the march of history.”

In that light, Greenwood has asserted “the law on humanitarian intervention has changed both for the United Nations and for individual states. It is no longer tenable to assert that whenever a government massacres its own people or a state collapses into international anarchy international law forbids military intervention altogether.” Ethically, Hoffman has argued military intervention is justified when domestic unrest threatens regional or international security and massive abuses of human rights occur. He points out, however, “in most, but not necessarily all cases the intervention should be organized or at least authorized by the Security Council, which should be given autonomous means and reorganized to enhance both its legitimacy and the capacity for action.” While Roberts notes, with respect to the questions posed earlier, that “international thought and practice seem to be changing.” Teson forcefully argues that “the doctrine of humanitarian intervention has experienced a dramatic revival with the end of the Cold War” and concludes “that the international community has a right to intervene to uphold human rights is supported by recent practice.” Even though Falk suggests that humanitarian intervention since 1989 has been a failure, and attributes reasons for the failure, he nevertheless argues that “with the end of the Cold War there has been a notable shift in intervention diplomacy away from purely geopolitical interventionism in the direction of support for humanitarian claims to alleviate human suffering” and "from a purely normative perspective of law and morality, this

212 Scheffer, supra, note 2 at 259.
shift in intervention practice is a welcome development."216

Opponents of humanitarian intervention, however, remain skeptical by insisting that sovereign states and their prerogatives remain fundamental even when humanitarian issues arise. For Donnelly, "we should not expect-hopefully or fearfully- the imminent emergence of an international practice of humanitarian intervention."217 Others have also expressed concerns about the viability of humanitarian intervention as a mechanism for enforcement of the will of the international community.218 Ayoob distinguishes between two kinds of humanitarian interventions: the politically motivated and politically innocent. The former takes place when the political interests of a major power are evident, and this affects the legitimacy of the action. The latter type fails to consider and address the political causes of conflict from the beginning. He questions the selective nature of humanitarian interventions even among the many candidates for

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216 Supra, note 11 at 511, 512. For other writers supportive of humanitarian intervention in the post-Cold War era see for instance, Duke, "the state and humanitarian Intervention: Sovereignty versus humanitarian Intervention" 91994) 12 International relations 25 (examining justifications for intervention and concluding that legal grounds exist when adequate proof of gross violations of fundamental human rights can be established); Amison, supra note 6 (noting how events in the cases examined illustrate the growing need for humanitarian intervention when armed conflict, egregious human rights violations or starvation put countless lives at risk); Nanda, supra note 8 at 344 (discussed post-Cold war practice and concluding "humanitarian intervention" remains a viable alternative. That it should be sparingly used is appropriate. But that it can be used should prove a powerful deterrent to oppressive regimes"); Hoffman, "Rescuing Endangered people: Missed opportunities" (1995) 62: 1 Social research 23 (arguing in favor of humanitarian intervention as a last resort to correct massive violations of human rights like genocide and political mass murder); Burmester, "humanitarian Intervention: The New World Order and the Wars to Preserve human Rights" (1994) Utah Law Review 269; Delbruck, "A French Look at Humanitarian Intervention Under the Authority of the United Nations" (1992 67 Indian Law Journal 887; Nafziger, "humanitarian Intervention in a Community of Power Part I" (1994) 22 Denver Journal of International Law and Policy; 219; Walzer, "The Politics of Rescue" (1995) 62: 1 Social Research 53: Dowty and Locher, " Refugee Flows as Grounds for International Action" (1996) 21: 1 International Security 43 (arguing whatever the theoretical debates, international intervention as a response to refugee flows is quietly becoming a de facto norm in state declaration and practice); Copra and Weiss, supra, note 2; Higgins, Problems and Process: International Law and How We Use it (Oxford: Clarendon Press, 1994) at 247-248; Parekh, supra, note 2 at 49-69; Lillich, "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN humanitarian Intervention in the Post-Cold War World" (1994) 3 Tulane Journal of International and Comparative Law at 1-17.

217 Supra note 9 at 607.

218 As noted earlier, Roberts, questions whether "humanitarian war" is not an oxymoron". He points out that armed intervention "may come to involve a range of policies and activities which go beyond, or even conflict with, the label humanitarian. The use of force with the objective of saving lives is likely to lead to more loss of lives. The lives of interveners as well as innocent civilians are likely to be endangered through such operations. Booth has noted in this regard "the desire to do something has to be tempered by the knowledge that not only may be possible to solve a historic conflict by a short and dramatic military intervention, but may make matters worse". For him, "the injection of military force to impose a resolution on a bitter conflict is likely to be a slippery slope, and probably an ineffective instrument". See Roberts, supra, note 8 at 429, 448; Booth, "Human Wrongs and International Relations" (1995) 71: 1 International Affairs 103 at 120-121. 

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intervention in the Third World which reinforces doubts about the real motives of interveners, and concludes:

"for many reasons humanitarian intervention, in any effective sense of the term, can be considered a nonstarter. Both politically motivated and politically innocent varieties of intervention may be counterproductive. Moreover, lack of resources and will could make such intervention selective, detracting further from its credibility as a legitimate instrument for the enforcement of the will of the international community as a whole." 219

However, as Whitman argues, "the deployment of military force is always founded on a hard-headed calculation of risk, and there is nothing to preclude humanitarian objectives on an agenda framed by a more determinedly self-interested motivation." 220 It is argued that if states conduct their affairs based on national interest, then the trends in post-Cold War humanitarian interventions can be explained on the basis that national interest is being redefined in such a way that humanitarian crises cannot be ignored since they affect all nations. This is especially evident when humanitarian tragedies result in wider regional conflicts, and when the flow of refugees destabilizes states. Thus, states have begun to redefine national interests more broadly, and in ways which acknowledge the relationship between humanitarian crises, and national, political and economic security. Instances of less consistent responses to humanitarian crises or the selection bias in these cases of intervention can be explained by the assignment of various priorities to other interests at any particular time.

Having said that though, it seems to be the case that not all states are supportive or in

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favor of the proactive international interventionist stance. International support has been forthcoming mainly from Western states. France has been in the forefront and took the lead in supporting a new humanitarian intervention, and to this end has even created a ministry of humanitarian affairs to deal exclusively with those issues. In July 1991, President Mitterand stated "France had taken the initiative of this new right, rather extraordinary in the history of the world, which is in a way the right of intervention within a country, when parts of its population are victims of persecution." Humanitarian issues have become a major matter of French diplomacy within the UN. French initiatives led to the adoption of UN General Assembly Resolution 43/131 (1988), which recognized the right of humanitarian assistance to victims of natural disasters and similar emergency situations, and Resolution 45/100 (1990) which reaffirmed these rights and the endorsement of the "corridors of tranquility" concept in order to facilitate the work of humanitarian agencies. It is therefore not surprising that, given the context of collective efforts aimed at alleviating human misery and suffering, France was actively involved in UN operations in Iraq, Somalia and Bosnia and took the initiative, albeit too late, in responding to the

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221 France has advocated a new right and duty of intervention. This discourse has its foundations in ethical concerns grounded in human rights conceived as minimum standards. Bettati and Kouchner have been its foremost proponents. Kouchner has argued "humanitarian intervention, backed by UN resolutions, has become our duty. And little by little, under the impetus of war, catastrophe and the awakening of the world conscience, this duty should become our right; to intervene wherever victims are calling out for help, where human beings are suffering and dying, regardless of borders". Kouchner, "A call for Humanitarian Intervention" UNHCR, (Dec.1992) Refugee Magazine, quoted in Harris ed; supra, note 2 at 61. Even though this position has not been accepted as common practice, international opinion seems to be moving in that direction For a detailed discussion of d'ingerence see for example, Bettati, "The right of humanitarian Intervention or the Right of Free Access to Victims?" (1992) 49 The Review: International Commission of Jurists 1; Sandoz, "Droit' or Devoir d' Ingerence and the Right to Assistance: The Issues Involved" (1992) 49 The Review: International Commission of Jurists 12; Garigue, Intervention-Sanction and Droit D'Ingerence in International humanitarian Law" (1992) XLVIII International Journal 668; Bowring, "The Droit et Devoir D'Ingerence; A Timely New Remedy for Africa? (1995) 7: 3 African Journal of International and Comparative Law 402; Guillot, "France, peacekeeping and Humanitarian Intervention" (1994) 1: 1 International Peacekeeping 30-43. 222 Quoted in Bettati, ibid; at 5. Elsewhere, French Foreign Minister Dumas has commented "France believe that the law of humanity takes precedence over the law of nations and should always serve as a basis for the latter; and that the duty to provide humanitarian assistance, ever more an integral part of today's universal conscience, should be embodied in international legislation in the form of a "right to intervene on humanitarian grounds". Quoted in Torrelli, "From Humanitarian Assistance to Intervention on Humanitarian Grounds?" (1982) International Review of the Red Cross 228 at 229. 223 France was also responsible for the origins of GA Res./Res/46/182 (1991), requesting the UN Secretary general to establish the position of an emergency assistance coordinator to work with governments and insurgents to provide more effective humanitarian assistance. This ultimately led to the establishment of the UN department of Humanitarian Affairs in early 1992.
humanitarian tragedy in Rwanda. Thus, with regard to the justification for the French intervention in Rwanda, its Foreign Ministry claimed a legal duty to intervene for humanitarian reasons.

Appalled by the response to the Rwandan crisis, the Danish Foreign Ministry convened a study group jointly to evaluate the emergency assistance to Rwanda, which resulted in a report that Hindell characterizes as essentially an interventionist manifesto.224 Germany and Belgium expressed similar sentiments. Genscher, the former German Foreign Minister, in his speech at the UN General Assembly expressed that “where human rights are trampled upon, the family of nations cannot be confined to a role of spectator.”225 The Belgian Foreign Minister also declared that: “the international community should help states to respect human rights, and to force them to do so, if necessary.”226 This statement emphasizes the idea that governments must be held accountable for the human rights violations of their citizens. Thus, forcible measures should, if necessary, be employed in extreme situations that warrant its use. Following the intervention in Iraq, the British Foreign Secretary, Douglas Hurd, proclaimed that “recent international law recognizes the right to intervene in the affairs of another state in cases of extreme humanitarian need.”227 Britain has consistently supported Security Council resolutions dealing with humanitarian crises discussed earlier. The Canadian government took a significantly different approach in dealing with sovereignty, internal conflicts and human rights violations abroad. Former Canadian Prime Minister Brian Mulroney drew an analogy between internal violence and international violence by saying “just as it is no longer acceptable for society, the police or the courts to turn a blind eye to family violence, so it is equally unacceptable for the international

225 Ibid.
226 Ibid.
227 Quoted in supra, note 25 at 2.
community to ignore violence and repression within national borders." 228 The new approach in Canadian foreign policy has been supportive of humanitarian intervention, although this has not been without controversy. In September 2000, the Canadian government also established an independent International Committee on Intervention and State Sovereignty (ICISS). 229 At the outset of the Clinton administration, a policy of "assertive multilateralism" was put forth, This policy was to see the US working closely with international institutions like the UN in addressing intractable problems like ethnic conflicts, aggression, genocide and the survival of democracy in the face of tyranny, among others. The then the US Permanent Representative to the UN, Albright, outlined the relationship that the US will forge in the UN. She pointed out the fusion of peacekeeping and peace enforcement operations with the delivery of humanitarian assistance as examples of what the US will support. 230

At the UN Security Council summit meeting in 1992, Russian President Yeltsin intimated support for the primacy of human rights and the need for a rapid response mechanism to consolidate the rule of law throughout the world. 231 At the very least, Russia and other former Soviet Republics have explicitly expressed their intention to participate actively in international institutions, 232 or at least acquiesce in the international community's efforts towards such ends.

228 Notes for an address by Prime Minister Brian Mulroney on the Occasion of the Centennial Anniversary Convocation, Stanford University, California, Sept. 29, 1991. Cited in Gillies, "Human rights or state Sovereignty? An Agenda for Principled Intervention" in Charlton and Riddle-Dixon eds; International Relations in the Post-Cold war Era. Canada, 1993) at 463. Similarly, the Canadian representative to the UN points out that "the principles of sovereignty and non-intervention in internal affairs of states no longer reign in the UN" Indeed the pressure felt in the UN is for more intervention, not less and the debate of the future may revolve less around the question of whether the UN has the right to intervene than whether it has a duty to do so". "Lessons from Recent UN operations in Yugoslavia, Cambodia and Somalia" (Address to the Sixth Annual Meetings of the Academic Council on the United Nations System, Montreal, June 18, 1993) at 17: 1 the Quoted in Weiss, "Intervention: Whither the United Nations" (1993) 17: 1 The Washington Quarterly 109 at 124.


230 Cited in Scheffer, supra, note 2 at 283.

This development has permitted the UN to take actions that it would previously not have taken.

In Northern Iraq, resolution 688 was passed to protect the Kurdish population through the creation of no-fly zones and Kurdish enclaves. In this case, the Security Council emphasized the link between respect for human rights and maintenance of international peace and security. In Somalia, UNOSOM was created by Resolution 751 to monitor a ceasefire and escort delivery of humanitarian supplies. Resolution 794 authorized the use of “all necessary means” to establish a secure environment for humanitarian relief operations which provided the basis for the US-led deployment of UNITAF. Under Resolution 814, the UN assumed transitional authority in Somalia, where the use of force was authorized to restore law and order, and to deal with bandits. Moreover, in the case of former Yugoslavia, Resolution 743 established UNPROFOR with a mandate “to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis.” In a series of resolutions, the Security Council demanded an unimpeded delivery of humanitarian supplies for the populations of Sarajevo and other parts of the country. Resolution 770 called on states and regional organizations to take “all measures necessary”, including use of force, to protect humanitarian convoys in Bosnia. Furthermore, in Rwanda the UN mandate before the genocide broadly related to monitoring implementation of the Arusha Accords. Resolution 912 reduced the number of troops with a mandate to mediate between the government and rebel forces, and to assist in humanitarian relief operations. By Resolution 918, the mandate was expanded to include protection of refugees through the establishment of safe humanitarian zones and the provision of security for relief operations. Resolution 929 eventually authorized member states to use “all necessary means” to carry out humanitarian operations. In Liberia, ECOWAS troops intervened in that country to end the civil
strife, restore law and order, and prevent further loss of life. The Security Council in resolution 788 commended the ECOWAS effort to find a solution to the conflict. Finally, in Haiti, Security Council Resolution 841 imposed wide-ranging sanctions in 1993 on the Haitian military regime. Resolution 940 called on member states to form a multinational force and to use “all necessary means” to return Aristide to power. The United Nations Mission in Haiti (UNMIH) was finally deployed to replace US forces. In Kosovo, Resolution 1160 (1998) imposed an arms embargo on Yugoslavia. In East Timor, Resolution 1246 stated that the situation in East Timor was a threat to international peace and security and there was a need to restore peace and security, and to facilitate humanitarian assistance to East Timor. These resolutions reflect the UN’s willingness, at least in principle, to find massive human rights violations as constituting threats to or breaches of international security, and thus taking action not excluding military measures to redress those violations.

Opposition to humanitarian intervention has mainly come from Third World countries. Many non-Western states view with skepticism the motives of Western countries in advocating humanitarian intervention. States such as China, India \(^{233}\) and Zimbabwe \(^{234}\) have been at the forefront in arguing that it is not within the domain of the Security Council to handle human rights issues. China is very important in this regard since it has a veto in the Security Council. However, it has proceeded cautiously. It has so far gone along with other Security Council members, albeit reluctantly, in authorizing UN humanitarian interventions, or it has abstained

\(^{233}\) India has intimated its readiness to develop “general principles and guidelines for such intervention”. See UN s/vp. 3046 31 January 1992. Cited in Childers and Urqhart, Renewing the United Nations System (Uppsala: Dag Hammerskjold Foundation, 1994) at 18.

\(^{234}\) Zimbabwe seems to be retreating from this position. In reaction to ECOMOG’s intervention in Liberia, Zimbabwe’s president Mugabe stated the “domestic affairs” of a country must mean affairs within a peaceful environment, but when there is no government in being and there is just chaos in the country, surely the time would have come for an intervention to occur". Ephson, “Right to Intervene”, quoted in Wippman, “Enforcing the Peace: ECOWAS and the Liberian Civil War” in Damrosch ed; supra, note 1 at 182. See also, ibid.
from voting in that regard.\textsuperscript{235}

Furthermore, concerns have been expressed about the expanding definition of "international peace and security" by the Security Council.\textsuperscript{236} Scepticism is expressed regarding the interpretation of what amounts to "a threat to the peace, breach of the peace, or act of aggression" to include issues which were previously considered to be within the domestic affairs of states. The Security Council can become involved in issues ranging from peace building and peace enforcement, early warning systems and the protection of human rights to nonmilitary threats to peace and security in the economic, social, humanitarian and ecological fields.\textsuperscript{237} The ever-increasing powers of the Security Council have created an apprehension among certain Third World states of being subject to, in the words of Dallmeyer, a "hegemony directorate", or what Nafziger describes as "the spectre of a modern Holy Alliance of the Great Powers" that could dispense with the principle that the basis for the UN action in a state's domestic affairs must be subject to that state's consent.\textsuperscript{238} Some of these states perceive a greater threat from the

\textsuperscript{235} Wheeler and Morris comment that the reason for Chinese caution remains unclear, though it seems her experience with colonial powers, and a radically different notion of human rights grounds a policy that places sovereignty over Article 2 (7) of the UN Charter acts as a strong brake on Security Council mandated humanitarian intervention, her options are limited by wider political constraints. This dictates not stepping too far out of line with a Security Council dominated by its three Western permanent members, especially the US. Wheeler and Morris, supra, note 19 at 162-163.


\textsuperscript{238} Dallmeyer provides an example of reaction by certain third world states towards a proposal to provide emergency humanitarian assistance following major disasters. The Moroccan representative stated: "we believe also that any international assistance in this area must be subject to consent, following a request by a state, and must be compatible with needs and priorities. This consent and the appeal of the state concerned must be respected. Our country cannot go along with any undertaking designed to create autonomous machinery that, if not properly defined and strictly controlled, could result in interference in the internal affairs of states. The Indian representative stated: "The Charter of the United Nations stresses the domestic jurisdiction of states; nobody can or should dilute this aspect of national sovereignty, even if the stakes are high". The Pakistani delegate observed: "First, no attempt should be made to compromise national sovereignty when providing emergency assistance. We agree with those who have categorically rejected the use of humanitarian relief as a disguise for political intervention". Finally, the representative of Tunisia stated: "First, there must be consensus on this important and complex question. Emergency humanitarian assistance
permanent members of the Security Council than which existed during the Cold War contest between the superpowers. Some Third World states have thus argued that the General Assembly should maintain a greater involvement in decision-making processes regarding humanitarian intervention lest the UN becomes dominated by the major powers using it for their own interests. In cautioning against an expansion of the definition of humanitarian intervention, the Chairman of the Group 77 noted:

"the G77 is slightly worried that some may...not be sensitive to certain pleas for anabiding respect for the sovereignty of nations. Our concern stems from our historical

necessarily involves the participation of several parties, including donor and recipient countries. Secondly, the main responsibility for disaster management rests with the governments of the stricken countries. Humanitarian assistance should in no case violate the principle of national sovereignty. Any reform in this field should, in our view, fully respect national sovereignty as embodied in the consent given or the request made by the country concerned". See UN/46/PV. 41 at 19-56. Quoted in Dallmeyer, "National Perspectives on International Intervention: Form the Outside Looking in" in Daniel and Hayes eds; Beyond Traditional Peacekeeping (London: Macmillan Press Ltd; 195) 20. See also Nafziger, "humanitarian Intervention in a Community of Power part II" (1994) 22 Denver Journal of International Law and Policy 219 at 230.

A publication by the United Nations Association in the United States, notes "the East-West rapprochement and the invigoration of the Security Council have left many developing countries deeply concerned about their vulnerability to international intervention in the post-Cold War era. There is now no counter-balancing political bloc to discourage Western countries from using economic pressure to force a developing country government to make the sort of internal changes they believe desirable; and the big powers have now demonstrated the potential for forceful intervention under the aegis of the Security Council. Governments of weak and poor states, acutely aware of the limited nature of their sovereignty in confronting the global tides of economic, social, environmental, and communication changes, have drawn the line to assert at least their political sovereignty. They have blocked efforts by Western powers to add to the Security Council agenda such issues as environment, drugs, and democratization-issues that, they fear, might be used to justify international intervention in their affairs-insisting that such matter are the province of the General assembly, whose one-state/one-vote rule of decision-making embodies the Charter principle of the sovereign equality of states". UNA-USA, The Common Defense; Peace and Security in Changing World 91992) at 34, quoted in Nafziger, ibid; at 230-231, footnote 54. A detailed discussion of specific proposals, and the pros and cons of Security Council reform is beyond the scope of this work. On these issues see the Report of the Independence Working Group on the Future of United Nations in its second half-Century; Sutterlin, "United Nations Decision-making: Future Initiatives for the Security Council and the Secretary General" in Weiss eds; Collective Security in a Changing World (Boulder: Lynne Rienner Publishers, 1993) 121-138; Russet, O'Neill and Sutterlin, "Breaking the Security Council Logjam" (1996) 2: 1 Global Governance: A Review of Multilateralism and International Organizations 65; Smith, comment, "Expanding Permanent Membership in the UN Security Council: opening a Pandora's Box or Needed Change? (1993) 12 Dickinson Journal of International Law 173; Bills, Note, "International Human Rights and Humanitarian Intervention: The Ramifications of Reform on the United Nations' Security Council" (1996) 3: 1 Texas International Law journal 107; Caron, "the Legitimacy of the Collective Authority of the Security Council" (1993) 78 American Journal of International Law 552; Weiss, "Whither the United Nations" (1993) 17; 1 The Washington Quarterly 109.

Nafziger, ibid; at 231.
past, when many of us, as colonial subjects, had no rights. The respect for sovereignty which the UN system enjoins is not an idle stipulation that can be rejected outright in the name of even the noblest gestures.... An essential attribute of that sovereignty is the principle of consent, one of the cornerstones in the democratic ideal itself.”

In essence, international intervention is viewed with suspicion and fear since it brings back memories of imperialism, colonialism, racism and humiliation which militates against any broadly based formulation of principles regarding intervention. Nevertheless, this attitude of outright hostility to humanitarian intervention seems to be changing. As noted in the last chapter, comments by several prominent African leaders endorsing ECOMOG’s role in Liberia demonstrate shifting attitudes and thinking about sovereignty and under what circumstances intervention may be appropriate. This seems to be consistent with Childers and Urqhart’s findings of a growing readiness among Third World countries to find ways for “genuinely disinterested and UN-directed humanitarian intervention.”

Moreover, international organization appears to open the door to a more vigorous approach to humanitarian interventions. Within institutional secretariats, the former UN Secretary General, Boutrus Ghali, in his Agenda for Peace, and the Supplement to the Agenda offers a useful starting point. Boutrus Ghali observed that respect for sovereignty and integrity is “crucial to any common international progress,” but “the time of absolute and exclusive sovereignty...has passed” and it was necessary for governments “to find a balance between the needs of good

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242 Dallmeyer, ibid.
243 See supra, note 39.
internal governance and the requirements of an ever more interdependent world."\textsuperscript{244} During his time in office, Boutros Ghali regularly urged the Security Council to devote equal attention to less prominent trouble spots of the world when it seemed the Council would not discuss or even act in certain situations.

The theme of a more assertive humanitarianism was commented on by other prominent secretariat officials. The former UN representative in Somalia, Mohamed Sahnoun, observed that "governments cannot invoke sovereignty to prevent humanitarian access to the population...if there is a humanitarian catastrophe, the international community is morally bound to intervene."\textsuperscript{245} In a similar context, Jan Eliasson, Under-Secretary General of the UN Department of Humanitarian Affairs, in response to a question as to whether there is a moral obligation for the international community to respond to humanitarian crises, asserted that "certainly there is a moral obligation, and now also an obligation that is accepted by...member states of the UN." He went on to admit that "the concept that solidarity does not end automatically at a border but rather with a human being in need has broken through in the humanitarian area."\textsuperscript{246} Commenting on the role of the Security Council in the post-Cold War era, the present UN Secretary General, Kofi Annan, Undersecretary General for peacekeeping operations stated that "the Council is moving towards greater interventionism because in many tragedies public opinion perceives a human imperative that transcends anything else. We are using more force because we are encountering more resistance."\textsuperscript{247}

Writing about concerns leading to an effort to better define conditions under which humanitarian intervention could be undertaken, the Undersecretary General for Political

\textsuperscript{244} Supra, note 43 at 5.
\textsuperscript{245} Sahnoun, "An Interview with M. Sahnoun" (1994) 2-3 Middle East Report.
\textsuperscript{246} Eliasson, "interview-the UN Humanitarian Assistance" (1995) 48:2 Journal of International Affairs at 492-493.
\textsuperscript{247} Quoted in Martin, "peacekeeping as a Growth Industry" (1993) 32 The National Interest at 3.
Affairs sums it up as follow:

"In interviews with representatives of member states at the United Nations and in discussions at various seminars, there is no objection to humanitarian intervention where there is overwhelming evidence that many people are starving and those involved in the conflict are deliberately preventing the international community from delivering humanitarian assistance to those who need it. There is a consensus that under such conditions efforts must be made to overcome obstacles and to override the objections of the warring parties. There is also a consensus that these efforts should not be carried out unilaterally-either by one country or a coalition of countries-but that such a situation should be brought to the attention of the international community to obtain a clear mandate for humanitarian intervention." 248

Another development occurred in Africa during the African Summit in Burkina-Faso in 1998. President Mandella of South Africa, speaking at the Summit, pointed out that "we should know that we are not encroaching upon the sovereignty and we cannot deprive the continent of the right release it from the duty of intervention and at the same time people have been slaughtered in the cause of protecting a totalitarian regime." 249 Mandella's speech was a good sign for the OAU to intervene whenever gross human suffering takes place. Thus, it appears the consensus supports multilateral intervention in situations of extreme human rights deprivations and suffering.

With regard to regional organizations, international enforcement action involved their use, for example, in the former Yugoslavia. Security Council authorization to states "acting nationally

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248 Jonah, "humanitarian Intervention" in Weiss and Minear eds; Humanitarian Across Borders; Sustaining Civilians in Times of War (Boulder: Lynne Reinner Publishers, 1993) 69 at 70.

266
or through regional organizations” to enforce a no-fly zone over Bosnia, to enforce economic sanctions and to protect the Bosnian Muslims through the concept of safe havens were undertaken through NATO and the Western European Union. As Solana, NATO Secretary General, points out “NATO helped bring the war to an end through its support over several years to the United Nations through its limited, but effective use of airpower.” He continues by saying “not to meet the challenge of Bosnia would have been a profound failure of collective will and an abdication of moral responsibility by the entire international community.”

These statements suggest NATO had in the past complemented UN efforts and that, where necessary, the organization will support future UN efforts when called upon.

The Haitian problem served as a trigger for the OAS to overcome its reservations regarding interference in the domestic affairs of states. The Santiago commitment of June 1991, in which the OAS resolved that any “sudden or irregular interruption of democratic political institutional process” in any one of the member states would result in the convening of an emergency meeting to decide what to do, was vital in establishing “a normative trigger” to deal with Haiti, even though “articulation of the response was too weak to constitute a deterrent.”

Nevertheless, more significantly, the declaration “internationalizes the issue of domestic governance, stating that democracy and human rights are essential to regional identity.” If the lessons of Haiti are anything to go by, then it seems the OAS will be prepared to take similar kinds of action in future, even if they fall short of the use of force where democratic rule- and consequent violations human rights- is truncated.

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250 Solana, “NATO role in Bosnia: Charting a New Course for the Alliance” 91996) XLV!! Review of International Affairs 1.
251 Damrosch, supra note 1 at 351.
252 Wedgwood, “Regional and Sub-regional Organizations in International Conflict Managements” in Crocker et al; supra, note 36 at 279.
The Somali tragedy has influenced the OAU in rethinking its approach to issues of sovereignty, human rights and intervention. Prior to the Somali crisis, African states were reluctant to allow foreign intervention in internal strife on the continent. However, a change of viewpoint seems to be underway. At the OAU foreign ministers meeting in Addis Ababa in 1992, and its summit meeting in July 1992, African states were prepared to approve intervention in circumstances such as Somalia.253 OAU commendation of the ECOWAS action in Liberia has already been noted. Since the tragedy of Somalia, the Organization's Secretary General, Salim Salim, has made bold proposals for an OAU mechanism for conflict prevention and resolution. He has observed that “if the OAU is to play the lead role in any African conflict” then “it should be enabled to intervene swiftly.” He goes on to suggest that the OAU should be a leader in transcending the traditional notion of sovereignty, building on African values of kinship, solidarity, and the view that “every African is his brother’s keeper.”254 It is also interesting to note that African leaders gave their support for a military intervention to dislodge leaders of the recent coup in Sierra Leon. A Nigerian-led alliance took military action in that country which eventually led to the return of the ousted president. Reacting to the events, the UN Secretary General noted there was general African acceptance of the military intervention. The Nigerian-led move had also enjoyed the apparent, if not explicit, support of the OAU and the Commonwealth, whose General Secretary called a military intervention “totally justified.”255 As noted earlier, these developments suggest an increasing recognition by many African states and the OAU that a total prohibition on intervention in states’ internal affairs as a result of suffering caused by war, or widespread human rights violations is no longer feasible or necessarily in their interest.

253 Supra, note 55 at 74.
254 OAU Council of Ministers, Report of the Secretary General on Conflicts in Africa, quoted in Deng, supra, note 6 at 299.
Nongovernmental organizations (NGOs)\textsuperscript{256} are also becoming central to international responses to internal conflicts, and have performed important humanitarian tasks alongside other actors in the post-Cold War period. This increasing importance of NGOs is becoming evident in the fact that "some control programmatic resources that rival or dwarf those of many governments and UN agencies."\textsuperscript{257} During the Cold War, when UN agencies operations were limited due to political considerations, NGOs mostly became the conduit through which relief reached suffering populations. NGOs have been more flexible, less partial, and operate to some extent on rules of neutrality in their delivery of relief supplies in situations of conflict.

The rise of NGOs in emergency relief throughout the 1980s was spectacular. In 1991, European-based NGOs delivered about 450,000 tones of food aid to Africa, in comparison with about 180,000 tones in 1989.\textsuperscript{258} In 1994 NGOs accounted for over 10\% of total public development aid which amounted to some $8 billion. They earmarked about half of the ever-

\textsuperscript{256} Anderson has stated that "nongovernmental organizations are privately organized and privately financed agencies, formed to performed some philanthropic or other worthwhile task in response to a need that the organizers think is not adequately addressed by public, governmental, or UN efforts". These NGOs receive private contributions or are founded with funds from private sources. Some rely on founding from their national governments, and others completely avoid any government funding, Anderson, "Humanitarian NGOs in Conflict Intervention" In Crocker te al; supra, note 36, at 344. A distinction is usually made between national and international NGOs. The Latter, may however, be described as nationals NGOs that extent their activities internationally. Anderson identifies four different mandates that NGOs mainly based in Europe and North America, and operating internationally, carry out. These are: 1) The provision of humanitarian relief to people in emergencies. 2) The promotion of long-term social and economic development in countries where poverty persists. 3) The promulgating and monitoring of basic human rights, and 4) The pursuit of peace, including the promotion of the philosophy and techniques of negotiation, conflict resolution, and nonviolence. NGOs have grown over the last forty years from 832 in 1951 to 16,208 in 1990. It is estimated the some 400 to 500 international NGOs are currently involved in humanitarian activities world-wide. Beigbeder, The Role and Status of International Intervention Volunteers and Organizations: The Right and Duty to Humanitarian Assistance (Dordrecht: Martinus Nijhoff Publishers, 1991) at 80-82. Cited in Martin, "International Solidarity and Cooperation in Assistance to African Refugees: Burden-Shafting?" (paper presented at the Eighth Annual Meeting of the Academic Council on the United Nations System, New York City, 19-21 June 1995) at 12. On the changing nature of NGOs, see for example, Aall, "Nongovernmental Organizations and Peacemaking" in Crocker et al; ibid; at 433-443.

\textsuperscript{257} Examples of these NGOs include: World Vision International, Save the Children, CARE, International Rescue Committee, Medicine without Borders, Oxfam, and Catholic Relief Services. These organizations engage in various activities in almost all humanitarian crises. Others, operate in specific countries or continents, sectors, or population groups. The International Committee of the Red Cross (ICRC), which Weiss places in a category by itself, assists and protects individuals in both international and non-international armed conflicts. This organization consists of governmental and nongovernmental members, with donor governments funding about 90\% of its $500 million budget. Weiss, "Nongovernmental Organizations and Internal Conflict" in Brown ed; supra, note 36 at 439.

\textsuperscript{258} Griffith et al; supra, note 2 at 72.
growing percentage of their resources to emergency relief.\textsuperscript{259} According to Weiss, “about one-quarter of US development aid is being channeled through NGOs as of the mid-1990s”, and this is expected to increase to one-half by the beginning of the 2000s.\textsuperscript{260} The reasons for NGOs’ success in emergency relief work, according to Griffith, Levine and Weller lie in their “flexibility, speed of reaction, comparative lack of bureaucracy, operational and implementation capacity, and the commitment and dedication of the usually young staff”. In addition, “the political independence of the NGOs....gives them a strong comparative advantage in increasingly complex internal conflicts.”\textsuperscript{261} Their “low overhead operations help victims that governmental and intergovernmental aid programs often fail to reach.”\textsuperscript{262} Thus, bilateral and multilateral organizations are increasingly relying on NGOs as sub-contractors. While this trend will allow for expansion of the scope of their activities, some NGOs have expressed concern about the possibility of being exploited by governments or international institutions with a consequent loss of autonomy in their operations.\textsuperscript{263}

The provision of humanitarian relief by NGOs has become a vital supplement to the efforts of governments and international institutions to rebuild societies torn apart by war. NGOs’ response to humanitarian crises caused by internal conflicts in the post-Cold War era has meant that they are often trapped in the midst of this violence. Thus, it becomes important to assess their views on the use of force in addressing these crises.

NGOs’ support for the use of military forces in the complex humanitarian emergency

\textsuperscript{259} Weiss, in Brown ed; supra, note 36 at 441–442.
\textsuperscript{260} Ibid; at 442. See also, Bennet et al; Meeting Needs: NGOs Coordination in Practice (London: Earthscan Publications, 1995) at xi.
\textsuperscript{261} Griffith et al.; supra, note 2 at 72.
\textsuperscript{262} Ibid.
\textsuperscript{263} See Weiss, in Brown ed; supra, note 36 at 442. Also, see Weiss ed; Beyond UN Subcontracting: Task-Sharing with Regional Security Arrangements and Service-Providing NGOs (London: Macmillan Press, 1998).
situations of the 1990s appears to be mixed. UN military actions have been the "objects a loud chorus of criticism or mixed messages from parts of the NGO community- some calling for military intervention one day and then castigating it the next."264 Given the pacific nature of humanitarian NGOs, it is not surprising that many of them have been critical of the use of force in the various UN missions. However, as Keen, Curtis and Slim suggest, there is a tendency among the NGO community where "it has certainly been of most de rigueur to concentrate on the failings of UN military humanitarianism rather than to identify what military forces can do well in such situations."265 While African Rights, for instance, has described UN and NGOs missions in this period as one of liberating humanitarian organizations from "the Cold War straight-jacket," it has nevertheless been critical of these missions. It has characterized these missions as "a reckless period of humanitarianism unbound in which assertive humanitarian policies have often done more harm than good".266 Some NGOs, such as Save the Children Fund (SCF), believe that the injection of UN military forces in humanitarian emergencies actually worsens the situation. SCF has stated that:

"military intervention is no panacea...greater military intervention by the international community should not be automatically equated with rapid and durable solutions...once the UN intervenes militarily in a humanitarian emergency, as in Somalia, its actions can all too easily become another complicating ingredient of the problem."267

Slim and Visman have argued UN military operation in Somalia in early 1993 made NGOs less

secure with the disarming of armed guards hired by the NGOs while leaving the rest of the country still armed.\footnote{Slim and Visman, “Evacuation, Intervention and Retaliation: United Nations Operations in Somalia, 1991-1993” in Harriss ed; supra, note 2, 145 at 156-157.} Once the UN had decided that it was embarking upon disarming these armed guards, a more persistent and appropriate level of force should have been used to disarm other armed bandits who were left to roam the countryside, and who carried out attacks on relief consignments targeted for the civilian population.

There seems to be a dilemma among the NGO community on the use of force regarding situations of intense levels of violence and acute human suffering. As Wheeler asks, in cases where NGO operations are overwhelmed given the level of violence and human suffering, should they appeal to states to use force knowing that such use of force, while unlikely to offer a lasting solution, might save a lot of lives in the short term?\footnote{Wheeler, “Agency, Humanitarianism and Intervention” (1997) 18: 1 International Political Science Review 9 at 22.} In answering this question, Cuny has noted how NGOs operating in the former Yugoslavia and Somalia “resented their sponsoring governments’ willingness to place them in harm’s way without providing adequate security, either by peacekeeping forces or direct intervention.”\footnote{Cuny, “Humanitarian Assistance in the post-Cold War era” in Weiss and Minear eds; supra, note 55 at 33.} Luck, head of the UN Association of the US, has stated that when “a national government collapses, leaving chaos and widespread domestic violence in its place” the UN is justified in authorizing a multilateral military intervention.\footnote{Luck, “Making Peace” 91992-93) 89 Foreign Policy at 145.}

In the former Yugoslavia, NGOs were initially hostile to the idea of armed protection for humanitarian convoys but, as the situation deteriorated, they finally succumbed to the idea.\footnote{Guillot, supra, note 26 at 33.} Having resisted since its inception to advocate the use of force for humanitarian purposes, Medicine without Borders eventually called for it in response to the genocide in Rwanda in

Other NGOs, such as the International Commission of the Red Cross (ICRC), argue that the use of force has a role to play in preventing massive violations of human rights. It notes military forces were effective when ordered to protect civilians in Rwanda, and that far more lives could have been saved had the UN employed military force to stop the genocide. Capability of even a small UN force to save more lives in Rwanda in May 1994, and the French action to secure the chaotic situation in southwest Rwanda subsequently, according to Weiss, led Oxfam to conclude that "the policy of caution about UN peacekeeping, induced by experiences in Somalia, should now be reviewed." Thus, it appears to be the case with NGOs, as Hermet suggests, that the level of human suffering has come to mean "there could be no qualms about the methods used."

In sum, there is a shift underway in terms of principle and practice of humanitarian intervention in the post-Cold War era. There is the belief that state sovereignty connotes responsibility and cannot be used as a shield to commit massive and systematic violations of human rights. Human rights have been a recurring normative theme in international relations. From the inception of the state system, the Peace of Westphalia, which marked the ideas of sovereign authority of the state, and subsequent peace treaties noted earlier, contained significant clauses limiting sovereign prerogatives vis-à-vis the rights of populations inhabiting their territories. Contemporary post-1945 developments have also seen an elaborate international

273 Supra, note 73 at 22.
277 Blechman observes "the belief that governments have a right, even obligation, to intervene in the affairs of other states seems to have gained great currency in recent years". Blechman, in Crocker et. Al supra, note 36 at 288.
human rights regime starting from the UN Charter and the Universal Declaration of Human Rights, to the 1966 UN Covenants on Human Rights and beyond. These documents spell out responsibilities of governments toward their citizens in terms of promoting and protecting their human rights. Recent innovations, such as the OAS's Santiago Declaration, the OSCE's Copenhagen Document and the Harare Commonwealth Declaration, contain notable human rights provisions. Even states applying to join NATO's "partnership for peace" are required to commit to the Universal Declaration on Human Rights. Similarly, international financial institutions like the World Bank have, since the 1980s, imposed various political conditionalities, including respect for human rights, as a prerequisite for receiving financial loans and aid. Most Western countries in their dealings with Third World countries have as well incorporated the linking of aid and trade to human rights in their foreign policies. The Commission on Global Governance has recently acknowledged that:

"Global security extends beyond the protection of borders, ruling elites and exclusive state interests to include the protection of people....To confine the concept of security exclusively to the protection of states is to ignore the interests of people who form the citizens of a state and in whose name sovereignty is exercised. It can produce situations in which regimes in power feel they have the unfettered freedom to abuse the right to security of their people....All people, no less than states, have a right to secure existence, and all states have an obligation to protect those rights."

As Jackson argues, "human security presupposes the sovereignty of the people and where those

278 For a discussion of this Declaration as well as an overall commitment by the Commonwealth to human rights issues, see for example, Duxbury, "Rejuvenating the Commonwealth-The Human rights Remedy" (1997) 46: 2 international and Comparative law quarterly 344-377.
conditions are not met a human right of security can be invoked to protect people endangered by that development."  

These policies and practices suggest adherence by governments to certain principles in their domestic practices. Interventions to protect human rights should thus not be seen as incompatible with state sovereignty but rather affirming it. Support for humanitarian intervention is on the rise among scholars, states (to a lesser degree among Third World states), in institutional secretariats, and it seems in the NGO community, at least in cases of intense violence and human suffering. The trend, however, is still unfolding and if the international community should move towards an entrenched notion of humanitarian intervention, the UN can use recent cases to provide a framework for laying down some general principles or guidelines on when an internal situation warrants international action, either through authorization by the Security Council or a regional organization.

It is apparent that, although support for humanitarian intervention is gaining currency, there are still various actors opposed to its use. In order to get closer to an international consensus, a clear articulation of principles is necessary to further enhance the legitimacy of humanitarian interventions. To this end, some analysts have proposed the Security Council and the General Assembly jointly adopt a standard operating procedure for humanitarian intervention.  

281 In Adam Robert’s view “one might even say that if a coherent philosophy and practice of humanitarian intervention could be developed, it could have the potential to save the nonintervention rule from its own logical absurdities and occasional inhumanities”. Roberts, “The Road to Hell”: A critique of Humanitarian Intervention” (1993) 16: 1 Harvard International Review at 11. Nafziger, for example, proposes that: “the General Assembly and the Security Council might jointly adopt a resolution on humanitarian intervention. It should preempt unilateral actions. Accordingly, member states would be authorized, only under the resolution, to undertake measures in other states that are deemed necessary to vindicate fundamental human rights. Such measures might include the use of force, unless the target state agreed within a reasonable period of time to submit immediately to fact-finding and conciliation procedures, and in good faith to carry out any resulting recommendations or decisions. Under Articles 98 and 99 of the UN Charter, the Secretary General might continue to play a central role. Rescue missions requiring an immediate response would be an exception; these would be governed primarily by customary rules of law, such as immediacy,
very least, some kind of general declaration or statement analogous to the Copenhagen Document or Santiago Declaration would be appropriate. While international consensus, understood not necessarily to mean unanimity but eliciting the widest possible support to bring this about, will be a difficult undertaking, it is nevertheless worth exploring. It is in this regard that the notion of epistemic communities becomes important.

3- The Role of Epistemic Communities in Forging Consensus

Epistemic communities have been employed in altering perceptions and framing the context for collective responses to various international problems. Examples of specific issue-areas in which epistemic community roles have had significant influence include arms control, where a US based epistemic community framed the issue and cultivated an interest in superpower cooperation around the theme of nuclear arms control. In pollution control, ecologic epistemic community activities have engendered joint decisions emphasizing environmental protection. In proportionality, and necessity. Thu, humanitarian intervention by one state would be permissible only under tow circumstances: (1) if a target state had declined to submit a dispute to impartial review within a reasonable period or time; (2) if after agreeing to do so, the target state failed to comply in good faith with resulting recommendations or decisions. Humanitarian intervention would be subsumed within a process of community decision, and would be authorized only as a last resort when Article 33 procedures have failed. Effective community deliberations and collective initiatives, rather than unilateral argument and doctrinal justification of intervention, would become the hallmark of a new process of multilateral dispute resolution". See Nafziger, supra, note 44 at 229. Burton also proposes codification of a limited doctrine of unilateral humanitarian intervention in one of three forms: (1) an amendment to the UN Charter; (2) a multilateral treaty; or (3) a General Assembly resolution. "Legalizing the Sub-regional: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention" (1996) 85: 2 The Georgetown Law Journal 417 at 440-448.

The Copenhagen Document recognizes a responsibility to protect democratically elected governments, if these are threatened by acts of violence or terrorism. Document of the Copenhagen Meeting of the Conference on the human dimension of the Conference on Security and Cooperation in Europe (CSCE), required in (1990) 29 International Legal Materials 1305. For comments on the Document see Halberstam, "The Copenhagen Document: Intervention in Support of Democracy" (1993) 34 Harvard International Law Journal 163. A similar declaration is the Moscow Concluding Document. This Document affirms the CSCE’s power to conduct investigations of human rights violations in member states without their consent. See Conference on Security and Cooperation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-finding, reprinted in (1991) 30 International Legal Materials 1670. The Santiago Declaration calls for an automatic meeting of the OAS Permanent Council in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the organization member states, in order within, the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the Ministers of foreign affairs, or a special session of the General Assembly, all of which must take place within a ten-day period". It further stipulates the purpose of any of such meeting should be "to look into the events collectively and adopt June 5, 1991, OAS AG/Res. 1080 (xx1-0/91). It was pursuant to these provisions that the OAS adopted economic sanctions against Haiti following the coup that toppled President Jean-Bertrand Aristide.
telecommunications, epistemic community activity has been relevant in framing the context of a telecommunications regime and influencing state choices in the direction of multilateral agreements. In structuring the Law of the Sea regime, epistemic consensus on the economics of seabed mining produced a broader set of possible bargaining aimed at promoting a broader arrangement of interest-based negotiation. It also aimed in the identification of specific compromises on which international policy coordination could be based.²⁸³ In post-World War II economic management, policymakers were alerted to the possibilities of mutual gain and the need for strategic, coordinated action.

Ikenberry shows how the underlying structures of power and interest alone do not fully explain the postwar economic order. He looks, instead, at how the many conflicting political interests were reconciled in reaching agreement by placing emphasis on the community of experts, and how consensus was arrived at within the larger political environment, and within and across both the United States and British governments. For Ikenberry, what mattered in structuring this economic regime was that it was not based on policy ideas put forth by an expert community, but that "the policy ideas resonated with the larger political environment." The ideas of the experts, however, "ultimately carried the day because they created the conditions for larger political coalitions within and between governments..." He argues that the group of economists and policy specialists did not entirely constitute a epistemic community by a strict definition of the term, "nor did the manner in which these experts influenced the terms of settlement conform to the strict logic of epistemic community influence..."The community of experts in this instance

²⁸³ The articles in (1992) 46: I International Organization by Drake, Kalypso, Nicolaidis, Adler, Peterson and Haas all investigate the ways in which epistemic communities provided an initial framework of issues for collective debate, which influenced subsequent negotiations and brought about preferred outcomes to the exclusion of others in the examples outlined.
was not "an independently existing scientific community"\(^{284}\) Rather, the expert community was created by the process of Anglo-American negotiations. Thus he points out, to that extent:

"...The Anglo-American experts were, at best, a primitive epistemic community, a collection of professional economists who shared a set of general and technical views which concerned the proper functioning of the world economy and distilled contemporary economic thought and lessons of recent economic history."\(^{285}\)

The application of Ikenberry's notion of primitive epistemic communities to efforts aimed at codifying humanitarian intervention can potentially produce fruitful results. In the realm of humanitarian intervention, one has to identify, heuristically, analogous actors at the international level that could be considered epistemic communities given the role of these communities in other issue areas. It is a recognized fact of international political life today that human rights have been internationally recognized and made the object of varied international action. This development has been possible in recent times due partly to the activities of certain groups. It would seem that groups such as the ICRC, Amnesty International, Human Rights Watch, Oxfam, Doctors without Borders, to name a few, and the International Commission of Jurists, the International Law Commission, and the Academic Council on the United Nations System (ACUNS) have all been active and significant catalysts in the process of international governance and have played varying roles in the institutionalization of human rights norms. These groups potentially fall within the category of constituting at least primitive epistemic communities, for the purposes of

\(^{285}\) Ibid; at 293. The application of the epistemic community concept here is exploratory. It is only a research strategy and an invitation to academics and groups working in the area of international human rights seriously to consider this approach in terms of its potential contribution to speeding up the process of codification of humanitarian intervention.
consolidating the present support for humanitarian intervention. These various groups have performed useful roles in the past and will be expected to do so in the future.

NGOs have demonstrated the ability to influence policymakers and have tried to effect change at the national and international levels by working with and beyond the governmental framework. As Weiss notes, "both through formal statements in UN fora and through informal negotiations with international civil servants and members of national delegations, many NGOs seek to ensure that their views, and those of their constituencies, are reflected in international texts and decisions." Their influence on state responses to humanitarian crises vary from one organization to another and from case to case. Their efforts can affect the timing and configuration of international responses to humanitarian crises. In the US, for instance, NGO efforts aided the favorable domestic climate that existed for the Bush administration's decision to intervene in Iraq in support of the Kurds. A similar climate existed for the US-led decision to intervene in Somalia. Key personnel within the humanitarian NGO community such as the President of CARE US, who had been seconded to the UN, pressed for the use of force in Somalia. With regard to Rwanda, NGO advocacy was less effective in persuading the Clinton government to act in stopping the genocide in April and May 1994. Eventually, however they were successful in urging the government to act in support of relief operations in the refugee camps of Zaire and Tanzania.

Additionally, NGOs have drawn the attention of the media to crisis situations, particularly,


Weiss, in Brown ed; supra, note 36 at 443.

Ibid; at 444.

Ibid. See also, Ramsbotham and Woodhouse, supra, note 8 at 204.
as in the case of Ethiopia, where the government was part of the humanitarian crisis that engulfed this country. Thus, its influence on public opinion, reports and activities, as Helman notes, "puts pressure on Western democracies to act, regardless of the nonintervention principle." 290 In France, NGOs championed an assertive humanitarian policy that was adopted by the French government which subsequently influenced debates in the UN, leading to the passage of the General Assembly resolutions on humanitarian assistance referred to earlier. Thus, NGOs can have an impact on how the international community will respond to various humanitarian crises, as well as the ability to influence the creation of new norms for international action.

Humanitarian NGOs operate on a political logic shaped almost entirely by moral considerations and, as Falk points out, on "an ethos of responsibility and solidarity- that is very different from the statist outlook that guides most governments when they are engaged in humanitarian missions." 291 Where governments are stymied by political considerations and are unwilling to act, humanitarian NGOs can become significant catalysts, at least, in efforts directed towards non-use of force in humanitarian tragedies, and promote states to use force when all else fails. Humanitarian NGO operations historically have been dependent upon interstate organizations for the provision of channels of action. However, in recent times, international NGOs not only transcend national boundaries but have also created a direct and independent form of nongovernmental diplomacy through networks of their own. 292

In the words of one writer, "the economic, informational and intellectual resources of NGOs have

291 Falk, supra, note 11 at 499.
garnered them enough expertise and influence to assume authority in matters that, traditionally, have been solely within the purview of state administration and responsibility. 

Furthermore, the relative influence of NGOs is not a static phenomenon. Their impact on state policies has changed and is changing with time.\textsuperscript{293}

In sum, apart from the important roles humanitarian NGOs play in humanitarian crises, they are also engaged in education and advocacy. Given these functions and first-hand knowledge and experience in different humanitarian crises situations, it is possible that NGOs can be instrumental in any endeavor to convince governments of the benefits of formulating agreeable principles of humanitarian intervention through a combination of conferences, publicity, making recommendations, and governmental diplomacy.

Since the 1940s, the International Law Commission has played a significant role in generating ideas and making proposals to the General Assembly for the development of consistent and coherent rules on various aspects of international law. It was, for example, instrumental in formulating the Law of the Sea regime, and has been prominent in putting forward proposals for the establishment of an international criminal court. Based on the experience of the Commission in those areas, it is feasible that it could have a vital role in establishing the nature of a collective debate on humanitarian intervention.

The Academic Council on the United Nations System is an international association of scholars, teachers, practitioners and others active in the work and study of international organizations. This group shares a professional interest in encouraging and supporting education and research which deepen and broaden understandings of international cooperation. In

\textsuperscript{293} Clark, "Non-Governmental Organizations and their Influence on International Society" (1995) 48 Journal of International Affairs 507 at 508.
implementing its goals, the Council focuses special attention on the programs and agencies of the United Nations System. It also forges close working relationships with the UN Secretariat and other institutions within the UN system, as well as with other inter-governmental and nongovernmental organizations. The Council's program consists of promoting research and organizing conferences and workshops to deliberate salient issues affecting the international community. Individual members of this group have been at the forefront in advocating humanitarian intervention and pertinent issues or considerations for its exercise. Based on the experience of these members in humanitarian crises situations and their writings, it is possible to spread these views among the wider membership that come from different parts of the world. Members from various countries may then articulate the advantages of codifying humanitarian intervention, with the ultimate goal of influencing governments towards that end.

The various groups, humanitarian NGOs and publicists discussed here bear evidence of a primitive epistemic community or an epistemic-like community. Based on the experience of these actors in other issue areas, it is suggested that identification of these groups and a simultaneous coordination of their activities at the national and international levels is sufficient to demonstrate the utility of epistemic communities in furthering the principle of humanitarian intervention as well as helping in its international institutionalization. 294

In addition to the issues examined above, other important considerations that can be taken into account by effective communities in an effort towards providing a consolidated framework for collective humanitarian intervention should include, among others: the establishment of a permanent international criminal court; defining the respective roles of the UN and regional

organizations in humanitarian intervention; and the conditions under which humanitarian intervention may be legitimately exercised.

First, issues relating to the possibility for the creation of a permanent international criminal court to try, among other international crimes, grave human rights violations must be seriously considered.\textsuperscript{295} Advances have been made under the auspices of the UN in declaring human rights deserve special protection. The many governmental actions adversely affecting human rights which are now prohibited through the UN Charter, the Universal Declaration of Human Rights, and several other international instruments (discussed earlier) are indicative of this progress. Many states are increasingly demonstrating a willingness to accept international norms in an effort to create and maintain a more peaceful and stable international order. In this context, there is growing international recognition of the pressing need for such an institution as an essential means for reducing many of the sources of tension and conflict among states, and to make individuals responsible for their crimes.\textsuperscript{296} Although the Security Council has demonstrated


\textsuperscript{296} The need for an international criminal court assumes importance when one assesses developments in international law pertaining to international or transnational crimes. The existing international law and practice is largely dependent on numerous international law convections addressing particular crimes, and require states to enact legislation criminalizing certain acts, prosecute or extradite offenders. These conventions cover crimes against humanity, torture, genocide, apartheid, drug offences, counterfeiting, slavery, piracy, traffic in women and children, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes against diplomatic agents and other internationally protected persons, and hostage taking. Bassiouni, for example, lists the existence of 22 categories of international
some activism in creating ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, with the object of punishing those suspected of committing war crimes and other grave breaches of international humanitarian law, these ad hoc measures are problematic. Inherent in ad hoc measures dealing with international criminality, apart from political and procedural flaws, is the question of selective adjudication. The reported atrocities that were committed, for example, in Liberia and Burundi have gone unpunished. In other areas where internal conflicts are still continuing, with alleged crimes against international humanitarian law being committed,

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297 The creation of an ad hoc tribunal for the former Yugoslavia for example, was viewed by some as politically driven and discriminatory. In a letter addressed to the UN Secretary General, the Minister of Foreign Affairs of the Federal Republic of Yugoslavia noted: Yugoslavia is one of the advocates of the idea concerning the establishment of a permanent international tribunal and respect for the principle of equality of states and universality and considers, therefore, the attempts to establish an ad hoc tribunal is discriminatory, particularly in view of the fact that grave breaches of international law of war and humanitarian law have been committed and are still being committed in many armed conflicts in the world, whose perpetrators have not been prosecuted or punished by the international community. "War crimes are not committed in the territory of one state alone and are not subject to the statute of limitations, so that the selective approach to the former Yugoslavia is all the more difficult to understand and is contrary to the principle of universality". A/48/170; S/25801 of 21 May 1993. Quoted in Perera, "Towards the Establishment of an International Criminal Court" (1994) 20 Commonwealth Law Bulletin 298 at 300. Wedgwood, for example, notes three potential problems that may limit the effectiveness of the Yugoslavia war crimes tribunal: These are (1) the reluctance of the UN to proceed with war crimes trials in absentia, or effecting international arrest of the offenders; (2) the sources of applicable law for the war crimes trials; and (3) the UN's failure to address the delicate relation between politics and criminal law after a civil war, particularly the absence of any pardoning power or amnesty power in the political organs of the UN. See Wedgwood, "War Crimes in the former Yugoslavia: Comments on the International War Crimes Tribunal" (1994) 34 Virginia Journal of International Law 267. Rather generally, one commentator argues that "however impartial and incorruptible members of an ad hoc tribunal might be, the mere fact that the tribunal had been set up expressly to try crimes arising out of particular circumstances would suggest, however unjustly, that the tribunal is not impartial, that the matters to be tried have been prejudged and that the tribunal has been set up to give a false impression that justice is being done". Bridge, "The Case for an International Criminal Justice and the Formulation of International Criminal Law" (1964) 13 International and Comparative Law Quarterly 1255 at 1271. Crawford observes the creation of an ad hoc court carries with it the risk that it will be seen in a sense as part of the conflict. The establishment of special tribunals raise expectations that something will happen, which may divert attention from resolution of the conflict to the targeting and punishment of transgressors. Crawford, "The ILC Adopts a Statute for an International Criminal Court" (1995) 89 American Journal of International Law 404 at 415. See generally the articles in (1994) 5: 2-3 Criminal law Forum: An International Journal (which is devoted to a critical study of the International Tribunal for the former Yugoslavia); Scharf, "A Critique of the Yugoslavia War Crimes Tribunal" (1997) 25: 2 Denver Journal of international Law and Policy 313.
there seems to be demonstrable inaction. Thus, the case for a standing court supported by the entire international community is strong.

UN activism surrounding humanitarian intervention also suggests an important role for regional and sub-regional organizations. Regional arrangements such as the EU, OSCE, ECOWAS and OAS played important roles in humanitarian operations in the Former Yugoslavia, Liberia and Haiti respectively. Their role in the maintenance of international peace and security suggests that they can perform important functions in fostering or undertaking humanitarian interventions. Thus, their use in this context has certain advantages that may not be realized through UN action alone. Chapter VIII of the UN Charter provides the legal and institutional arrangements between these organizations and the UN. Article 52 encourages states to use regional organizations before referring conflicts to the Security Council. It also recommends that the Security Council make use of such regional arrangements to facilitate the pacific settlement of disputes or to carry out enforcement measures. Regional organizations acting independently but "consistently with the purposes and principles of the United Nations" may deal "with such matters relating to the maintenance of international peace and security as are appropriate for regional action." Articles 53 and 54 prohibit regional organizations from taking measures involving international peace and security without Security Council authorization and by insisting that regional organizations inform the Council. It is evident that the security structure of the international system is characterized by an overlapping jurisdiction between the UN, and regional and sub-regional organizations. This lack of specificity on the division of responsibility, however,

298 Article 52 (1) of the Charter states: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations".
allows states the flexibility to create mechanisms fostering international peace and security,\textsuperscript{299} or to shift responsibility when they do not to deal with an issue.

As the United Nations is overburdened in its ability to engage in enforcement action relating to international peace and security, then what role is there for regional organizations? Are regional organizations appropriate mechanisms for conflict management? Should they be viewed as a viable alternative to the UN? Should there be a possible division of labour? How could regional organizations work in tandem with the UN? These are all questions that must be considered in structuring a role for regional and sub-regional organizations vis-à-vis the UN.

Some observers have a preference for collective action at the regional level, believing that humanitarian intervention should be the result of an expression of community standards and that regional organizations usually reflect the community better than a universal organization such as the UN. The advantages of regional collective action are familiarity with the region, its people, its culture and the general environment. A regional organization should, therefore, be better adapted to taking preventive measures and monitoring potentially volatile situations. Proximity to a conflict situation is also likely to prompt regional entities to act in a timely manner since they are more directly affected than are distant states. Moreover, the local population caught in the throes of internal conflict is likely to view intervention by troops from a regional organization more favorably; they are seen as less foreign and thus are more welcome. Lastly, the parties to a dispute might prefer a regional forum for settlement.

There are, however, many problems associated with regional action. Weiss, Forsythe and Coate, after examining the role of regional entities in conflict management, contend that "the

\textsuperscript{299} Weiss, Forsythe and Coate, the United Nations and Changing World Politics (Boulder: Westview Press, 1994) at 34.
apparent advantages of regional institutions exist more in theory than in practice." "In reality, these organizations are far less capable," they point out, "than the United Nations". First, most regional entities, especially non-Western regional organizations, lack the organizational, financial and military capacities either to carry out mandates in peace and security or to take effective action. NATO, which is an exception, was reluctant, at least initially, to act in cases where it should have acted, especially in the former Yugoslavia. Regional organizations may also have a particular stake in a conflict. One or more of the strong states in regional organizations may also be parties to a conflict or another humanitarian emergency, thus crippling the capacity of the organization to act as a neutral mediator, and rendering conflict resolution problematic. Furthermore, members of a regional entity may be so deeply divided as to make agreement on a particular course of action difficult to arrive at. Lastly, the leadership of a regional organization may be unwilling to approve a course of action lest it provides a precedent to be used against them in the future. Regional collective action can thus have either positive or negative effects in a conflict situation. Although they may have the advantage or privilege to seek peaceful solutions within their regions, they do not necessarily have the institutional capabilities to do so.

In light of the difficulties associated with effective regional action, it is argued that "although it makes sense to strengthen regional organizations where possible, ...they should not be viewed as a viable alternative to the UN in a conflict management role." Rather, these regional arrangements should be viewed as a complement and not a replacement when it comes to

300 Ibid; at 35 for a detailed historical account of global-regional competition in peacemaking see Henrikson, "the Growth of Regional Organizations and the Role of the United Nations" in Fawcett and Hurrell eds; regionalism in World Politics (Oxford; Oxford University Press, 1995) at 122-168. on the role of regional organizations in enhancing global order, see Farer, "the Role of Regional Collective Security Arrangements" in Weiss ed; supra, note 2 at 153-186.

301 See supra, note 105 at 33-39.

dealing with issues relating to maintenance or restoration of international peace and security. In this era of multilateral diplomacy, the UN must clearly define its relationship with the various regional organizations. Issues relating to when the UN should address a particular problem, when a regional body should take up an issue, and under what circumstances both the UN and regional organizations should act in a particular situation need to be carefully re-examined. The modalities within which regional arrangements and the UN can best complement each other, especially regarding the taking of enforcement action, should be an important consideration.

The post-Cold War practice suggests new forms of inter-organizational cooperation in approaches to human security. It is encouraging that in his supplement to the Agenda for Peace, former UN Secretary General Boutrus Ghali identified at least five ways in which this cooperation can take place. First, there should be consultations with the object of exchanging views on conflicts and finding solutions to those conflicts. Second, mutual support must be gained through diplomatic initiatives. The UN can offer support to regional organization endeavours in peacemaking and other issues and vice versa. Third, operational support can be offered by regional organizations such as NATO air support for UNPROFOR troops during the conflict in the former Yugoslavia. The UN, on the other hand, provides advice on technical or other aspects of peacekeeping operations carried out by regional organizations. Fourth, there should be co-deployment of UN and regional troops in enforcement actions such as in Liberia, or the former Soviet Republic of Georgia. Lastly, joint operations may be undertaken, as with the UN mission in Haiti. The task ahead will be to build upon these principles, structuring a flexible UN-regional organizations relations. As Henrikson argues, "...at least some UN action is always

303 See Supplement to an Agenda for Peace, supra, note 13.
necessary, if not to elicit regional-organizational efforts then to make them more fully accepted and effective; yet, without direct and deep regional involvement, international peacemaking is likely to lack continuity and consistency.\textsuperscript{304}

If the present inconsistent stance on intervention is to improve, it is necessary to develop criteria for such interventions along with the development of the means and the will to intervene. The conditions that would justify intervention to protect human rights have been enumerated in various scholarly works.\textsuperscript{305} These deal with substantive and procedural issues and are considered either absolute or preferential prerequisites.

4- Possible Criteria for the Use of Armed Force for Humanitarian Intervention

After discussing the history and legitimacy of humanitarian intervention, it is possible to conclude that the doctrine has a substantial basis in international law and may be used in extreme circumstances; the basic issue, however, is which circumstances should necessitate humanitarian intervention. Obviously, international relations are too complicated to determine specific criteria for the application of humanitarian intervention in all circumstances. Nevertheless, some working

\textsuperscript{304} Henrikson, supra, note 106 at 125.

standards may be formulated if humanitarian intervention is to exist in international law. 306

Some states support the establishment of formal criteria that have to be met before intervention can take place, although questions remain over who would set out the criteria and who would oversee their implementation. Presumably the UN would have a major role in this process but not all its members share the same views. These criteria seek to establish a set of rules that advance the goal of building formal processes to overcome the sovereignty and human rights disconnect. Such guidelines would be helpful for at least two reasons; First, specific criteria would help in drawing the proper lines between genuine humanitarian intervention and its abuses. Second, clearly articulated criteria should prevent governments from violating their citizens' rights 307 and from abusing the right to humanitarian intervention.

Different arguments have been advanced to justify using force to rescue or protect nationals abroad: (1) an emergency need to save lives; (2) legitimate self-defense, and (3) non-derogation of territorial integrity and political independence of the state in whose territory the action occurred. 308 A classical study of the use of force gave three conditions under which a state may use force abroad in self-defense to protect its nationals. “There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection in place strictly confined to the object of protecting them against injury.” 309 Similarly, other criteria have been suggested to determine the legality of humanitarian intervention. 310

306 See Bazyler, supra note 6 at 598.
307 Id.
308 Schachter, supra, note 47, at 145.
309 Waldock, supra note 36 at 467.
310 Summarizing the works of Richard B. Lillich and John Bassett Moore, John R. D’Angelo outlined the following
The intervening states have invoked different arguments to support their actions. For example, in 1976, the Israeli delegate to the UN, justifying the Entebbe raid, stated that the Israeli action was self-defense for which they had "no choice of means and no moment for deliberation." He also emphasized that the Israeli government only employed the amount of force strictly necessary to rescue its citizens.

In suggested criteria for using force for humanitarian purposes, one may conclude that many such criteria should be similar to the criteria for using force in international relations. Obviously, this conclusion is not surprising because the same criteria should govern any use of force in international relations. Additional criteria may be added as particular uses of force may warrant.

All this having been said, a number of authors are against formulating such criteria, as doing so might provide potential interveners not only with an extra incentive to intervene abroad but also with the knowledge where to find and exploit loopholes in the law. Others take the view that it would, nevertheless, be preferable to formulate or even codify these criteria, as the traditional requirements stipulated by customary international law are necessarily vague and their

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factors:
(1) the immediacy of the human rights violation;
(2) the extent of the violation human rights
(3) an invitation from an appropriate authority to use forcible self-help
(4) the degree of coercive measures employed
(5) the relative disinterestedness of the intervening state
(6) minimal effect on authority structure
(7) prompt disengagement consistent with the purposes f the action

311 See Ronzitti, supra, note 4 at 55.
312 Ibid.
93 See Farer, 1969 at 152; See also, Frey-Wouters, 1973 at 107.
clarification could contribute to reinforcing the legal restraints on abuse. 94 Since it would be utterly unrealistic, moreover, to expect states to refrain from humanitarian intervention in extreme cases of gross and massive human rights violations which the UN cannot prevent or stop, it would serve a proper law-promoting purpose to formulate these criteria.

It is worth noting that the fate of the concept of humanitarian intervention in the future will depend entirely on what intervening states plan to do with it; more precisely, whether they will use it properly or abuse it. If the community of states is interested in keeping the concept alive as a morally, politically and legally acceptable instrument, any state venturing to resort to armed force in protection of human rights abroad should respect the necessity of utmost restraint. In view of the large-scale abuse made of the concept in the past, any state claiming to plan, or to be involved in, an act of humanitarian intervention should submit convincing evidence to the United Nations prior to the intervention, if possible, or immediately during the intervention if necessary, that the following criteria will be or have been fulfilled.

(A) Threat to Lives and Large-Scale Atrocities

What constitutes “an emergency need to save lives” justifying the use of force? 95 It is easier to justify the use of force when a situation has become violent and there is an imminent threat to national lives. In 1956, the United Kingdom sought to justify the Anglo-French invasion of the Suez in this manner. 96 The Lord Chancellor informed the House of Lords that “self-defense undoubtedly includes a situation in which the lives of a state’s nationals abroad are

95 Gilmore, supra, note 87 at 61.
96 Gilmore, supra, note 87 at 61.
threatened and it is necessary to intervene on that territory for their protection....” 97 In such a situation, the state may choose between repatriating its nationals or using force to save them. The decision depends on many circumstances. Generally, a peaceful solution is preferable. 98 In some cases, however, using force is the state's only alternative. The Israeli rescue action in Entebbe, Uganda, was the most evident example of state action when citizens' lives were in danger. 99 It was clear that Israeli lives were in danger and the Ugandan government had done nothing to protect or rescue them. In these circumstances, using force to rescue these citizens was both legitimate and justifiable. 100 The US position was stated in the following manner:

"Israeli action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally such a breach would be impermissible under the Charter of the United Nations. However, there is a well-established right to use limited force to protect one's own nationals from an imminent threat of injury or death where the state in whose territory they are located is either unwilling or unable to protect them." 101

When the threat to lives is imminent, a state may use force but there are many situations when the threat is not so obvious. For example, should a state be permitted to use force when there is substantial evidence of imminent danger to nationals? In other words, should a 102 state be allowed to use force in anticipation of an attack against its citizens? The answer has substantial practical effects because armed force is frequently used in the absence of an attack on nationals.

97 Id. at 56.
99 See Leslie C. Green, Rescue at Entebbe-Legal Aspects, 6 Israeli Y.B. on Hum. Rts. 312, 313 (1976); see also Ronzitti, supra, note 4, at 37.
100 See Leslie C. Green, Rescue at Entebbe-Legal Aspects, 6 Israeli Y.B. on Hum. Rts. 312, 313 (1976); see also Ronzitti, supra, note 4, at 37.
101 See John Bassette Moore, destruction of the Caroline, 2Dig. Int’L 412 (19906); see also R.Y. Jennings, The Caroline and McLeod Cases, 33 Am J. Int’L 87 (1938).
This practice has given rise to much controversy among international lawyers. In 1842, Secretary of State Webster utilized a formula relating to the Caroline incident. This formula has been cited as an example of anticipatory self-defense, although it is quite controversial and not endorsed unanimously. The British claimed they had a legal right to attack a vessel, the Caroline, on the US side of the Niagara River in 1837 because the ship carried armed personnel to support an uprising in Canada. Webster required the British government to show that the "necessity of that self-defense is instantly overwhelming, and leaving no choice of means, and no moment for deliberation." It also had to show that the Canadian authorities did nothing unreasonable or excessive because the necessity of the self-defense limits the acts that are justifiable.

This formulation of self-defense is often cited as authoritative customary international law. During the Secretary Council debates on the legality of the Israeli bombing of a nuclear reactor in Iraq, some delegates referred to the Webster formulation of the right of anticipatory self-defense prior to an actual attack only where such attack is imminent with no time for negotiation. Regardless of different interpretations and controversial state practice, it is hard to deny the right to anticipatory self-defense in a nuclear age, due to the potential destruction of a

103 See Leslie C. Green, Rescue at Entebbe-Legal Aspects, 6 Israeli Y.B. on Hum. Rts. 312, 313 (1976); see also Ronzitti, supra, note 4, at 37.
104 See Leslie C. Green, Rescue at Entebbe-Legal Aspects, 6 Israeli Y.B. on Hum. Rts. 312, 313 (1976); see also Ronzitti, supra, note 4, at 37.
105 See id.
106 Id. at 412.
107 Id.
108 Some international law scholars explicitly deny anticipatory self-defense. See for example, Ian Browlie, The Principle f Non-use of Force in Contemporary international Law, The non-use f Force in International Law 24 (W.E. Butler ed; 1989); Lauterpacht, supra, note 70, at 156; Henkin, supra, note 14, at 41.
109 See Schachter, supra, note 47, at 152.
nuclear attack.\footnote{See Henkin, supra, note 81, at 141.} In 1946, the US government offered a new interpretation of armed attack, entirely different from that which existed prior to the invention of nuclear weapons. It encompassed the dropping of an atomic bomb as well as “certain steps in themselves preliminary to such action.”\footnote{Gordon, supra, note 44, at 369; Jessup, supra, note 30 at 166-67 (both quoting US Memorandum No. 3).} These steps are also required for conventional warfare.\footnote{Rosalyn Higgins, General Course of Public international Law, 230 Recueil Des Curs des L’ Academie de Droit International (R.C.A.D.I.) 310 (1992).} It can be argued that an armed attack on nationals abroad does not necessarily imperil a state’s existence.\footnote{Ian Brownlie contends that the phrase “armed attack” strongly suggests a trespass.” Ian Brownlie, International Law and the Use of Force by states 278 (19963).} Ultimately, the fate of a state is linked directly to its citizens’ welfare.\footnote{See id.}

It is possible that anticipatory self-defense could become a pretext for interventions and gross international law violations.\footnote{The International Court of Justice observed that a right to use force “in the cause of justice” would be “reserved for the most powerful states and might easily lead to perverting the administration of justice itself...(A) policy of force such as this has in the past given rise to most serious abuses and...cannot, whatever be the defects in international organization, find a place in international law.” Corfu Channel Case (UK v. Albania), 1949 ICJ 4, 35.} The potential for abuse, however, arises with respect to any rights available to a state. Similarly, a right to self-defense in national law is subject to individual abuse, but this hardly justifies complete denial of this right.

Large-scale atrocities are the first prerequisite for humanitarian intervention.\footnote{International Covenant on Civil and Political Rights, supra, note 96, article 19-20.} The target state’s government should be involved in killing, torturing or creating conditions of unbearable suffering for large numbers of its own citizens. Because the right to life is a fundamental human right, the international community should not forgive its violation.

This prerequisite raises the issue of what should be considered as massive killing or large-scale atrocity. The most obvious answer is that it should be a question of fact to be determined
according to particular circumstances. The murder of one person is not a reason for humanitarian intervention, though human losses should not have to amount to millions to justify intervention. Without a doubt, any government practicing genocide may be a target of humanitarian intervention. 117 Interestingly enough, the Genocide Convention does not specify the number or percentage of a national, ethnic, racial or religious group that must be killed to constitute genocide. 118 But once a situation reached the point where many thousands or millions of lives are being lost or are at risk of being lost, this possible criteria would probably be met. If any additional information is needed, it is on the intervening state to acquire such information before deciding to intervene.

Some scholars propose a balanced approach that would involve weighing “the amount of destruction which may be caused by armed intervention and the importance of the human rights sought to be protected.” 119 Others have argued for humanitarian intervention not only in cases of “genocide, enslavement or mass murder, but also to put an end to situations of serious ordinary oppression.” 120 This approach, however, gives too much scope to states, providing them with unlimited power to employ force in every case violating human rights.

Although every human rights abuse is a violation of international law, it does not necessarily require the use of force. International law provides numerous alternative methods, such as diplomatic protests, public condemnations, and various sanctions. The response should match the abuse, and interventions should not be allowed for small-scale abuses. 121

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117 See Bazyler, supra, note 6, at 600.
118 Id.
119 Fonteyne, supra, note 20, at 258-59.
120 Teson, supra, note 4 at 15.
121 See Bazyler, supra, note 6 at 600.
Is anticipatory humanitarian intervention permissible? It is possible to draw a line with rescue operations to save nationals abroad? As discussed, an argument has been made in favor of anticipatory use of force to protect nationals, but humanitarian intervention is definitely more unusual and should be considered with more care. The intervening state should have very clear evidence of atrocities. By only alleging the possibility or imminence of massacres, the intervening state does not have a substantial basis for intervention. Allowing states to intervene in the event of merely potential atrocities would create enormous risk of abuse. The intervening state would become not only a judge, but a supervisor that could dictate how to proceed. Even if the intervening state crosses the line, its action may be partially warranted in the event of ongoing abuses but is unlikely to be justified where atrocities are merely pending. Humanitarian intervention is a remedy of last resort to be used only in situations of apparent and current massacre or other serious abuses, after exhausting all other remedies. The intervening state should attempt all possible peaceful procedures before restoring to force.

In some circumstances, resort to other options may be useless. The intervening state may use force to stop atrocities when it is apparent that no other remedy is available or efficient. For example, where the atrocities will proceed with such speed that any delay, even informing the UN, may bring tremendous casualties, it is conceivable that the intervening state may immediately intervene and use force for humanitarian ends.122

(B) Necessity

No state should resort to armed force unless absolutely necessary. Necessity is comprised of two elements: (1) the existence of a danger (2) the nonexistence of reasonable peaceful

122 See id. at 607.
alternatives.123 Using Webster's formula, in the context of the Caroline case:

“It must be shown that admonition or remonstrance to the persons on board the Caroline was impractical, or would been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror.”124

At first glance, the danger requirement seems self-explanatory. As soon as danger is present, a state is free to exercise its right to self-defense. In other words, when an armed attack occurs, armed force may be used to rebut that attack. No future justification is necessary to warrant any action taken in self-defense; however, particular cases can be more complicated. The international community is generally skeptical of any use of force. The necessity of using force is questioned especially when such action is an anticipatory use of force or the threat to nationals' lives is longstanding.

The presence of danger is closely related to the justification of armed attack. As soon as an attack is imminent, the necessity for force is justified. Particular circumstances may raise additional questions but, as a matter of principle, an imminent attack warrants the use of force in self-defense.

123 Stuesser, supra, note 31 at 31.
124 Schachter, supra, note 47 at 153.
The continuity of threat raises another issue. When a threat is imminent, a state may use force to defend its nationals. Does the state still possess this right if it is not exercised without delay? The rescue mission in Iran illustrates this problem. On November 4, 1979, 52 people were seized and held hostage at the US Embassy in Tehran. Soon after the Security Council adopted Resolution 457, condemning the capture as illegal and calling for the immediate release of the hostages. On November 8, 1979, the Security Council repeated its call. On December 15, 1979, the ICJ issued an order demanding the release of the hostages. The court pointed out that "a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations is one which by its very nature falls within international jurisdiction." The case was before the World Court despite Iran's refusal to cooperate with the ICJ and the United Nations. Because the case was presented to different bodies of the UN, it was argued that the US did not have a right to use military force to rescue the hostages.

Judge Lachs, in a separate opinion, stated that the United States, "having instituted proceedings, is precluded from taking unilateral action, military or otherwise, as if no case is pending." The International Court of Justice did not agree. It assessed the rescue mission as moderate and did not attempt to outlaw it. The Court's only criticism was that the US may have inflamed the situation, and defied the court's earlier order:

125 Case Concerning United States Diplomatic and Consular Staff in Iran (Hostage Case), 1980 ICJ 14.
126 Id.
127 Id.
128 Id.
130 See id.
131 Case concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), ICJ at 48.
"an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B of its order of 15 December 1979, the court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries." 

The critical question was whether the hostages were in imminent danger of being executed. The environment in Tehran and the Iranian government’s threatening posture were decisive factors in the US determination that rescue measures were appropriate.

The state whose nationals are in danger must be given the option to determine whether a rescue action is necessary; there is no international body or third party in a position to make that judgment. The rescue action, therefore, cannot be characterized as illegal under international law. Whether it was wise in a political and military sense is a different matter.

In sum, a state has the right to rescue its nationals immediately after their lives are endangered. An obscure threat, however, does not constitute danger. An actual attack (or at least an apparent threat where attack is imminent with no time to negotiate) must have occurred. A state may use force while its nationals are in danger when its use of force is the last resort. Because the world community is always very sensitive about the use of force, a state should do its best to show that all reasonable peaceful measures have been exhausted, using force as the final alternative. In some circumstances, resorting to other options may be fruitless or inefficient.

For example, the atrocities may be proceeding so rapidly that any delay (no matter how brief)
may result in tremendous casualties.

(C) Exhaustion of Peaceful Measures

An intervening state must exhaust all reasonably available means and avenues of peaceful conflict resolution before resorting to force to stop the criminal behavior. These would include UN resolutions, diplomatic missions, negotiations, political initiatives and non-forcible countermeasures such as economic sanctions. A related problem is that of making a balance between the use of force and peaceful means of settlement. Obviously, peaceful means are preferable, and every state is obligated to seek redress through such measures. Article 2 of the UN Charter provides that “all members shall settle their international disputes,” and Article 33 requires that member states actively utilize peaceful means to settle any dispute likely to endanger international peace. On the other hand, the prevailing view among international lawyers is that, in the absence of a special agreement, states have no international legal obligation to settle or even attempt to settle, their disputes. In particular, in the absence of a special agreement, a state has no international legal obligation to submit a dispute with another state to impartial arbitral or judicial settlement.

Any categorical answer to the choice between using force and seeking redress through peaceful means is unwarranted. Despite a general trend in international law toward peaceful settlement of disputes, states are not obligated to exhaust peaceful means before resorting to the forceful rescue of nationals. In a particular situation, a state should carefully balance all pros and

136 UN Charter, Article 2 (3).
137 UN Charter, Article 33.
139 See Schachter, supra note 47, at 152.
cons of different means and choose the most efficient way to save its nationals' lives abroad. Different circumstances may dictate a variety of solutions. Ultimately, the state must decide whether to resort to force, negotiate, or use other peaceful means of settlement. Yet, there may also be cases where, because the threat is so massive and the situation is evolving so rapidly, that there might not be time to implement other measures of force before resorting to more forceful action.

(D) Preference for Collective Measures

Among the peaceful alternatives to the use of force, one of the most critical is collective measures. Collective measures are generally preferable to unilateral action. They are more likely to succeed and their legality is unlikely to be questioned, especially by the United Nations. Collective intervention therefore, in general, possesses a legitimacy which is normally denied to unilateral intervention.” International institutions, however, historically reflect numerous inefficiencies and failures. Therefore, the intervening state must use its best efforts to gain support from the world community by exercising all possible peaceful means.

The UN Charter embodies the expectation that, where possible, member states will use collective measures to avoid unilateral use of force. In principle, the UN resolution is always preferable to unilateral actions. Unfortunately, international institutions often do not perform according to their original intent, and member states need them to be more effective.

Even in the aftermath of the Cold War, the UN still is not an effective mechanism to end

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140 Evan Luard, Collective Intervention, in World Politics 158 (Hedley Bull ed; 1985).
141 The Use of Armed Force in International Affairs: The Case of Panama, in 47 The Record f the Association of the Bar of the City of New York. 666 (1992).
human rights violations. Moreover, the UN has been an extremely ineffective enforcement mechanism. Therefore, it is unlikely that states would rely heavily on the UN. They will continue to use force unilaterally. This unfortunate reality should not veil the fact that UN members must use their best efforts to engage the UN’s collective intervention. The Persian Gulf War is a perfect example of the UN’s potential to intervene collectively. Regional organizations have also been effective in stopping large-scale atrocities. Liberia and Kosovo cases are good examples of regional intervention by ECOWAS and NATO as we have already seen earlier in this study. Given the unfortunate fact that nations cannot rely on multinational efforts, there will be any unilateral interventions. Nevertheless, their best efforts should be used to engineer multinational actions.

(E) Humanitarian Objectives

Military intervention must be truly humanitarian to be justified. Therefore, the intervening states’ motives are particularly important. The problem is to formulate standards to measure the humanitarian purpose of the intervention, with the following standards as of disinterestedness. First, intervening states must aim military action at stopping human rights deprivations by governments. Second, collateral non-humanitarian motives should be such as not to impair or reduce the first paramount human rights objective of the intervention, so that intervening states should not use humanitarian motives as cover for overthrowing target state governments or for other non-humanitarian ends. For example, with respect to the Congo operation, the State Department of the United States declared “This operation is humanitarian not military. It is designed to avoid bloodshed not to engage the rebel forces in combat. Its purpose is to accomplish
its task quickly and withdraw, not to seize or hold territory.\textsuperscript{142} Such declarations support the argument that the intervention was genuinely humanitarian. Third, the means used must always be rights-inspired. This requirement is violated where the intervener acts to impair human rights along the way (for example in third nations), even if the true overall aim is to protect human rights in the target state.

Disinterestedness should not be measured by reference to some mythical "state will" as evidenced in statements by government officials. Rather, the genuineness of the humanitarian purpose must be ascertained by examining the concrete actions taken by the intervener in the light of the human rights objective.

How can the humanitarian purpose mission be reconciled with the violation of a state's territorial integrity? A rescue mission's main purpose is not to violate territorial integrity or political independence, but to protect nationals endangered abroad and secure a minimum international standard of human rights.\textsuperscript{143} For example, in the Entebbe situation, it was not Israel's main purpose to violate Uganda's territorial integrity. The mission was in response to inhuman behavior and was intended to liberate Israeli nationals held hostage. The temporary and limited breach of Uganda's territorial integrity was therefore justified.\textsuperscript{144} The UN Charter usually prohibits such a violation of territorial integrity or political independence regardless of the grievance under which it arose.\textsuperscript{145} Nevertheless, the Israeli action was permitted due to the extraordinary circumstances of this specific case and because of the well-established albeit narrow

\textsuperscript{142} United States Cooperates with Belgium in Rescue of Hostages from the Congo, 51 Department of State Bulletin, December 14, 1964, at 838, 842.
\textsuperscript{143} McDougal et al. supra note 15.
\textsuperscript{144} See Protection of Human Rights, supra, note 152, at 150-51.
\textsuperscript{145} UN Charter Article 33.
right to use force to protect nationals endangered abroad. 146

Interestingly enough, some highly regarded lawyers argue that there was no violation of Uganda's territorial integrity or political independence. 147 One commentator stated that "Israel could argue that in the circumstances its raid at Entebbe was not a use of force against the political independence or territorial integrity of Uganda, or in any other way contrary to any purpose of the UN." 148 In addition, two other commentators wrote that "the action of the Israelis could not possibly have had the effect of threatening the territorial integrity or political independence of Uganda." 149 If Israel's intention was other than purely humanitarian, the world's reaction to the mission would have been quite different.

Some of the questions we must ask in order to assess the genuineness of an intervention are the following: Did troops occupy the territory longer than necessary? Has the intervener demanded advantages or favors from the target governments? Did the intervener seek to dominate the target state in some way unrelated to humanitarian concerns? The test I suggest here avoids the difficulties of trying to determine what state officials really had in mind when they decided to intervene, whether they said that they were acting out of humanitarian concerns or they cited some other reason. Their actions, not their words, must count. And the final test will be whether human rights have been effectively restored as a result of the intervention.

(F) Proportionality

Proportionality means that great care must be taken to ensure that the force used is...
proportional to the situation. In other words, military actions must do more good than harm. The intervener should employ only the amount of troops reasonably necessary to accomplish the objectives so as to reduce to a minimum the infringement upon the territorial integrity and political independence of state intervened in. Since humanitarian intervention is being sanctioned only in response to mass violence and killing, the question of using violence for situations which are not violent, or relatively not violent, will not come up. However, the force used should be as surgical as possible so that only the absolute minimum amount of force is used, and that which is used is proportional to the situation which is being remedied. Also, the force should only stay as long as it takes to stop the mass violation and loss of life. Sometimes, this might mean deposing a ruling despot and perhaps putting a country under UN trusteeship for a time.

Proportionality is a fundamental element for determining the legality of the use of force and is closely linked to the necessity of the use of force. In a letter to the British authorities, US Secretary of State Webster included a requirement of proportionality:

"It will be for (Her Majesty's Government) to show that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the US at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."

Proportionality limited the right to self-defense under classical international law. Although not

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150 Ibid.
152 See International Law: Cases and Materials 663-64 (Louis Henkin et al. eds; 1987).
specifically mentioned in Article 51 of the UN Charter, the Charter strictly maintains proportionality.\(^{153}\) The proportion of force used in relation to the danger deserves significant consideration when drawing the line between lawful self-defense and illegal reprisals. Illegal reprisals consist of action in response to a prior unlawful military attack, aimed not at defending oneself against an attack as it happens, but rather in delivering a message of deterrence against the initial attack being repeated.\(^{154}\) In 1974, acting Secretary of State Kenneth Rush wrote that:

"the United States has supported and supports the foregoing principle a duty to refrain from acts of reprisal involving the use of force. Of course we recognize that the practice of states is not always consistent with this principle and that it may sometimes be difficult to distinguish the exercise of proportionate self-defense from an act of reprisal."\(^{155}\)

Proportionality, as well as necessity, has another practical importance. According to the International Court of Justice, a state's use of force can still be unlawful, even though it complies with the rules of necessity and proportionality.\(^{156}\) Yet, if this activity is not necessary and proportionate, this may constitute an additional ground of wrongfulness.\(^{157}\) Even though it is difficult to define, proportionality is an important question of fact.\(^{158}\)

Proportionality "requires functional reference to all the various factors relating to the opponent's allegedly aggressive coercion...which together comprise a detailed context."\(^{159}\)

Traditionally, the Security Council considered this detailed context in a narrow scope limited to

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\(^{153}\) See Beyerlin, supra note 5 at 213.
\(^{154}\) Higgins, supra, note 163, at 308. "Reprisal would necessarily involve a violation of Article 2(4) ...and, not being self-defense are not brought within the permissive use of force in Article 51." Id.
\(^{156}\) See Military and Paramilitary Activities (Nicaragua v. US), 1986, ICJ 122, January 10.)
\(^{157}\) Ibid.
\(^{158}\) See Stuesser, supra, note 31 at 37.
\(^{159}\) McDougal and Feliciano, supra note 78 at 243.
the immediate attack that led to the state’s response. In this context, the UN’s negative response to the Grenada invasion demonstrated the world community’s intention to limit self-defense and forbid it to be an instrument of intervention. The main cause of such a negative response was that, despite unanimous consensus that only a short-term use of armed force is justified, the US military forces remained in Grenada for nearly two months, long after those Americans who wished to be evacuated had left.  

The lesson to be learned from the Grenada invasion is that the measures taken should be strictly confined to the purposes of protection and, in particular, military forces should not remain after exercising their protective function.

The numerous fatalities and actual threat to US citizens rendered the invasion in Panama problematic. Despite the seriousness of the Panama situation, it did not warrant launching a full-scale invasion, eventually consisting of 12,000 American soldiers. This military attack was not proportional and it resulted in the death of 26 Americans and over 700 Panamanians, mostly civilians. In addition, severe and widespread physical devastation, property damage and dislocation resulted. Nevertheless, it is plausible to argue that if more soldiers are deployed, fewer casualties may occur. In today’s war, the preparation of the military force may be the decisive factor. Therefore, it is conceivable that if fewer soldiers were used in the Panama invasion, there may have been more casualties.

In comparison to the Panama invasion, Israel’s response in the Entebbe case was precisely proportional. The US specified that the right to protect nationals abroad, “stemming from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened

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160 See Gordon, supra note 44 at 379.
162 Ibid.
nationals from injury. In this statement, the United States emphasized that its right to protect nationals abroad was limited and must adhere to certain standards. In 1976, this approach was also highlighted in the Legal Advisor of the Department of State’s internal memorandum to the Secretary of State regarding this incident:

“The Israeli military action was limited to the sole objective of releasing the passengers and crew, and terminated when that objective was accomplished. The force employed seems reasonably justifiable as necessary for the rescue of the passengers and crew; the killing of Palestinians themselves for obvious reasons; the firing on Ugandan troops because they involved themselves in the conflict; and the destruction of Ugandan aircraft to eliminate the possibility of pursuit of the Israeli force.”

Because this operation was carefully proportionate, only three hostages, one Israeli commando, seven Palestinians, and some Ugandan soldiers were killed.

With respect to the Congo operation, commentators have made this same point. Personnel engaged were under orders to use force only in their own self-defense or in the defense of the foreigners or Congolese. They will depart from the scene as soon as their evacuation mission was accomplished.

The foregoing examples reemphasize the importance of proportionality. To be proportionate, a state’s response should be limited in intensity and magnitude to what is

163 Protection of Human Rights, supra note 152 at 150.
166 United States Cooperates with Belgium, supra, note 194 at 842.
reasonably necessary to secure the permissible objectives of self-defense. Because a rescue mission aims to protect nationals’ lives abroad, the military operation should limit its scope to protecting lives and preventing future attacks. On the other hand, it should not be too restrictive. In principle, the rescue operation may allow a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attack (with substantial military weapons) from the same source. Such action would not be “anticipatory” because prior attacks occurred; nor would it be a “reprisal” since its prime motive would be protective, not punitive. Thus, defensive retaliation may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action. A state undertaking a rescue mission should be careful to avoid civilian casualties. A commitment to save human lives should not be transformed into a brutal massacre of civilians. A state has an obligation to balance possible civilian casualties against the threat to nationals’ lives.

Proportionality plays an important role in distinguishing genuine humanitarian intervention from abuses. As we noted, actions of a state in self-defense should be proportionate to the attack. The same is true to humanitarian interventions. If an intervening state delays the evacuation of its soldiers after an invasion, this delay may indicate that the action has transcended the confines of appropriate humanitarian intervention. The world community generally views such activity with suspicion. Similarly, if an intervening state uses more soldiers than necessary to stop a massacre, the world community may doubt the credibility of the state’s humanitarian motives.

An important debate is whether a group of states could undertake an intervention without

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167 McDougal and Feliciano, supra, note 78 at 242.
168 Schachter, supra note 149 at 1683.
UN authorization. If UN authority were not required for humanitarian intervention then this would be an alteration to the present restrictions on the use of force and a major dilution of UN power. However, if these criteria were simply adopted by the UN then this might be seen as a refinement of Chapter VII and reinforce the notion that a humanitarian disaster is a threat to international peace and security.

Some states are wary over relinquishing the protection that the UN affords them. They envisage the retention of a UN structure that preserves the primacy of the state in providing security for the population of a state. Others suggest that if a state is not providing security for all its population, then protection of human rights should be the prime consideration.169

Finally, critics suggest that establishing formal criteria for humanitarian intervention would generate expectations that if those criteria can be met, intervention will take place.170 Positive intervention from anyone, despite the possibility that the above criteria could be met, has only involved a small number of states at one point in time, but might culminate into something quite disastrous. Defining when abuses are grave or when there is a disaster is highly subjective and the nature of the decision, whether it is made by the UN Security Council or a coalition of concerned states, would inevitably be highly politicized.171

In the debate over humanitarian intervention, a certain real fact remains. Decision making in states is driven by a variety of factors, with humanitarian concern being only one. Decisions by states, whether in the Security Council or with allies, cover a variety of considerations including political, military and economic interests. Criteria for intervention might usefully be formulated to

170 Ibid.
171 Ibid.
guide conduct in an intervention (proportional use of force, high probability of success, clear and articulated goals, post-conflict plans, following laws of war, etc.) but are unlikely to form the only basis of a decision to intervene. This does not mean that the exercise of formalizing criteria is necessarily useless. Some see it as desirable to establish criteria as a guide and as an ideal. Others suggest, however, that given the nature of international relations, it should not be expected that rules for humanitarian intervention would regulate conduct absolutely.

Since it would appear to be impossible in the post-cold war era to raise sufficient support for any effort to codify these criteria, or even formulate them in a non-binding UN General Assembly resolution, the only alternative available to promote their adoption and implementation in state practice, probably, is to suggest that as many international lawyers as possible should express their support for them in their writings.

In sum, the object of deliberating the issues discussed in this chapter is to reduce the dangers of abuse by proposing a standard against which to judge humanitarian intervention. As Minear suggests, the process of negotiating the new ground rules or trigger mechanism would help to de-politicize some of the post-Cold War conflicts and might gain the consent of a reluctant government or rebel group, or failing that, could help to isolate an entity unwilling to cooperate. However, the establishment of such a standard is no guarantee that states would enforce it unless they considered it to be in their self-interest to do so. Nevertheless, it is important that the issues and criteria discussed here should be seriously reconsidered with a view to improving them for acceptance by the international community.

The difficulty in making use of epistemic communities is the lack of consensus within the various bodies, even on the question of the desirability of codifying the principles of humanitarian
intervention. At the very least, however, primitive epistemic communities or epistemic like communities working within and outside the UN system could start to explore how a widespread consensus could be reached on the feasibility of such an undertaking. Here the dissemination and diffusion of ideas on, among other things, the changing character of state sovereignty is important.

The nature of the increasing support for Post-Cold War humanitarian interventions presents an opportunity to push forward the idea of codification. This undertaking is worth pursuing if the international community builds upon the present practice of humanitarian intervention for the future. Epistemic communities can assist in this endeavor by laying the foundation through enlisting widespread support for the idea and its eventual reality.

5- The Possibility of Abuses

It is not clear what is meant by "abuse." One possible interpretation is that the intervening state abuses when it does not aim its action at stopping human rights violations. This is enough to turn the intervention into aggression. But there is an alternative interpretation. Some legal scholars approach this problem as one of disinterestedness. In this view a necessary condition for the justification of humanitarian intervention is that the interveners act purely out of humanitarian concerns. 172 A state acts abusively by this standard if it harbors a hidden agenda or if its main motives are selfish. If we are concerned with human rights, we should look at whether the intervention has rescued the victims of oppression, and whether human rights have been restored.

172 See, for example, Moore, Towards an applied Theory of Intervention, in Law and Civil War in the Modem World 3, 24-25 (N. Moore ed. 1974).
The intervener must also employ means that are consistent with the humanitarian purposes. 173 But, unless other motivations have resulted in further oppression by the interveners (including political subjugation), they do not necessarily count against the morality of the intervention. It is not immoral for a government to act out of humanitarian and self-interested motives at the same time. The true test is whether the intervention has put an end to human rights deprivations. That is sufficient to meet the requirement of disinterestedness, even if there are other, non-humanitarian reasons behind the intervention. There is nothing wrong in a government trying at the same time to rescue foreign victims of oppression and to legitimately advance the interests of its own citizens, provided that the self-interested action dies not impair the main humanitarian objective. Humanitarian intervention is thus justified not because the motives of the intervening government are pure, but because “its various motives converge on a single course of action that is also the course of action called for by the victims of oppression.”174

The opponents of humanitarian intervention frequently use the possibility of abuse to support their position against intervention. The opponents argue that interventions for allegedly humanitarian purposes were a cover that “permitted outside powers to invade sovereign states for all sorts of illegitimate reasons, but primarily to prevent the indigenous people from changing the religion, or especially, the socio-economic systems imposed by their governments.” 175 Many countries are concerned that they are more likely to be considered a humanitarian intervention target than an intervening state exercising a right to humanitarian intervention. 176

173 For an application of this standard to the United States intervention in Nicaragua, see infra, Chapter 10.

174 Walzer, supra, note 34, at 105. Walzer here is defending the morality of India’s intervention in Bangladesh because the human rights violations by Pakistani army had reached genocidal proportions.

175 Franck and Rodley. Supra, note 7 at 242.

commentator presented humanitarian intervention as “simply a cloak of legality for the use of brute force by a powerful state against a weaker one, and experience has shown how readily more powerful states have used the pretext of a higher good to impose their will and values on weaker states.”

Such violations and abuses have existed in the history of international relations. The doctrine of humanitarian intervention has often been used to achieve unlawful and criminal ends. Opponents of humanitarian intervention argue that even when humanitarian intervention is undertaken for proper ends and is relatively successful, it may cost too much in terms of human lives, injuries and disruptions to normal life. The Somalia case is a good example.

The fact that the use of force for humanitarian purposes is susceptible to abuse or may lead to casualties is too important to ignore. In today’s world, it is too dangerous to provide some governments with an instrument that allows them to circumvent conventional means of peaceful dispute settlement and increase their capacity to violate international law. Nevertheless, the potential for abuse is not sufficient to reject humanitarian intervention. Even lawful and well-justified rules can be abused. The potential for abuse is common to all legal policy, doctrine or rule.

The possibility of abuse of humanitarian intervention should not obscure the fact that a

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178 See Brownlie, supra, note 164, at 370. “No genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860 and 1861” Ibid.
179 See Wright, supra, note 221 at 440.
180 See Wright, supra, note 221 at 440.
181 See ibid. at 442.
182 MacDougal and Feliciano, supra note 78 at 416.
potential wrongdoer can usually find many other suitable excuses and pretexts. Although Adolph Hitler relied on the doctrine of humanitarian intervention in his unconvincing attempt to legitimize the annexing of Poland and Czechoslovakia, nothing would have prevented him from using another pretext if the doctrine of humanitarian intervention had been unavailable.\textsuperscript{182} Hitler would simply have found another false justification for invasion. The harm still would have occurred.\textsuperscript{183} “Foreign policy is too intricate a topic to suffer any total taboos.”\textsuperscript{184} On the other hand, humanitarian intervention “should not be allowed to become a regular and routine feature of the governmental process, cast in the concrete of unquestioned habit and institutionalized bureaucracy.”\textsuperscript{185} To prevent abuse, the foregoing criteria may be a useful guide to appraise an act’s lawfulness.

6- Recent Trends in Intervention

It is worth noting that all of the military interventions of the 1990s were more legitimate than the earlier cases. Rather than remaining on the sidelines, the Security Council was seized by each of them and made decisions authorizing coercion. Unlike the earlier cases, in which the rescue of nationals and self-defense were the prominent justifications, the conscience-shocking and truly “humanitarian” elements of the post-1990 cases were explicitly recognized as important justifications for international action. Instead of single state military operations, the interventions of the 1990s were also genuinely multilateral.

During this period, the forms of non-consensual intervention shifted. It was a decade of

\textsuperscript{182} Wright, supra note 221 at 443.
\textsuperscript{183} See Bazyler, supra, note 6 at 584.
\textsuperscript{184} George F. Kennan, Morality and Foreign Policy, Foreign Affairs, 205, 214 (1985/86).
\textsuperscript{185} Ibid.
profound change for two forms of intervention, sanctions and international criminal prosecutions. The 1990s have been labeled the “sanctions decade” because the Security Council imposed more than twelve sanction regimes, several times more than in the previous 40 years combined. As well as being used more frequently, sanctions were also applied more widely, including against non-state actors in Angola and Cambodia and other places.\textsuperscript{186} The frequent resort to sanctions occurred despite the fact that most observers criticized their political inefficiency and devastating humanitarian consequences.\textsuperscript{187} Ultimately, the Charter’s call to use non-forcible before forcible measures may have a less than optimal humanitarian result. Some advocate moving toward “smart sanctions” designed to target regime leaders while minimizing the impact on the general population,\textsuperscript{188} while others call for the application of deadly force sooner rather than later.

International criminal prosecution was another type of intervention that, for the first time since the immediate aftermath of the Second World War, was employed to bring to justice those who had committed crimes against humanity. A number of recent legal decisions suggest considerable erosion of the rules relating to the immunity of states and their leaders. These have long provided that leading officials (including retired ones) of a state cannot be tried in courts in another country for acts committed in their own state and in the exercise of their official duties.\textsuperscript{189}

\textsuperscript{186} In the case of Cambodia, the sanctions were not imposed under Chapter VII. On Angola, see United Nations, Report of the Panel of Experts on Violations of Security Sanctions against UNITA, UN Document S/2000/203, March 10, 2000.
\textsuperscript{189} The International Law Commission between 1977 and 1986 produced a “Draft Convention on the Jurisdictional Immunities of States and their Property,” which sought to change the previous rules, including by allowing legal actions against officials who committed crimes. However, the draft rules still required a nexus between where the
Although the Genocide Convention specially calls for punishing perpetrators "whether they are constitutionally responsible rulers, public officials or private individuals," state practice over decades had overwhelming supported the notion of sovereign immunity. \(^{190}\)

The fight to establish limits to impunity received a boost with the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively. More recent violence in Burundi, the Congo and East Timor has led to calls for additional ad hoc tribunals. Dissatisfaction with early institutional shortcomings for both the Rwandan and the former Yugoslavian tribunals demonstrated to many observers the need for a permanent court. In 1998 the International Criminal Court (ICC) was created. However, international agreement on the independence of the prosecutor and the court 's jurisdiction over internal conflicts and disturbances suggests that criminal prosecution could become a common, rather than an ad hoc, response in the face of large scale atrocities.

Questions related to the legality of intervention for humanitarian purposes are also relevant to non-military intervention. The Security Council has the legal capacity both to authorize intervention and to delegate needed authority to regional bodies. Sanctions have been
imposed without Council authorization by regional bodies or unilaterally.

The most substantive departure in the post-Cold War era, however, remains the Security Council’s willingness to authorize military action in response to matters that were to be solely within the domestic jurisdiction of states.

The most basic transformation in the use of Security Council powers in the post-Cold War era is that civil war and internal strife have been described as threats to international peace and security and may, therefore, be the basis for Chapter VII enforcement action. This development was virtually inconceivable during the Cold War, when similar conflicts were not considered to constitute such threats. Yet, by 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia summarized that it is the “settled practice of the Security Council and the common understanding of the United Nations membership in general” that a purely internal armed conflict may constitute a “threat to the peace.”\textsuperscript{191}

Substantial flows of refugees have been deemed by the Security Council to constitute a threat to international peace and security. This has enabled them to justify Chapter VII actions to create safe havens in the Balkans and Rwanda. The Council also determined that “serious” or “systematic, widespread and flagrant” violations of international humanitarian law within a country also threaten international peace and security. This undoubtedly represents a considerable stretch for those who are familiar with the convictions of the framers of the UN Charter. But resolutions establishing the international criminal tribunals for Rwanda and the former Yugoslavia did not indicate that violations of humanitarian law were a threat to international

\textsuperscript{191} Prosecutor v. Tadic, IT-941-AR72 (October 1995), para. 30.
peace and security, a position strongly supported by the ICRC and other humanitarian agencies.\footnote{International Committee of the Red Cross, "Report on the Protection of the War Victims," International Review of the Red Cross 296 (September-October 1993), pp. 391-445.} There has been, therefore, a gradual shift away from strict reliance on the transboundary implications of a humanitarian situation as the determining factor.

Some have argued that the ever-widening definition of international peace and security is artificial and unsustainable, and that more explicit grounds for intervention to protect civilians should be developed. For example, the Independent Commission on Global Governance proposed “an appropriate Charter amendment permitting such intervention but restricting it to cases that constitute a violation of the security of people so gross and extreme that it requires an international response on humanitarian grounds.”\footnote{The Commission on Global Governance, Our Global Neighborhood (Oxford: Oxford University Press, 1995), p. 90.}

If humanitarian and human rights tragedies can be squeezed under the rubric of international peace and security, the restoration of democracy within a country demands even more leeway. In this light, operation Restore Democracy in Haiti can be seen as a high watermark of Council activism in the 1990s. The unprecedented authorization called for the use of force to remove one regime and stall another. It has been argued that this foreshadows the emergence of a more general norm of intervention in support of democracy, a proposition that finds limited support in the amended OAS Charter.\footnote{Chesterman, Just War or Just Peace? P. 98. Some scholars argue that the absence of democracy may itself constitute a threat to international peace and security. This is an extreme form of the democratic peace thesis that authentic democracies do not fight each other, or, depending on the definition of “democracy” or fighting, that such conflicts are exceptional. Depending on the definitions, application of this thesis would mean that around one-third of the world’s states could be deprived of the protection of Article 2 (7) of the UN Charter. See Tom J. Farer, “Collective Defending Democracy in a world of Sovereign States: The western Hemisphere’s Prospect,” Human Rights Quarterly 15, November 1993., pp.716-750.} 

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\footnote{192 International Committee of the Red Cross, “Report on the Protection of the War Victims,” International Review of the Red Cross 296 (September-October 1993), pp. 391-445.} \footnote{193 The Commission on Global Governance, Our Global Neighborhood (Oxford: Oxford University Press, 1995), p. 90.} \footnote{194 Chesterman, Just War or Just Peace? P. 98. Some scholars argue that the absence of democracy may itself constitute a threat to international peace and security. This is an extreme form of the democratic peace thesis that authentic democracies do not fight each other, or, depending on the definition of “democracy” or fighting, that such conflicts are exceptional. Depending on the definitions, application of this thesis would mean that around one-third of the world’s states could be deprived of the protection of Article 2 (7) of the UN Charter. See Tom J. Farer, “Collective Defending Democracy in a world of Sovereign States: The western Hemisphere’s Prospect,” Human Rights Quarterly 15, November 1993., pp.716-750.}
CHAPTER SEVEN

The Concept of Humanitarian Intervention in Islam and Christianity

(1) Introduction

At a time when some informed Muslims believe Islam to be “set on a collision course with the West” and some Christians warn of a possible “irrational but surely historical reaction of an ancient rival against our Judeo-Christian heritage,” it may be helpful to ask what both traditions teach about the current issues of joint concern. One of the most urgent of these issues is the question of humanitarian intervention. Setting aside broader questions of interpretation, such as the extent to which Islam can be identified with political radicalism and Christianity with Western political interests, this chapter compares Muslim and Christian teachings on this issue. Both traditions have had to confront questions of political violence, suffering and war since at least the time of the conversion of Constantine in one case (1600 years ago) and the founding of the first Islamic state at Medina in the other (1300 years ago). The central argument in this chapter is that there is a surprising measure of agreement between the two traditions on the question of humanitarian intervention, enough to provide the basis for a shared doctrine.

A Search for Consensus

The question of humanitarian intervention has become an urgent and highly contentious

one in 1990s for Muslims and Christians alike as humanitarian crises associated with a series of "complex emergencies" have faced the international community. Both Muslims and Christians have been implicated as aggressors and have suffered as victims in these situations. In some cases, Christians have persecuted Muslims (Bosnia); in others, Muslims have persecuted Christians; and Muslims have persecuted Muslims (Iraq) and Christians have persecuted Christians (Croatia). Impassioned, if inconsistent, calls for humanitarian intervention have come from both faith communities. Where there has been collective military intervention on supposedly humanitarian grounds, associated in some cases ambiguously with the UN Security Council resolutions - as in Iraq, Bosnia, Somalia, Liberia, Rwanda, Haiti, and Zaire - the governments of both predominantly Muslim and predominantly Christians countries have voted for these resolutions and provided troops for subsequent missions. On the Muslim side, the two leading troop suppliers for UN peace-keeping and observer missions worldwide in 1996 were Pakistan and Bangladesh, while in Somalia the first UN Secretary General's special representative and the first force commander of the second United Nations Operation in Somalia (UNOSOM II) were Muslims. Bangladesh, Egypt, Indonesia, Kuwait, Malaysia, Morocco, Pakistan, Tunisia, Turkey, Saudi Arabia and the United Arab Republic also contributed military forces in Somalia.

The question of humanitarian intervention is not a new one but it has assumed new dimensions with the end of the Cold War. In terms of international law, there has been a shift of concern in humanitarian intervention debate from UN Charter Article 2(4) (the legitimacy of

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4 We leave open the difficult question of whether religious groups are being persecuted as such or for other reasons.

5 For example: Security Council Resolutions (SC/Res) 688, April 5, 1991 (Iraq); 770, August 13, 1992 (Bosnia); 794/814, December 3, 1992/March 26, 1993 (Somalia); 688, September 22, 1993 (Liberia); 929, June 23, 1994 (Rwanda); 867, September 23, 1993 (Haiti).

314 See Oliver Ramsbotham and Tom Woodhouse, Humanitarian Intervention in Contemporary Conflict (Cambridge, UK: Policy, 1996) for a fuller account, including a suggested reconceptualization in which "forcible humanitarian intervention" is seen as one option among others within the broader category of "humanitarian intervention" in general.
cross-border military action by states) to UN Charter Article 2(7) (the legitimacy of intervention by the UN in the internal affairs of states, as we saw earlier). This has revived older conceptual categories, apparently eclipsed by modern statist orthodoxy, from within Muslim and Christian tradition, raising deep questions about conflicting values of order and justice enshrined in the character, the desirability or possibility of reform of the United Nations, and the nature of international collectivity itself. These are issues of great concern to both Muslims and Christians, and there can be no prospect of collective international response – or even, I would argue, of genuine humanitarian response- unless it embodies a cross-cultural international consensus that includes both faith communities. This chapter compares Christian and Islamic teachings on the question of humanitarian intervention in order to determine the scope for possible doctrinal concurrence.

(2) Christianity and Humanitarian Intervention

Controversy on the issue of humanitarian intervention within the Christian tradition goes back to the break up of the universal Roman church in the Reformation and the end of the Holy Roman Empire's authority with the emergence of the modern state system. In the earlier period, no fundamental inconsistencies had been thought possible between the *jus naturale* (natural law)-
and the corpus of canon and civil law that flowed from it and applied throughout Latin Christendom- and the *jus gentium* (law of nations), which governed dealings with foreigners such as Tartars, Greeks and Saracens.315 However, with the slow emergence of the concept of the secular sovereign state, heralded by Jean Bodin and Albercio Gentili in the 16th century and

315 See, for example, M. Keen, The Laws of Wars in the Late Middle Ages (London: Routledge and Kegan Paul, 1965), pp. 7-22.
reappearing in the *cuius regio eius religio* clauses of the Peace of Westphalia, the earlier unity of Latin Christendom was progressively replaced by an "international anarchy" in which states no longer recognized superior universal jurisdiction.\(^{316}\) In that situation, did states have the right to wage war, not only in defense of their own interests but also in order to protect the citizens of other states from abuse by their own governments? Early commentators such as Gentili thought that they did. Grotius endorsed Gentili's position, albeit with some caution:

"The fact must also be recognized that kings, and those who possess rights equal to those of kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever... Truly it is more honorable to avenge the wrongs of others rather than one's own."\(^{317}\)

Here was an adaptation of earlier traditions in which "defense of the innocent" was allowed as a "just cause" for a war, a tradition that went back at least as far as Augustine, and is also found in codes of chivalry.\(^{318}\) Grotius did not have a modern conception of intervention because he did not see an intermediate condition between peace and war, and he envisaged a "solidarist" international community of humankind in which natural law applied to individuals as well as states.\(^{319}\)

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\(^{316}\) "The sovereign has no earthly judge, for one over whom another holds a superior position is not a sovereign... Therefore it was inevitable that the decision between sovereigns should be made by arms," Albérico Gentili, *De Jure Belli Libri Tres* (1598; Dobbs Ferry, N.Y.: Ocean, 1964), p. 15.


(A)- Order Versus Justice

It was in the eighteenth century, in the writings of Christian Wolff and Emerich de Vattel, that the principle of non-intervention received its first explicit manifestation, although not its technical definition.\(^{320}\) From then on, what alter came to be called international law was seen by most jurists to apply solely to states, not individuals; as Vattel put it, "The natural society of states cannot continue unless the rights which belong to each by nature are respected."\(^{321}\) At this point, the new statist non-intervention prohibition, championed as the foundation of international order by some, came into direct conflict with the older solidarist tradition that recognized governments' duties and rights to defend humanitarian values wherever they were threatened in the name of international justice. The debate deepened when the idea of princely sovereignty gave way to the idea of popular sovereignty at the time of the American and French revolutions. The key question then became: If particular governments lose inner legitimacy because they violate or fail to protect the natural rights of their citizens, do they by the same token forfeit international legitimacy?

This discrepancy was never satisfactorily overcome. It reappeared in nineteenth-and early-twentieth-century discussions about the rights and duties of Christian European powers to intervene to protect threatened populations elsewhere, particularly in the Ottoman Empire. The UN Charter itself contains an underlying tension between what Lori Fisher Damrosch has called the two "clusters of values" that lie at its core: "state system values" provided by the non-intervention norm enshrined in Articles 2(4) and 2(7), and "human rights values" enshrined in

\(^{321}\) Emerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns (1758; Dobbs Ferry, N.Y.: Oceana, 1967), introduction.
Articles 1(3), 55, and 56. 322

(B)- Just War Perspective

All of these inner contradictions and disputes are reflected in contemporary Christian thinking, with Christian realists in the tradition of Reinhold Niebuhr and Christian pacifists unlikely bedfellows in opposing humanitarian intervention, albeit on very different grounds, and many Christians in what might be called the broad "just war" tradition prepared to countenance it under certain circumstances. 323

It is difficult to find a consensus or even a central tradition here. In the transformed post-Cold War situation, however, where gross human suffering is associated with protracted internal conflict and incipient state collapse, where the question of "consent" is ambiguous, and where the possibility of concerted action through regional organizations and the United Nations is possible, there appears to be more agreement.

Interviews with spokespersons from different churches suggest that a majority of them accept Christian doctrine as teaching that governments are not only responsible for their own citizens, but also have a duty of concern for people in other countries; the non-intervention rule in international law should not be a shield behind which atrocities can be committed with impunity; where basic subsistence and security needs or rights are threatened, international action to sustain and protect below the level of the use of force should be pursued vigorously; and in extreme circumstances, military force can and should be used by governments to protect the innocent in


323 Among the latter are a number of Christians who have been prominent in the recent revival of just war thinking in the West. For example, Paul Ramsey, The Just War (New York: Charles Scriber's Sons, 1968), pp. 141-47, argues in favor of a duty to protect the innocent, as does James Turner Johnson, "Threats, Values, and Defense: Does the Defense of Values by Force Remain a Moral Possibility?" in the Nuclear Dilemma and the Just War Tradition, edited by William O'Brien and John Langan(Lexington, Mass.: Lexington Books, 1986) pp. 31-48, at p. 33.
other countries.\textsuperscript{324}

Some doubt whether circumstances are ever likely to be right. A minority of them, while endorsing vigorous cross-border humanitarian concern, rule out the use of force for Christians on pacifist grounds. For these spokespersons, even an apparently benign use of military force presupposes the whole machinery of militarism, itself considered an evil that Christians should not condone. They see the resort to force as representing a tragic failure by the international community to act better.

There is, therefore, no general approach common to these various Christian perspectives. Within all of them, however, we may note the persistence of what Alan Donagan calls the "common morality" of the original natural law tradition.\textsuperscript{325} By implying "positive concern for the welfare of people outside one's own community," this tradition is thought by many Christians to provide the normative grounds for a justified humanitarian use of force across international borders.\textsuperscript{326} This is also reflected in the papal insistence:

"The conscience of humankind, sustained henceforth by its liability to international human rights, asks that humanitarian interference be rendered mandatory in situations which gravely compromise the survival of entire peoples and ethnic groups: this is an obligation for both individual nations and the international community as a whole."\textsuperscript{327}

\textsuperscript{324} Id.
(C)The Case of Bosnia

When war erupted with devastating force in Bosnia in April 1992, the international community in theory had three broad military options: abstention or withdrawal (because there already were United Nations Prospective Force (UNPROFOR) troops in Bosnia), enforcement, and non-forcible "peacekeeping." The international community drifted into the non-forcible peacekeeping option over the summer of 1992, and there it remained until UNPROFOR was reconstituted by the pulling back of vulnerable contingents and the deployment of the more heavily armed Rapid Reaction Force before "Operation Deliberate Force" began on August 30, 1995. The NATO-constituted Implementation Force (IFOR) subsequently took over as part of the Dayton Agreement.328 In the period between April 1992 and August 1995, despite extensive and successful relief work, the international community clearly failed to prevent large-scale humanitarian atrocities, including blatant massacres in specially designated UN-protected "safe areas." As the catalog of violations grew, so did the calls for forcible action to end them. How does this relate to the Christian thinking on humanitarian intervention outlined above?

It must be acknowledged that there is substance to the criticisms that some Christian churches contributed to the tide of intolerance and that reactions were often decidedly partisan. For example, there was significant Christian support both from within Croatia and from the Serbian Orthodox Church for nationalist policies in Bosnia. While at times condemning "violence and crimes from whatever side they come,"329 Serb church leaders in general failed to comment upon or even acknowledge Serb atrocities in Bosnia. They seem to have shared many of the

328 For substantiation of the assertion that, despite a UN Charter VII mandate and NATO air support, UNPROFOR prior to August 30, 1995, was essentially a non-forcible intervention, see Ramsbotham and Woodhouse, Humanitarian Intervention, in Contemporary Conflict, ch. 6.
329 Holy Synod of Bishops of the Serbian Orthodox Church, Appeal to All International Factors, December 12, 1995.
perceptions of their fellow Serbs, including denial that humanitarian abuses were perpetrated on the scale claimed by outsiders, assertions that blame was shared by Croats and Muslims, and insistence that the whole humanitarian agenda, including the activities of UNPROFOR, was in any case a political program promoted for reasons of self-interest by their enemies. Serbs were seen as the victims of European history. Other Orthodox churches, the Russian Orthodox for example, reacted comparably. At a lower level, many clergy and bishops expressed solidarity with their Slav Orthodox brothers, and few of them criticized the atrocities.330

Christian churches elsewhere were also divided on the question of humanitarian intervention, and many of them simply endorsed the policy lines followed by their respective governments. The reaction of the British churches, for example, was criticized by Adrian Hastings in this attack on a 1993 Council of Churches for Britain and Ireland report on the Bosnian situation:

"The overall impression of these and other documents is of an amazing inability to face up to the reality of evil and to grapple responsibly and clear-mindedly with a moral crisis comparable to the Holocaust. On the one hand the ecumenical desire not to upset the Serb Orthodox Church and, on the other, willingness to swallow whole the political line of the Foreign Office and the European Community, have completely nullified any prophetic voice on the part of central church leadership."331

In answer to such criticism, three main points are usually made. First, that the churches were not silent or inactive on the Bosnian conflict. From the beginning visits were made to Bosnia, expressions of outrage were unanimous, and strong representations were made to the

330 Information communicated by Xenia Dennem, Keston Institute.
British government to do everything possible to stop atrocities. A 1992 message from Cardinal Basil Hume to the British Prime Minister can be taken as representative:

"we are faced with atrocities in Bosnia, some committed in the name of "ethnic cleansing" which is horrifying and totally unacceptable, and they cannot be allowed to continue. It is not for me, as a churchman, to define what would be politically and militarily acceptable, but people are looking for an early response which needs to be effective and sustainable in bringing humanitarian relief to those who are suffering, particularly the Muslim community, and also a cessation of hostilities."332

The second point is that Christian churches did not speak with one voice, nor was there an agreed "Church of England" position. Nevertheless, strenuous efforts were made to respond ecumenically, including attempts at solidarity with Jewish and Muslim representatives and communities.

The third point is that many Christian leaders found it difficult to pronounce on political options, particularly those to do with the possible use of military force. In a joint letter to the Times (London) on July 14, 1995, at the time of the Srebrenica atrocities, the Archbishop of Canterbury, the Archbishop of Westminster, the Moderator of the Free Church Federal Council, and the Chief Rabbi condemned these outrages: "Events in recent days have highlighted once again the barbarity of those who murder, terrorize and oppress people in Bosnia." But they went on to say that "as religious leaders we are not competent to judge between the agonizingly difficult military and political choices which are now facing the international community." It was hard to find a consensus on these issues within the Christian churches in Britain. Nevertheless, by the late summer of 1995, there seemed to be a large body of opinion supporting the enforcement

option. The Church of Scotland stated: "so terrible is the plight of the victims of this conflict that no immediate means of ending the violence apart from the commitment of the United Nations troops seems available."

An open letter to all victims of "ethnic cleansing" in the former Yugoslavia, titled the Sarajevo Charter, which was endorsed by, among others, the bishops of Oxford, Hereford and Barking, was an unequivocal call to undertake humanitarian intervention.

The horrors of the Bosnian war have provided what is probably the most strenuous test of Christian thinking on the question of humanitarian intervention so far in the 1990s. This survey of opinion from within the British churches suggests that, though a majority of them favor the principle of humanitarian intervention, national church leaders held back from making specific recommendations in a situation over which public opinion was divided, government policy was opposed, political-military outcomes were seen to be uncertain, and there was a real prospect that British lives might be lost. In other words, there is majority support for a general doctrine of humanitarian intervention, derived from, among other things, a revival of traditional prestatist Christian natural law thinking, but this is supported only "under certain circumstances"-and as yet there is no clarity or consistency in determining what those circumstances might be.

3- Islam and Humanitarian Intervention

At the political level, since the 1950s there has been as much inconsistency within the Islamic as within the Christian world on the concept of humanitarian intervention. On the one

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hand, many governments of predominantly Muslim countries have been firmly opposed to anything that might revive colonial domination and thus reluctant to the idea of humanitarian intervention. This deep, historically conditioned objection dates back at least as far as the period in the nineteenth century when most supposed cases of humanitarian intervention involved intervention by European powers in parts of the Ottoman Empire- the only Muslim power to be accepted on anything like equal terms as a member of the international "society of states." The principle of non-intervention has been regularly cited as foundational for regional organizations with strong Muslim memberships, such as the Organization of African Unity and the Association of South East Asian Nations (ASEAN). In the case of ASEAN, since its formation in 1967 members have explicitly adhered to the "Asian way," in which governments support each other-for example against communist insurgents-but on no account meddle in each other's domestic affairs, observing the "rule of silence" when disagreement threatens. Western attempts to link aid to human rights or to orchestrate protest against Indonesia for the Dili massacre in East Timor were branded by Malaysia as "cultural imperialism" and part of a global campaign "to make us permanent developing countries," in the words of Prime Minister Mohamed Mahathir.

On the other hand, in different circumstances the governments of predominantly Muslim countries have been prominent in not only allowing but demanding intervention to uphold international human rights. For example, with reference to South Africa, it was the Tunisian representative at the United Nations who in 1961 declared that protection of human rights and fundamental freedoms was the essential purpose of the UN, and that the organization would dig

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6 See Oliver P. Ramsbotham, "Islam, Christianity, and Forcible Humanitarian Intervention" Ethics and International Affairs, 1998 Volume 12
335 M. Haas, the Asian Way to Peace: A Story of Regional Cooperation (New York: Praeger, 1999) We should note, of course, that ASEAN also contains predominantly Christian countries, like the Philippines.
its own grave if it tolerated abuses and failed to intervene. As we have seen earlier, similar calls for intervention have been voiced in the 1990s in response to the victimization of Muslims in recent humanitarian crises, particularly in Bosnia and Kosovo, as can be seen in this impassioned appeal from Mustafa Ceriche “leader of the Muslim Religious Council” in Bosnia-Herzegovina, in July 1993:

“A fascist invasion has taken over 200,000 lives, raped tens of thousands of Muslim women, destroyed over eight hundred Muslim holy places, and driven more than a million Muslims from their homes. Therefore, we address ourselves to all Muslim Imams throughout the world in the name of Islamic compassion; to all Christian dignitaries of the Catholic Orthodox and Protestant churches in the name of Christian love; to all Jewish rabbis in the name of Talmudic justice; to all Buddhist priests in the name of Buddha’s enlightenment; and all those who nurture in their hearts a spark of humanity: we call upon them, through the force of their faith and love, to open up a path to Sarajevo, and thus save hope and belief in the dignity of man and universal divine and human values.”

(1) The Community of Muslims (umma wahida)

The Qur’anic concept of the *umma wahida* 8 or a single community of Muslims (potentially a community of all humankind) long predates the modern secular state and is widely seen to overrule it. All other divisions, including ethnic, racial or national difference are

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7 See “Invitation to Sarajevo,” Sarajevo, July 1993.
8 In one basic sense, the concept of community means “a community is a comprehensive group with two chief characteristic: (1) it is a group within which the individual can have most of the activities and experience that are important to him; (2) the group is bound together by as have sense of belonging and a feeling of identity. (Brooms and Selznick, p. 3) Brooms and P. Selznick, Sociology: A Text with adopted Readings (New York: Harper and Rowe, 1968) Quoted in “Islam in Focus”, Hammudah Abdalati.
secondary: Allah (God) made humankind into “nations and tribes” for self-understanding and interaction “so that you may get to know one another”\(^9\) but for no deeper purpose. Exclusive nationality and state sovereignty are not foundational concepts in Islamic law. The majority of Muslim states that are members of the Organization of Islamic Conference (OIC) are recent creations, often within what are seen as artificial ex-colonial borders. As members of the United Nations, their governments have signed up to the international instruments that define statehood in contemporary international law. But, it seems fair to say, there is still a great deal of work to do to relate traditional Islamic law to this relatively recent set of circumstances in a way that satisfies Islamic legal principles. The OIC itself, for example, voted in 1980 to set up an International Islamic Law Commission “to devise ways and means to secure representation in order to put forward the Islamic point of view before the International Court of Justice (ICJ) and other such institutions of the United Nations when a question requiring the projection of Islamic views arises therein,” but as yet it has failed to do so.\(^{10}\)

The importance of all this for the question of humanitarian intervention is that Islamic jurisprudence overwhelmingly tends to recognize the Qur’anic umma, not the state, as the foundational element in international law, so that the question of overriding a statist non-intervention norm to protect the vulnerable technically does not arise. The onus is all the other way: “The burden of proof lies with those who would challenge the right of intervention on grounds of sovereignty rather than on those who assert it.”\(^{11}\)

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\(^{10}\) A. Al-Ahsan, The Organization of the Islamic Conference (Herndon, Va.: International Institute of Islamic Thought, 1988).
The Ethical Basis of Intervention

How can the political espousal of statist non-intervention principles by a number of governments of Muslim countries and the absence of clear teaching on the status of the modern state in Islamic law be reconciled? Perhaps the best way to respond is to turn, finally, to the ethical dimension and, recognizing that the political, the legal and the ethical are inexorably intertwined in Islamic doctrine, to ask with Sohail Hashmi: "Is there an Islamic ethic of humanitarian intervention?" A moral obligation is laid upon Muslims "to order that which is right and to forbid that which is wrong" (Qur'an 3:104), which includes the defense of the vulnerable against injustice and oppression. This is the authentic voice of humanitarianism, in which principles of humanity, impartiality and universality are firmly grounded in the duty of obedience all Muslims owe to divine command. What happens if these orders are violated and vulnerable populations are threatened by or actually suffer injustice and oppression on a massive scale, either in Muslim or non-Muslim countries?

Hashmi identifies three schools of modern Islamic thought on the relationship between Islamic tradition and the nation state. The first is a diffuse secular school in which the traditional concept of the Muslim community is "stripped of substantive political content" and in some cases rejected in favor of rapid modernization and state building. Despite its historical significance in relation to modernizers like Kamal Ataturk in Turkey and Reza Shah in Iran, this group is considered marginal today.

The second group tries to reconcile Islamic tradition and the modern state system, for example, by arguing in the vein of Mohamed Iqbal (influential ideologue of the new Pakistani state) that nation states represent a temporary phase of human development, useful in this era, but
to be condemned strongly when "regarded as the ultimate expression of the life of mankind." As Hashmi puts it "modernist Muslim intellectuals cannot be embraced as the *summum bonum* of Islamic political life."\(^{337}\)

Finally, there are those such as Hasan Al-Banna and Sayyid Qutb of the Muslim Brotherhood in Egypt, Abu'-A'la Mawdudi in the Indian subcontinent, and Ayatollah Ruhollah Khomeini in Iran, who reject the nation state as an un-Islamic relic of European colonialism. From this perspective the significant distinction is not between states, but between the *Dar al-Harb* (home of war) and the *Dar al-Islam* (home of Islam).

These debates are as yet unresolved. But, within what is broadly the second approach, which is indicative of mainstream academic Muslim opinion, there is still a clear trend in favor of humanitarian intervention. As Zaki Badawi puts it:

"The notion of the state is not very clear in the Muslim perspective; but we have now recognized and accepted it, so a Muslim country may not intervene in the internal affairs of another state, provided- and this is a very important proviso- that the internal war is not a war against a Muslim community or a weak community. If it is a power struggle between two generals, say, you would not intervene. But if a minority is singled out for oppression, then it is incumbent on Muslims, or for that matter the international community, to intervene."\(^{338}\)

Up to this point, therefore, Islamic teaching can be seen to coincide with the Christian natural law tradition in recognizing a theoretical basis for humanitarian intervention. And, just as within the Christian tradition, this is seen as a revival of earlier just war categories going back at

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\(^{337}\) Sohail Hashmi, "Is There an Islamic Ethic of Humanitarian Intervention?" Ethics and International Affairs 7 (1993), pp. 55-73.

least to the time of St. Augustine. So, within the Islamic tradition it is seen to take its place within the broad Qur'anic tradition of jihad. The command to act justly and enforce justice clearly includes a duty to wage war for the protection of the weak, the vulnerable and the helpless as laid down in the Qur'an:

"How should you not fight for the cause of Allah and for the feeble among men and of the women and children who are crying: Our Lord! Bring us forth from out this town of which the people are oppressors! Oh, give us from Thy presence some protecting friend. Oh, give us from Thy presence some defender!" (4:75).

When to Intervene

As in the case of Christian approaches, there are as yet unresolved problems in relating Islamic teaching to contemporary politics. Following Hashmi, we can distinguish three broad situations that elicit different doctrinal responses and pose different ethical challenges for Muslims.

A -When Muslims are Oppressed by Non-Muslims

There is the question of whether Muslims should intervene in other countries on behalf of Muslims who are oppressed by non-Muslims, as in Palestine or Afghanistan during the Soviet occupation and in the ongoing war in the name of terrorism or in Bosnia. In this case, the Qur'an gives two solutions. First, oppressed Muslims should remove themselves physically from the territory of the oppressors.(4:97) Second, the Muslim community should respond collectively in defense of the oppressed.(4:75) The Qur'anic verse reads:

"And why should you not fight in the cause of God and of those who being weak are ill-
treated and oppressed: men, women and children whose cry: “Our Lord! rescue us from this land whose people are oppressors. And raise for us by your grace one who will help.” (4:75)

In describing the oppressed community in both above cases the Qur’an uses the words “mustad’afun.” If the oppressed Muslims are able to relocate, it is better for them to do so, of course by the assistance of the Muslim community. This first case of intervention on behalf of Muslims being oppressed by non-Muslims is the most clear example of jihad cited by both the early and modern scholars. In today’s world this case has been used to legitimate anti-colonial struggles and the Palestinian struggle against Israel. According to the Iranian scholar, Ayatollah Mutahari, who defines jihad as “defensive war on behalf of oppressed Muslims:

“we may be in a situation whereby a party has not transgressed against us but has committed injustice against a group from another people, who may not be Muslims. If they are Muslims (as in today’s plight of the Palestinians, who have been exiled from their homes, whose wealth has been seized, who have been subjected to all kinds of transgression) whereas for the moment the transgressor has no intentions against us, it is permissible for us to give assistance to the oppressed Muslims and deliver them. This is not only permissible, but obligatory because they are Muslims. Such action would not be a case of commencing hostilities, but rather of rushing to the defense of the oppressed in order to deliver them from the clutches of oppression.”

A similar argument was addressed by leaders of the Muslim Brotherhood in Egypt as reasons for denouncing the Egyptian-Israeli peace agreement as Islamically illegitimate. They accused

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President Anwar Sadat in crippling the ethics of jihad by withdrawing from a conflict in which Muslims remained oppressed by non-Muslims. This argument has been supported by many Muslim countries.

Other conflicts which have been supported as cases of jihad against foreign aggression are the two wars in Afghanistan and the war in Bosnia. These wars have demonstrated large-scale support by several Muslims in different ways. Muzaffar stated that “the degree and extent of oppression suffered by the oppressed would have justified intervention in the eyes of Islam,” and the fact that most of the oppressed were Muslims was “an added reason, as it were, for intervention.” 21 In the case of Bosnia, Badawi claims that “a policy of firm military action against the aggressor at the outset would have been accepted by almost all Muslims,”22

On the other hand, although Muslim leaders were publicly in favor of forcible humanitarian intervention, for political reasons their actions proved otherwise. King Hussein threatened to pull Jordanian troops out of UNPROFOR if no military action was taken to stop Serb attacks on Muslim enclaves in Bosnia.23

B - When Muslims are Oppressed by other Muslims

There is the question of whether Muslims should intervene forcibly when Muslims are oppressed by other Muslims, as in the case with the Kurdish minority in Iraq. In the Sunni Muslim tradition, this was treated as a special case of civil discord (fitna) between Muslims. In the Shi’a tradition it was treated as part of jihad. Here the Qur’an provides:

“If two parties of the believers fall into a quarrel, make peace between them; but if one of

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21 Chandra Muzaffar, “Responses,” private communication with the editors of the Crescent and the Cross, June 1996, p.2. Unsurprisingly, the figures for deaths given here have been disputed, notably by Serb apologists.
22 Badwi, interview transcript, pp. 4-5.

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them transgresses beyond bounds against the other, then fight all of you together against the one that transgresses until it complies with the command of God. But if it complies, then make peace between them with justice, and be fair: For God loves those who are fair." (49:9)²⁴

The interpretations of this verse appeared clearly in most of the Muslim discourse during the Gulf war. According to this verse two steps have to be followed:

First, Muslims collectively seek reconciliation between the warring parties. This gives Muslims a right to collectively engage in preventive intervention to resolve a dispute before hostilities breakout.

Second, seek permission to launch a collective intervention on behalf of the aggrieved party. The party to be collectively fought is the party that has resorted to unacceptable means to achieve its ends. This was the justification cited by the Muslim countries of the US coalition in the Gulf War for this verse. Iraq was the baghi (rebel) not because it had breached the sovereignty of Kuwait, but because it had employed unacceptable means in resorting its dispute with Kuwait.²⁵

The same reasoning could have been applied to justify collective Muslim intervention on behalf of Iraqi minorities in the south and in the north. In the case of the Iraqi Kurdish and Shi’i situations against the Iraqi government, as required by the Qur’anic verse, the Muslim community has the obligation to intervene against the party employing unacceptable means, which is the Iraqi government. The atrocities visited upon these minorities, fall within the unacceptable means. It

²⁴ Quoted in ibid; p.65.
²⁵ See for example, the text of the “Declaration of Mecca,” a statement of Muslim scholars and activists meeting under the auspices of the people’s Islamic Conference justifying collective Muslim action against Iraq (Foreign Broadcast Information Service, Near East and South Asia J. January 14, 1991, pp. 4-7)
seems that Islam is again in favor of armed humanitarian intervention in these circumstances, even though the aggressors are Muslims. However, no matter what the actions or inactions of individuals, groups or governments, Islamic teaching recognizes a right and duty of forcible intervention when Muslims are the oppressors as well as the victims of humanitarian abuse.

C - When Muslims Oppress Non-Muslims

Where Muslims oppress non-Muslims, as in Nigeria, Muslim states should be in the first line in undertaking humanitarian intervention and conflict resolution within the Muslim world. This is clearly demanded by Qur'anic ethical principles. Badawi in his view agrees: the international community supported by Muslim governments, should “without question” intervene, even if the victim is non-Muslim and the oppressing government is Muslim “the prophet (PBUH) he explains that “your brother right or wrong,” which means that if your brother is in the right you support him, but if he is in the wrong you prevent him from doing the wrong because to prevent what is morally wrong is to support the right.” This receives wide agreement in the Qur’an: “Oh, you who believe! Stand out firmly as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor.”(4:135)

D- When Muslims Ally with Non-Muslims against Muslims

The question facing us now is about the legitimacy of an alliance between Muslims and non-Muslims in undertaking humanitarian intervention. In other words, can Muslim states ally themselves with non-Muslim powers to fight another Muslim state that may be committing

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26 Ibid; p.68.
27 Badawi, interview transcript, p.7.
massive human rights violations against its own people? Of course Muslim states should undertake humanitarian intervention and conflict resolution within the Muslim world. This is demanded by the Qur’anic principles. Also, nothing in international law would prevent Muslim states organized in an international body from enforcing principles of collective security and humanitarian intervention. This is compatible with Article 33 and Chapter VIII of the UN Charter that urges regional organizations to maintain international peace and security.

The Gulf War demonstrated the strong need for an effective collective Islamic body to resolve intra-Muslim disputes. The inability of the Islamic Organization made Western intervention in the dispute easy and necessary.

According to Ayatollah Mutahari in Iran, “no one should have any doubts that the most sacred form of jihad and war is that which is fought in defense of humanity and of human rights,” if non-Muslims join this jihad, then their action is also sacred. Indeed, citing the example of some Europeans who fought on the side of the Muslim Algerians against French colonial oppression, Mutahari says “the jihad of such people was even more sacred than that of the Algerians because the Algerians were defending the cause of their own rights, whereas the cause of the other was more ethical and sacred.”

4-Problems and Prospects for Humanitarian Intervention in the Muslim World

If we move from the theory to the practice of humanitarian intervention in the contemporary Muslim world, the situation is frustrating at best. The issue faces all the problems

28 Quoted in Hashmi, “Is There an Islamic Ethic of Humanitarian Intervention?” p. 70.
of implementation that it encounters elsewhere in our current international system: first, the lack of any clear commonly supported conception of humanitarian crises requiring quick collective intervention; second, the lack of any dependable institutional mechanism for implementing international resolutions on collective intervention.

In the Muslim world, the existence of the Organization of Islamic Conference (OIC) was established in 1972 on the rhetoric of universal Islamic ethics yet has been mired ever since in the reality of the politics of its charter, involving forty seven disparate and often mutually hostile states. The objective for the establishment of the OIC was the Israeli occupation of Palestine territory in 1967. Its charter especially acknowledges the centrality of the Palestinian-Israeli dispute in its objectives “to coordinate efforts for the safeguard of the Holy Places and support of the people of Palestine, and help them to regain their rights and liberate their land.” The charter went further to include support “of all Muslim peoples with a view to safeguarding their dignity, independence and national rights.”\(^{29}\) However, the charter remains passive on mechanisms whereby how these goals can be achieved. So there is no attempt to establish any collective mechanisms for the protecting and safeguarding of the human rights of Muslim peoples.

Not surprisingly, the record of the OIC in responding to international crises has been disdained to date. In 1971-72 it failed to respond to the Pakistani atrocities in Bangladesh; throughout the eight year Iran-Iraq war its peace initiatives were repeatedly rejected by Khomeini, who criticized the organization’s failure to condemn Iraq’s aggression; during the Afghan-Soviet war it was effectively paralyzed; and in the second Gulf War, it took no concerted action to intervene in Iraq to combat the \textit{baghi} (aggressor according to the Qur’an)\(^{30}\), and finally, during

\(^{29}\) Al-Ahsan, OIC, 128.
\(^{30}\) For reviews of the OIC’s role in the conflicts in Bangladesh, Iran-Iraq, and Afghanistan, see ibid; and Haider
the war against Taliban Muslim regime, the OIC was completely paralyzed.

Indeed, the August 1991 Council of Foreign Ministers meeting in Turkey essentially disclaimed the OIC members of any responsibility for the misery inflicted on the Iraqi people and put it on the Iraqi regime. Despite OIC's persistent, the Organization was clearly silent regarding Israeli violations of Palestinian rights and also was clearly silent on the gross abuses of human rights that Palestinians and others have faced in the aftermath of the Gulf War.

Similarly, in the unfolding tragedy of Bosnia, the OIC's role has primarily been one of verbal declarations from the sidelines. The meeting of foreign ministers on June 1992 in Turkey offered nothing more that calls for the strengthening of UN economic sanctions against Serbia. There was, indeed, much hinting prior to and during the conference of collective Muslim intervention, either unilaterally or through the UN, in order to check the Yugoslav army's military assistance to local Serbian militants.

In the cause of mounting domestic outrage of Serbian atrocities in Bosnia, the OIC states initiated measures in early November to exempt Bosnia from the UN arms embargo against Yugoslavia in effect since September 1991.\(^31\) This request was formally incorporated into a resolution adopted by the Foreign Ministers Conference in Saudi Arabia on December 1-2, 1992. The resolution demanded UN enforcement of the no-fly zone over Bosnian territory and for immediate measures “against Serbia and Montenegro including the use of force prescribed under Article 42 of Chapter VII of the UN Charter.”\(^32\) There were hints from some OIC foreign ministers of taking unilateral Muslim action if the Security Council failed to take any strong

\(^31\) See, Hashmi. Ibid.
\(^32\) Ibid.

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measures against Serbian aggression. However, other than limited arms assistance by individual OIC states and support for limited UN peacekeeping operations in Bosnia, the OIC member states have not undertaken any collective intervention.

At the opening meeting of the senior officials of the 57th Organization of Islamic Conference in Malaysia on October 13, 2003, and in responding to the ongoing US occupation of Iraq, the OIC called for the withdrawal of foreign forces from Iraq, allowing the United Nations to administer Iraqi affairs, which was prelude to the restoration of Iraq's independence, and to the rebuilding of what has been destroyed over the past 20 years.

In short, as it is presently constituted, the OIC cannot be expected to play any decisive role in applying the doctrine of humanitarian intervention in Muslim countries even if a consensus could be developed and existed among the ruling elites that such a right exists. However, the OIC like the UN itself cannot long remain immune from the current forces of change that are sweeping the international arena. The humanitarian crises in different parts of the world, including the Muslim world, have created have a popular voice permitting and demanding a doctrine of humanitarian intervention. In fact, in all crises up to today, the OIC states have been moved to take action by strong internal pressures.

So what should the OIC do to be an effective international body? First, The OIC as a regional organization could potentially play an important supportive role in humanitarian efforts of the UN. With strong motives and leadership being provided by the Security Council, the OIC in collaboration with other regional organizations could be encouraged to develop within the UN system a series of guidelines establishing the conditions that would trigger collective intervention.

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Such regional organizations are better suited to maintaining standing peacekeeping forces that are able to rapidly intervene, not only after the fact, as at present, but prior to the outbreak of hostilities. Such a proposal would also better meet the needs of most humanitarian crises for regional organizations, and not ad hoc UN peacekeeping forces, are much better suited to providing the long term presence in a crisis situation necessary for any meaningful conflict resolution.

In the long term, the OIC needs to define with much greater clarity its own place and the place of Islamic thoughts in the international system. One essential first step toward this goal would be the convening of the International Islamic Law Commission and for a truly open and systematic discussion of the place of Islamic theory in the contemporary international system. This could play an appreciable role in undertaking humanitarian intervention and preserving international peace and security as well. As the world community evolves toward a more universalist ethics based on the rejection of traditional concepts of state sovereignty, the OIC and Muslim peoples generally are uniquely positioned by virtue of the Qur’an’s universalist ethics to contribute to a new international society.

In sum, traditional Islamic legal and ethical teaching on the question of humanitarian intervention has been rendered more relevant by a transformation in the terms of the humanitarian intervention debate since the end of the Cold War. This transformation is reflected in much of the contemporary thinking on the issue within the Muslim community. After the collapse of the Ottoman Empire, Islam entered a long period of political decline from which it has begun to recover.

On the issue of humanitarian intervention in response to the denial and gross violations of human rights, Islam recognizes universal ethical and legal norms that condemn such abuse. Islam also
acknowledges human solidarity across interstate borders where the government refused to safeguard the rights and needs of its citizens and where the government has collapsed. Islam recognizes a common duty and right of action on the part of other governments in such cases, this includes the right to intervene forcibly if there is no other remedy available.

This doctrine of humanitarian intervention is part of an Islamic jihad tradition. As we have already seen in this study that defensive jihad in its original Qur'anic wording did not only apply to the protection of Muslims, but to the protection of the oppressed in general.

Finally, violation of humanitarian doctrine in the name of Islam by some radical Islamists or extremists is strongly condemnable. As to the objection that Muslims are in favor of the defense of threatened coreligionists while ignoring if not condemning their own oppression of others, this was deemed to be a common response to humanitarian abuse. There are accusations of double standards. Nevertheless, the Islamic teaching should condemn humanitarian abuse wherever it occurs and whoever perpetrates it. And if the government of a Muslim country fails to respond, then it should be castigated immediately.

5-Conclusion

This conjunction of prestatist Christian natural law doctrine and traditional Islamic legal and ethical teaching on the question of humanitarian intervention has been rendered more relevant by a transformation in the terms of the humanitarian intervention debate since the end of the Cold War. This study suggests that this transformation is reflected in much of the contemporary thinking on the issue within both faith communities. Despite different starting points and quite different traditions of exegesis from founding texts, both religions came to engage with similar problems and grapple with similar difficulties from quite an early period, including the
formulation of what John Kelsay calls the shared notion of "war as a rule-governed activity." More recently, historical experience diverged again. With the eclipse and eventual collapse of the Ottoman Empire, Islam entered a long period of political decline from which it has only recently begun to recover. The Christian West, on the other hand, entered a period of unprecedented global expansion, which is only now beginning to be challenged. At the same time, unlike Islam, Christianity lost its dominant position within an increasingly secularized Western culture, introducing what perhaps remains the greatest single discontinuity between Islam and Christianity today. Nevertheless, despite these differences, a common ancestry, which includes a rich Hebrew and Greco-Roman inheritance, still provides substance for a shared response to common problems.

On the issue of intervention in response to actual or threatened mass denial of human rights, this study suggests that both religions recognize universal ethical or legal norms that absolutely condemn such abuse or dereliction of the primary duty of governments to safeguard the rights and needs of their citizens; both religions acknowledge human solidarity across interstate borders where such abuse or dereliction takes place, including situations in which the government has collapsed; both recognize a common duty and the right of action on the part of other governments in such cases; and both consider this to include a duty as well as a right to intervene forcibly if there is no other remedy and if other conditions are satisfied.

This shared doctrine of humanitarian intervention is part of a wider conjunction of the Christian just war and Islamic jihad traditions. One of the most important conclusions in the

340 A full comparison of these traditions is beyond the scope of this study. See for example, James Turner Johnson and John Kelsay, eds; Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic
wider study of which the research for this study was a part was that "defensive" jihad in its original Qur'anic formulation did not just apply to the protection of Muslims, but to the protection of the vulnerable in general. This, as has been seen, is consonant with interpretations of Christian just war doctrine that includes defense of the innocent as one of the legitimate justifications for the use of force by properly constituted authorities.\textsuperscript{341}

To sum up, there seems to be general agreement from both Muslim and Christian traditions in condemning humanitarian abuse wherever it occurs and whoever is the perpetrator. And if the governments of Muslim or Christian countries fall short in response, then they should be criticized accordingly.

\textsuperscript{341} See Haleem et al; The Crescent and the cross, chs. 3-4.
CHAPTER EIGHT

CONCLUSION

In this study I have tried to establish a legal basis for armed humanitarian intervention through an examination of the evolution of the doctrine and its practice. The introduction briefly mapped out the purviews of the study. Chapter one offered a “working definition” of humanitarian intervention in the sense that the definition itself establishes the criteria of legality or illegality. I preferred to adopt an approach which addressed humanitarian intervention as a specific problem, whether and under which conditions it is permitted under international law to intervene or threaten to intervene.

Chapter two outlined the traditional development of the doctrine and state practice of humanitarian intervention before World War II. Various interventions during this era indicate some level of acceptance, as a matter of international law, of the right to intervene for the protection of human rights. These interventions reveal the difficulties in assessing the motivations of the intervening state or states and the tendency of states to seek other justifications for their conduct. The best that may be said of this practice is that a concept of humanitarian intervention was present before World War II state practice, but its application was sporadic and uneven.

Chapter three examined the evolution and strength of humanitarian intervention under the UN Charter during the Cold War era. It also examined the norms of state sovereignty, non-intervention in internal affairs, the international protection of human rights, and the UN Charter’s effect on humanitarian intervention. It argued that the customary international law right of humanitarian intervention has survived the UN Charter. It also showed that humanitarian
intervention coexisted with state sovereignty and that the meaning and interpretation of state sovereignty is consistent with intervention to protect human rights. This chapter demonstrated that a norm of justified intervention to protect human rights can be found in international law, scholars’ writings and state practice. Furthermore, state practice relating to humanitarian intervention was discussed. It concluded that the extent of support or condemnation varied in each case depending on its impact on the wider geopolitical relationship between the superpowers, thus resulting in the doctrine not enjoying wide support in some cases. Nevertheless, the silent acquiescence on the part of the majority of states and the UN, arguably, indicated acknowledgement of humanitarian intervention in this period under consideration. In this chapter I have argued that the use of force on humanitarian grounds is legitimate because it is directed neither against the territorial integrity nor the political independence of a target state and, however, is in harmony with the most fundamental provisions of the UN Charter.

Chapter four investigated incidents of intervention during the Cold War era. During this era (1945-1989), the UN was unable to act collectively most of the time to end human rights violations because the Soviet Union and the United States vetoed or threatened to veto resolutions in the Security Council. In most cases discussed in this chapter I showed that intervention was conducted unilaterally and based on one or more reasons, such as self-defense, invitation, consent, rescue of nationals abroad, and on humanitarian reasons. Then, we can say that in this era, humanitarian intervention was limited and incidental.

Chapter five covered the practice of humanitarian intervention after the Cold War period, and the challenges and debates surrounding such intervention in their legal, practical and moral dimensions in the cases of Liberia, Iraq, Bosnia-Herzegovina, Somalia, Rwanda, Haiti, Kosovo and East Timor. It suggested that the cases show the emergence of a wider support in the
international community for humanitarian intervention. The practice of the Security Council after the Cold War era shows that the authority of the Security Council to authorize the use of force under Chapter VII is not limited to cases of military aggression or military threats to international peace and security. To intervene by armed force in a human emergency within a member state, whether or not there are external effects, can be brought within the scope of Chapter VII, if the circumstances are such as in Somalia and if the government structure in the member state has collapsed. If there are transboundary effects of a human emergency, such as a large exodus of refugees, or other external aspects which threaten international peace and security and are determined as such under Article 39 by the Security Council, the case for applying forceful collective measures would seem even stronger.

In this chapter I also examined the two fresh cases of intervention, which are Kosovo and East Timor. The situation in Kosovo was regarded as being a very grave situation, so serious in fact that the Security Council adopted a resolution saying that it constituted a threat to international peace and security. The tragedy of East Timor, coming soon after that of Kosovo, has focused once again attention on the need for timely intervention by the international community when death and suffering are being inflicted on large numbers of people, and when the state nominally in charge is unable or unwilling to stop it. Through the examination of the Kosovo case, I recognized that the NATO action violated the UN Charter by using force without a mandate from the Security Council. The action of NATO also risked destabilizing the fundamental international rule of law that prohibits a state or group of states intervening by the use of armed force in another state (Art. 2(4)), absent authorization by the Security Council (Art.42) or a situation of self-defense (Art.51). Even though, to many observers NATO’s war in Kosovo marks a dramatic shift in the contours of international relations that is likely to have far-
reaching ramifications for years to come. In Kosovo NATO intervened without seeking authority from the UN Secretary Council. In Timor the Council determined that the situation was a threat to peace and security, and accordingly, has authorized intervention, but only after obtaining an invitation from Indonesia. What we have learned from these two fresh cases of intervention is that the world can not stand aside when gross and systematic violations of human rights are taking place. We have also learned that, if it is to enjoy the sustained support of the world’s peoples, intervention must be based on the authorization of the Security Council.

Chapter six made an assessment of the humanitarian intervention during the post-Cold War. The developments in this era regarding intervention to protect human rights suggest a gradual shift in attitudes and challenges to state sovereignty, and the principle of non-intervention. This is, however, not to suggest that state sovereignty and non-intervention are no longer important norms in international relations. They still are. After a comprehensive assessment of the humanitarian intervention during the post-Cold War era, this study concludes that instead of the view that interventions in internal conflicts must be presumptively illegitimate, the prevailing trend today is to take seriously the claim that the international community ought to intercede to prevent bloodshed with whatever means are available. Arguments now focus not on condemning or justifying intervention in principle, but rather on how best to solve practical problems of mobilizing collective efforts to ease internal violence.

Even though humanitarian intervention should be left to practice on a case by case basis, in this chapter the study suggested six criteria for the use of force for humanitarian intervention. These criteria are: (1) threat to lives and large-scale atrocities; (2) necessity; (3) exhaustion of

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peaceful measures; (4) preference for collective measure; (5) humanitarian objectives; (6) proportionality. The purpose of these criteria is to limit the use of humanitarian intervention to the cases in which no alternative is available and to limit the effects on the target state and the risks of abuse. History shows that the lack of clear criteria will allow abuse.

This chapter also dealt with the problem of abuse which means that the intervening state abuses when it does not aim its action at stopping human rights violations. Most legal scholars who are opposed to humanitarian intervention argue that governments always or almost always, abuse when they intervene abroad, even if they say they are intervening on humanitarian grounds, and even if the actual result of the intervention is to redress human rights violations. This argument is not sufficient to reject humanitarian intervention because even lawful and well-justified rules can be abused and the potential for abuse is common to all legal policy, doctrine or rule.

Chapter seven briefly discussed Islamic and Christian concepts of humanitarian intervention, and concluded that what has been established so far is support in principle for a doctrine of humanitarian intervention as part of the jihad and just war traditions, but only under certain circumstances. The further requirement, therefore, is to specify what those circumstances are- a task that involves reconciling just war and jihad criteria. One of the most important conclusions is that the defensive jihad in its original Qur'anic formulation did not just apply to the protection of Muslims, but to the protection of the oppressed in general.

In conclusion, a notable shift seems to be underway. The principle has been invoked by the UN and regional organizations, by national governments, non-governmental organizations and

342 There have been attempts to determine criteria for "just humanitarian intervention" by applying traditional just war criteria, as in David Fisher, "The ethics of Intervention," Survival 36 (1994), pp. 51-59. See Haleem et al; The Crescent and the Cross.
Looking at the reality, humanitarian intervention has gained wide support in the international community. Also what we are witnessing is that the world today is moving towards consensus and enhancement of humanitarian intervention legitimacy.

Finally, what we concluded from this study is that intervention in support of human rights is grounded in the premise that it is the interests of humanity at large that are at stake, and not the interests of any particular state or states. From a legal angle, the international recognition of human rights tends to hold governments responsible for gross and systematic violations. Most governments that engage in violations of human rights tend to use national sovereignty and non-intervention as a barricade to protect them from international scrutiny. Traditional notions of sovereignty, however, are beginning to give way to a growing international awareness grounded in international law, and under Chapter VII of the UN Charter, that states cannot ignore the consequences of internal conflicts and the attendant human rights violations that displace entire societies. State sovereignty means adherence to certain domestic practices including protection of the human rights of citizens; thus obstacles that the concept has raised cannot, and should not, be used as a bar to international intervention in issues that are deemed international. Sovereignty cannot mean that whatever happens within your borders and whatever you do to your citizens, the world will not get involved. I see sovereignty as a principle of responsibility to put your house in order, to take care of your people, to assist them and protect them and, if you need international cooperation, to call on the international community, or at least to welcome their initiative to help your people. I believe that the cause of human rights and humanitarian intervention is progressive, is incremental and that those who are trying to halt the march of humanitarian progress will be seen historically in a negative light. Sovereignty has always been limited by human rights issue. This is not something new. What we are witnessing in the post-Cold War era is an enhancement
and improvement of what has already been unfolding.

Recent experience suggests the growth of authoritative claims to act in defense of human rights. While the character of the UN’s role has sometimes been ambiguous, and has been subject to castigation, the cases demonstrate an emerging international support for humanitarian intervention legitimacy. The enormous number Security Council resolutions relating to Iraq, Yugoslavia, Somalia, Haiti, Rwanda, and Liberia established the linkage between human rights violations and threats to, or breaches of international peace and security. It is equally plausible to argue that, even if such a link is not invoked, humanitarian intervention is still permissible or justifiable. In spite of problems that have confronted the UN, it has established protection forces to watch over the security of minority enclaves. It has also considered different means of securing the supply of humanitarian assistance to populations in crises as a result of internal conflicts. These developments constitute notable precedents for future international practice.

Even though post-Cold War practice reveals the UN is prepared to implement a broader conception of humanitarian intervention, there is a realization at the same time that some of the problems confronted do not lend themselves to simple solutions. As Weiss points out, “Security Council resolutions have not always matched the means to well-considered ends and objectives. Thus, a lack of commitment and resources has plagued some of the interventionary projects of this era. The result has been that UN humanitarian operations have suffered from operational and institutional shortcomings, and have not been translated into effective performance with any consistency, thus evoking mixed reactions.”

The post-Cold War international order is still unfolding with its uncertainties. With the relaxation of East-West tensions and the demise of repressive regimes in many parts of the world, 

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expressions of domestic tensions and grievances have come to the fore. Given this state of affairs, it is likely that internal conflicts will increasingly challenge what one analyst characterizes as “the ingenuity and resourcefulness of the international community.” If this is the case, then as Sadako Ogata points, “the time has come for a major dialogue on the hard choices that will have to be made in the face of finite humanitarian resources and almost infinite humanitarian demands.”

Pressure on the UN to engage in more humanitarian operations if this scenario unfolds will mean the assignment of priorities in light of limited capabilities to intervene effectively. As Weiss suggests, it would seem to be the case for now that “confronted with increasing chaos and a seemingly endless number of humanitarian emergencies, the choices are better prevention, better intervention or triage.”

If the UN is to become more effective in the future regarding humanitarian intervention, then it must learn from its mistakes. I am in line with those who suggest that there exists a necessity of establishing a comprehensive framework of general principles to guide the UN in deciding when a domestic human rights situation or internal conflict deserves actions by the Security Council, regional organization or a collectivity of states. If future humanitarian interventions are to be successfully developed, then they must be collectively undertaken by the international community as a whole. Epistemic communities may play a key role in this regard.

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5 Weiss, ibid.

6 For more details, see Schachter, Community, (1992) 86, American Society of International Law Proceedings at 320. (cautioning against “a tendency on the part of those seeking to improve the United Nations to prescribe sets of rules for future cases, usually over-generalizing from past cases”. For him, “each crisis has its own configuration. Governments will always take account of their particular interests and the unique features of the case. While they can learn from the past, it is idle and often counterproductive to expect them to follow codified rules for new cases”.

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The opportunity for developing a general framework towards successful humanitarian intervention has presented itself. How to improve collective responses still constitutes unfinished work of the international community. The UN, however, remains the only meaningful organization in the world that can legitimately act for the betterment of mankind as a whole. In the world as it is today, with still-defective UN machinery when it comes to preventing or stopping acts of genocide or comparable atrocities against human beings, sincere humanitarian intervention, for the time being, seems to be the only way to prevent or eliminate situations in which too many people are left at the mercy of subjugation, despotism and cruelty.

An independent International Commission on Intervention and State Sovereignty (ICISS) set up by the Canadian government would be a very good contribution to this subject matter. This Commission is made up of foreign ministers, academics and representatives from NGOs to study ways and means for humanitarian intervention and to promote a comprehensive debate on the issues surrounding the problem of intervention and state sovereignty, and to contribute to building a broader understanding of those issues. The mission of this Commission is also to study the history of intervention, why and how it is conducted, questions about national laws, trade-offs between the UN and its members, and how countries respond to intervention and the concept of national sovereignty. I hope this Commission will come up with criteria under which humanitarian intervention can be conducted to prevent gross human rights violations. That is the task of the future.

In the end, let me just be optimistic and dream that by the end of the 21st century the abuse of

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7 This is an independent body intended to support UN discussion and action on this issue. It will focus on the “the appropriate international reaction to massive violation of human rights and crimes against humanity, as well as address the question of the preventive action through an international work program on consultation and outreach.” See the Commission website at http://www.iciss.gc.ca.
people within a state's borders will be a historical phenomenon. ##