

1991 HUMANITARIAN INTERVENTION IN KURDISTAN AND IRAQ'S SOVEREIGNTY

For the first time, the U.N. Security Council had linked humanitarian concerns to international peace and security and had given humanitarianism greater weight than non-intervention.

This paper argues that the resultant humanitarian intervention in Kurdistan in 1991 was legal.

Resolution 688 deemed intervention valid on humanitarian grounds because of the gross human rights violations by the then Iraqi government against its own citizens, and because these actions constituted a breach of the peace.

by

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ABSTRACT

Increased humanitarian intervention in last decades has raised a number of issues and questions pertaining to international law and the legal principles covering intervention. Intervention in Kurdistan in early 1990's marked a turning point in the development of the international system, not because the United States-Alliance was in any way improper in freeing itself from the constraints of real politic and UN legitimacy, but because it demonstrated the limits of those constraints. Intervention in Kurdistan was not so much a violation of international law and the principle of non-intervention, as an example of the short-comings of a law drawn up half a century ago.

This document is developed through an analysis of definition, history, Cold War and post-Cold War activity, and the moral issues inherent in intervention. A framework with which to view the issue of humanitarian intervention in Kurdistan is constructed around two mechanisms. The first is state sovereignty. The second is the belief that we have entered a new human rights era, with a new set of conditions by which to determine the best possible link between the legality and legitimacy of military intervention.

With the United States-Allied intervention in Kurdistan there began to emerge a system of values in which the defence of democracy and human rights outweighed the principle of sovereignty, in its strictest interpretation. Such military intervention may be seen as '*illegal*' yet legitimate, as both the constraints of realpolitik and the operating rules of United Nations multi-lateralism may be loosened or disappear altogether. Arguably, the international community has a historical responsibility to promote a new form of international regulation of this type, in which morality is a declared basis of policy, and human rights are more important than states' rights. This paper has no knots with the USA and UK invasion in 2003.

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INTRODUCTION

In the post-Cold War environment the United Nations Security Council resolution 688 of 1991 broke new ground in terms of interference in what had previously been regarded as the domestic affairs of a member state.¹ The resolution had a humanitarian objective in its insistence on an immediate end to the repression of the Kurdish population of Iraq by the Iraqi government. It led to the establishment of safe havens in northern Iraq² to allow Kurdish refugees to return to Iraq under international protection.

For the first time, the Security Council had linked humanitarian concerns to international peace and security and had given humanitarianism greater weight than non-intervention.³ The responsibility of the Security Council was linked to the consequences of Iraq's use of force during the invasion of Kuwait, and had several main objectives:

- i. to create humanitarian corridors to allow assistance to reach the civilian population;
- ii. to promote the return of Kurdish refugees from Turkey and Iran;
- iii. to establish humanitarian aid centres; and
- iv. to establish a no-fly zone north of the 36 parallel.

The intervention taken by United States-Alliance in Kurdistan has had been the subject of much criticism. This was not only because it happened without any authorisation from the Security Council of the United Nations, but also because it occurred in the first place. There is a fundamental tension between the two concepts of sovereignty and intervention.

The problem arises because the international system has been constructed on the basis of the principle of sovereignty, which remains the cornerstone of international law. However, there is an argument that the concept of sovereignty in its traditional sense is no longer sustainable. The view has been that the highest source of sovereign power rests with the people of a state, and it is up to those people to determine how they structure and run the society in which they live. It has not been acceptable for states to impose their own values and interfere in the domestic affairs of other states.

¹ Kofi Annan the Secretary-General of the United Nations made a remarkable series of speeches in 1998 and 1999. Since the phrase "humanitarian intervention" is increasingly falling out of favour, it is important to note that the Secretary-General never used it himself, speaking rather of "intervention". He stated: "Our job is to intervene...State frontiers...should no longer be seen as a watertight protection for war criminals or mass murderers. The fact that a conflict is 'internal' does not give the parties any right to disregard the most basic rules of human conduct". See Tharoor, Shashi and Daws, Sam "Humanitarian Intervention: Getting Past the Reefs" World Policy Journal, Article Extracts, Vol XVIII, No 2, Summer 2001.

² This thesis will not mention the no-fly zone in southern Iraq, because it deals only with Kurdistan /Iraq.

³ One of the basic assumptions of this new international order is that sovereignty can never be a pretext for genocide, a principle that is perhaps the most stabilising for international security in the twenty-first century.

Having said this, if a government flagrantly violates the human rights of its own people, outsiders have the right to intervene on behalf of those people, whenever possible, with the blessing of the UN Security Council. A purely legalist position underlines the paradigm that international law does not entitle states to engage in humanitarian war. The sanction of force, to prevent violations elsewhere, is legitimate only if all permanent members of the UN Security Council consent to such action.

The limitations of such a view were never more apparent than when Russia and China announced that they would not allow the Security Council to pass a resolution,⁴ under Chapter VII of the Charter, which would authorise the use of force against Iraq on behalf of that nation's Kurdish civilian. It was at this point that the international community reached a political and moral crossroads.

The core issue was whether the international community should uphold the principle of non-intervention in the internal matters of other states even though Iraq was clearly using that principle as a shield behind which it could continue to slaughter a segment of its population. As it happened, moral integrity won out over black-letter law.

This legal paper argues that the resultant humanitarian intervention in Kurdistan was legal. It was the first example of a new trend in humanitarian intervention. At the time, it appeared contrary to law, because it was contrary to established precedent. Now we can see it established a new precedent, through which we see it as legitimate, today.

The first chapter assesses the Kurdish situation in northern Iraq. The second chapter provides an understanding of humanitarian intervention. The third chapter describes and evaluates the application of just war theory to the concept of international humanitarian intervention in early 20th century. The fourth chapter attempts to discuss what intervention meant during the Cold War period. The fifth chapter examines the legality and legitimacy, under international law, of the US-Allied intervention in northern Iraq during the Kurdish Crisis in 1991. The sixth chapter sets out the dynamics of post-Cold War conflicts and maps the change in attitudes toward humanitarian intervention. The final chapter addresses some moral questions associated with the issues of human rights, sovereignty, and humanitarian intervention. The paper concludes that the humanitarian intervention in Kurdistan was legitimate.

⁴ On 7 April 1991, Chinese Foreign Ministry spokesman Sun Yuxi Xinhua stated that Iraq's sovereignty, territorial integrity, and independence should be fully respected. He added that the establishment of the no-fly zones violated the principles of the UN Charter. The Russian Foreign Ministry through Interfax made similar assertions on 7 April 1991: "US, UK Bombing Raids Draw Blood, Criticism" RFE/RL Iraq Report, 14 April 2000, Vol 3, No 10.

CHAPTER ONE

KURDS AND KURDISTAN

1. Introduction

The Kurds are people of Indo-European origins⁵ who have for thousands of years⁶ lived mainly in the mountainous region where Turkey, Iraq and Iran meet, in an area commonly known as ‘Kurdistan’. They have their own language, related to Persian but divided into two main dialects.⁷ No firm statistics exist for the Kurdish population but a cautious estimate is that they number 25 million.⁸ Although the Kurdish people are overwhelmingly Sunni Muslim, they include Jews, Christians, Yazidis, and other sects.⁹ The Kurds are one of the largest ethnic groups in the world “without their own independent state”.¹⁰

This chapter assesses the Kurdish then situation in northern Iraq.¹¹ The Kurdish dilemma offers a poignant example of the interplay between the

⁵ It is likely that the ancestors of the Kurds came from several sources; some from, Armenian, or Assyrian tribes, but most probably from Indo-European groups. For more details see Short, M and McDermott, A The Kurds (Minority Rights Group Report No. 23 (1975); Chaliand G (ed) People Without a Country (1980); Pelletiere, S C The Kurds: An Unstable Element in the Gulf (1984); McDowall, David The Kurds (Minority Rights Group Report No. 23 rev. ed. 1985); Hannum, H “Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights” in The Kurds, (1986) Chapter 9, 178-202.

⁶ They have lived for more than 2,000 years in the roughly 74,000 square mile mountains territory that they currently inhabit.

⁷ The Kurds have a north-western Iranian linguistic origin in common, they are separated by two major dialects with considerable local variation and a number of sub-dialects, which makes communication between the various tribes and regions difficult, though possible.

⁸ Teimourian contends that the 25-28 million people “born into the Kurdish language” constitute the Kurdish ethnicity. Little did the Arabs know that the association of the Kurds with “mountain people” would give modern states a rhetorical tool of exclusion. Turkey, for example, as part of a coercive policy of assimilation, refuses to admit the independent existence of the Kurds and refers to them as mountain Turks. See Teimourian, Hazhir “Kurdish Nationalism--An International Headache?” (1994) *Jane’s Intelligence Review*, 31 December. Meyers Grosses (Taschenlexikon, Vol. 12 (2nd. ed 1987) 282) states that almost half of the Kurdish people live in the eastern part of Turkey, about a quarter in Iran, some 20% in Iraq and the others in Syria and the former USSR.

⁹ Elements of Zoroastrian, Christian, Jewish, and Manichaeian religion have been found in Kurdish tribes and among the views of their priests. The predominant religion of the Kurds and the Kurdish people, however, is Sunni Islam, specifically the Shafi’ite school of Law (Madhab), while the other Sunnis in the region are of the Hanafite (Madhab). This gives them a sense of unity and uniqueness. See Kreyenbroek, Philip G and Allison, Christine (eds) Kurdish Culture and Identity (New Jersey: Zed Books Ltd., 1996) 86-110.

¹⁰ See Bonner, Elena Kurds - A People Without a State, 46. See also Chomsky who believes that the Kurds have been backed into a corner and given no other option. Stripped of all institutional outlets that provide release and escape for other ethnicities, the Kurds must fight for recognition, identity, and survival. See Chomsky, Noam The Prosperous Few and the Restless Many (Berkeley, California: Odonian Press, 1993) 59; see also Gunter, Michael M The Kurds in Turkey: A Political Dilemma (Boulder, Colorado: Westview, 1990) 1.

¹¹ This paper will not discuss the Kurdish situation in other parts of Kurdistan. It focuses only on the Kurds in Northern Iraq.

different facets of the New World Order: national identity, cultural expression, and physical security.¹²

2. The Kurds in History

In the winter of 401 BC, a defeated army of Greek mercenaries slowly made its way home from Mesopotamia, after failing to topple the Persian king Artaxerxes II. Crossing the Taurus Mountains, in what is now south-eastern Turkey, the mercenaries were set upon by bands of Carduchi, a fierce race of bowmen who caused more harm to the Greeks in seven days of hit-and-run raids than the Persian defenders had during the entire Mesopotamian campaign. He wrote that the Carduchi lived in the mountains and were not subject to outside authority: “Indeed, a royal army of a hundred and twenty thousand had once invaded their country, and not a man of them had got back...”¹³

Not all that much has changed in 2400 years. The Carduchi were almost certainly the ancestors of modern Kurds. From the 16th century, the Ottoman and Persian Empires afforded the Kurdish tribes almost total autonomy. In return, the Kurds kept the peace on the rugged but open border area between the two empires.¹⁴ That arrangement was slowly eroded from the middle of the 19th century onwards. Various governments decided to take direct control of these areas, and make subjects of the people living within them.

The years after the conclusion of the First World War were the closest the Kurds “ever got to statehood”.¹⁵ When the Ottoman Empire was carved up, the

¹² “No one finds it easy to live uncomplainingly and fearlessly with the thesis that human reality is constantly being made and unmade, and that anything like a stable essence is constantly under threat” See Said, Edward “East Isn’t East”. *Times Literary Supplement* 1, 3 February 1995.

¹³ Xenophon *Anabasis* 4.1.8-11 and 4.3.1-30. See also Kaplan, Robert D “Sons of Devils, in a turbulent region the stateless Kurds play the role of spoiler” *The Atlantic on Line* November 1987.

¹⁴ For many centuries Kurdistan had remained a buffer region between Turkey and Persia subject to the control of one or other of these empires. By 1639 three quarters of the Kurds had come under Ottoman rule and in the 19th century there were repeated uprisings particularly against Turkey. Following the defeat of the Ottoman Empire in World War I, the 1920 Treaty of Sèvres provided not only for the creation of the three Arab states of Hejaz (later Saudi-Arabia), Syria and Iraq, but also for an Armenian state and a Kurdish state. In 1921 Iraq became a monarchy under the rule of Feisal, who had been deprived of Syria by the imposition of a French mandate. The 1923 Treaty of Lausanne superseded the Treaty of Sèvres. The latter confirmed the plan to create the three Arab states, but no longer mentioned either Armenia or Kurdistan. It was Anglo-French collusion and rivalry in redrawing the map of the Middle East, as well as British interest in controlling oil rich areas, that led to the rejection of an independent Kurdistan and the artificial extension of Iraq to include a predominantly Kurdish north. After the 1958 coup d'état against the monarchy, relations between the Kurds and the new military government initially appeared promising on the basis of the new constitution that referred to a partnership between Arabs and Kurds in Iraq. In 1970 the Iraqi government and the Kurds concluded a peace agreement that reaffirmed Kurdish rights and envisaged the creation of an autonomous region of Kurdistan. However, the Kurds refuted the 1974 Law of Autonomy in the Area of Kurdistan announced by the Iraqi government as falling short of the peace agreement. Fighting continued with thousands of Kurds fleeing to Turkey and Iran.

¹⁵ See the Treaty of Sèvres 1920, Articles 62-64 in *The Treaties of Peace 1919-1923, Vol. II* (New York: Carnegie Endowment for International Peace, 1924).

Kurds were granted autonomy under the 1920 Treaty of Sèvres,¹⁶ and even expressly permitted to form an independent state.¹⁷ In 1922 the Kurds succeeded in establishing the Kingdom of Kurdistan, a semi-independent state. But this was short-lived. The Treaty of Sèvres was superseded in 1923 by the Treaty of Lausanne, which sanctioned the creation of three Arab states – Hejaz, Syria, and Iraq and omitted any mention of Kurdistan.¹⁸ The rejection of an independent Kurdistan and the artificial extension of Iraq to include a predominantly Kurdish north sowed the seeds for continuous Kurdish revolts in Iraq.

The formation of Turkey in the same year saw its new President neglect the Treaty of Sèvres, and official recognition of a Kurdish kingdom ended in 1924.¹⁹ Thus, the Kurdish people found themselves segmented between Turkey²⁰, Iran²¹ and Iraq²². The decades that followed were characterised by a repeated cycle of oppression and revolt. The first unrest occurred in 1925 after the League of Nations awarded the former Ottoman province of Mosul, in southern Kurdistan, to the new Arab state of Iraq. At that time Iraq was under British mandate, with some guarantees granted to an internationally owned oil company to develop the oil reserves of the Baghdad and Mosul regions.²³

¹⁶ The Treaty of Peace between the Allied and associated powers and Turkey signed at Sevres August 10, 1920. See *The Treaties of Peace 1919-1923, Vol. II*, Carnegie Endowment for International Peace, New York, 1924.

¹⁷ See Izady, Mehrdad R The Kurds: A Concise Handbook (Washington: Taylor & Francis, 1992).

¹⁸ Treaty of Lausanne, Treaty of Peace with Turkey, 24 July 1923.

¹⁹ Kurdish was banned in Turkey in 1938; an individual using Kurdish in public could be fined. See Kreyenbroek, P G “On the Kurdish language” in Freyenbroek, P G and Sperl, S (eds) The Kurds: A Contemporary Overview (London: Routledge, 1992) 68-83. See also *Update on the State of Affairs in Turkey*, N 6 1st August 1995.

²⁰ A statement of the Turkish Minister of Justice; 'The Turk is the only master in his country. Those who are not pure Turks have one right in this country: the right to be servants, the right to be slaves.' See Turkish News paper *Milliet*, 30 September 1930. See also Kreyenbroek, P G “On the Kurdish language” in Freyenbroek, P G and Sperl, S (eds) The Kurds: A Contemporary Overview (London: Routledge, 1992) 68-83 and *Update on the State of Affairs in Turkey*, N 6 1st August 1995.

²¹ In Iran the Kurds were similarly brought under control in the 1920s. In 1946 the Kurds of Mahabad (a Kurdish city in Iran) succeeded in declaring an independent republic, but it only lasted a few months. With the advent of the Islamic Republic and the Revolution of 1979, many Kurds tried to achieve autonomy. Though the Iranian government promised such autonomy in return for support against the Shah, such promises were never kept. See Entessar, Nader *Kurdish Ethnonationalism* (Boulder, CO: Lynne Rienner Publishers, p.17, 1992, see also Koochi-Kamali, Fereshteh, 'The development of nationalism in Iranian Kurdistan', in *The Kurds: A contemporary overview*, Kreyenbroek, Philip G. and Stefan Sperl, eds. (New York: Routledge, pp. 180-182, 1992).

²² In Iraq, there were numerous Kurdish revolts against the Iraqi government. From 1964 until 1974 Iraqi Kurds were strong enough to maintain an intermittent state of war interspersed with peace negotiations. In 1974 the Iraqi government offered the Kurds autonomy, but the Kurds believed the offer lacked substance and they reverted to war, strongly supported and encouraged by the West. In 1975, Iraq/Iran signed an agreement. In this accord Iraq agreed to recognise the Iranian sovereignty over half of the Shat al-Arab, and Iran decided to withdraw its support to Kurdish insurgency in Iraq. Without Iran's support the Kurdish resistance to the Iraqi government virtually collapsed. See “Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq” June 13 1975, Iran-Iraq, 1017 U.N.T.S. 136 (known as Algiers Agreement of 1975) I.

²³ Amatzia Baram and Wajeeh Elali, Country Information, Microsoft ® Encarta ®

3. The Iraqi Kurds in Early 1990's

During the Iran-Iraq War²⁴, the Kurdish Democratic Party (KDP) of Iraq cooperated with Iran against Iraq, and even conducted military operations within Iraqi territory, side by side with the Iranian army. Meanwhile, Iraq was supporting the Iranian Kurds, represented by the Patriotic Union of Kurdistan (PUK), against both the Iranian government and the KDP. In 1988, the Iraqi army ruthlessly crushed the alliance between Iran and the KDP, including the indiscriminate use of chemical weapons.²⁵

During the Gulf War²⁶, when Iraq invaded Kuwait on 2 August 1990, the United States on more than one occasion invited the people of Iraq to rise against the Iraqi regime²⁷, although the US government later denied this.²⁸ The official reason for the suspension of 'Operation Desert Storm'²⁹ on 27 February 1991 was that the goal of pushing Iraq out of Kuwait had been

Encyclopedia 2002.

²⁴ Iran-Iraq War: 1980-1988.

²⁵ In March 1988 about 5,000 civilians in the town of Halabja were killed by poison gas. The following is based upon the instructive summary given by Hippler. See Hottinger, Arnold "Die arabische Welt nach dem Golfkrieg" (1991) 15-16 Europa-Archiv 203-204. See also Genocide in Kurdistan, heval Hylan.

²⁶ August 2, 1990 Iraq invaded Kuwait.

²⁷ Mayall, James "Non-Intervention, Self-Determination and the New World Order" (1991) 67 International Affairs 421, 428 reproduces the following remarks made by President George Bush to the American Academy for the Advancement of Science on 15 February 1991 from the Financial Times, 16-17 February 1991: "But 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 hand to force Saddam Hussein the dictator to step aside and to comply with the UN and then rejoin the family of peace-loving nations".

²⁸ US State Department spokeswoman, Margaret Tutwiler. Probably, this was intended to invite a military coup against President Saddam Hussein. At any rate, in view of American interests in the region as a whole, it did not mean support for a division of Iraq in the wake of the Shiite insurrection in the south and a corresponding Kurdish uprising in the north. On the contrary, the territorial integrity of defeated Iraq needed to be secured in order to preserve Iraq's function as a balance, primarily against Iran. Although the Islamic Republic did not say so officially, it was clear that only Iran had an interest in a successful Shiite revolution in the south of Iraq. The establishment of an independent Kurdistan in the north of Iraq, on the other hand, not only would have raised the issue of control over the important oil resources in the area, but also would have posed a threat to the security of neighbouring states, in particular Turkey. There is reason to assume that this scenario and the unwillingness of the United States to commit its military to a presence of unknown duration in a country engaged in a civil war were key factors for the political decision not to go through with the campaign against Saddam Hussein at the end of February 1991. See Keesing's Record of World Events, Vol. 37 (1991) 38, 127. For a similar view see Ruehl, "Der Krieg am Golf. Militärischer Verlauf und politisch-strategische Probleme" (1991) 8 Europa-Archiv 237-246.

²⁹ Under the name 'Operation Provide Comfort' the US-Allied intervention force established a small triangle zone at the border in the north of Iraq between Zahko, Amadiya and Dohuk, but excluding the city of Dohuk. This was declared to be a security zone under the protection of the allied troops and non-accessible to Iraqi forces. The Kurdish refugees were brought from the mountain slopes into this area where they were supplied with food and tents. Many returned to their own quarters in neighbouring cities. See Hottinger "Die arabische Welt nach dem Golfkrieg" (1991) 16 Europa-Archiv 442; Keesing's Record of World Events, Vol. 37 (1991) p.38, 308 (News Digest for April 1991). Another report states that up to 6,700 Iraqi refugees, mostly children under five, died during a two-month period in Turkish camps along the border.

achieved.³⁰ Western ambivalence to the plight of the Iraqi people was highlighted by the international response to Kurdish pleas. In mid-March 1991, the Kurds, following the lead of the Shiite rebels in the south of Iraq, rose in the north. They were able to operate on the basis of an alliance called the Kurdish Front, which had been principally formed by the two major Kurdish organizations KDP and PUK.³¹ Because of the fear of more chemical weapons attacks³², the Kurdish Front urgently appealed to the leaders of France, the United Kingdom and the United States to seek immediate intervention by the United Nations.³³

Evidence of Iraq's maltreatment of the Kurdish population mounted, and with it grew international concern. However, by early April 1991 there still had been no coordinated international response. France attempted to persuade the UN Security Council to adopt a resolution to provide protection for the Kurds, on 2 April 1991, but failed.³⁴ Meanwhile, Turkey³⁵, France³⁶ and Iran³⁷ sent letters in support of the Kurds to the UN Security Council. Finally, on 5 April 1991, largely due to French persistence, the UN adopted Resolution 688, endorsing intervention. Thus, the UN embarked on a programme of humanitarian intervention for the first time in its history.

While Resolution 688 was rejected by Iraq³⁸, it reflected growing international condemnation of Iraq's treatment of the Kurdish people.³⁹ Its purpose was to

³⁰ Later it became clear that this decision allowed a large number of tanks of the Iraqi Republican Guard to escape to the north before General Schwarzkopf was able to complete his encirclement of the mass of Iraqi tanks assembled in the area west of Basra. As a result, the Republican Guard, which had deployed almost half of its forces in the north of Iraq, remained able to function after the war. It appears that the domestic survival of the regime in power was preferred as a lesser evil, for the time being, than carving up of the state of Iraq. See Hottinger "Die arabische Welt nach dem Golfkrieg" (1991) 15-16 *Europa-Archiv* 437.

³¹ They made quick advances in the north of Iraq and gained control over the Kurdish cities Sulaymaniyah, Arbil, Dohuk and the oil centre of Kirkuk. However, they were unable to resist counter-attack by the Iraqi army. Well remembering the Iraqi use of chemical weapons in 1988 the population of the cities fled in panic mainly towards Iran and Turkey. About 3 million Kurds had fled into the mountains as part of a 'tactical withdrawal' to escape the government's programme of 'genocide'. See Keesing's Record of World Events, Vol. 37 (1991) 38, 126 (News Digest for April 1991). This source also quotes the Iranian Foreign Minister, Ali Akbar Vellayati, as having stated on 3 April 1991 that "more than two million Kurds are leaving under constant bombardment". See also *ibid*, 437.

³² See Heval Hylan, *Genocide in Kurdistan*, 2000, Gendercide Watch website.

³³ See Malanczuk, Peter "The Kurdish Crisis and Allied Intervention in the Aftermath of the Gulf War" 1990-2001 (1991) 2 *European Journal of International Law* No.2, July 28, 1999.

³⁴ There was opposition from China, the USSR and the United States who shared the view that this would create a precedent for the involvement of the Security Council in internal matters. Various reasons for the refusal were put forward by the US administration, such as the unlikely success of insurgents in view of their lack of a central command, the absence of a mandate from the United Nations extending the objective of the operation beyond the liberation of Kuwait, and the President's reluctance to put the lives of American soldiers at risk by becoming involved in a civil war which had been continuing for decades. This attitude prevailed for some time, but eventually altered in view of the position taken by other states and public pressure resulting from reports in the media. See Keesing's Record of World Events, Vol. 37 (1991) 38, 127 (News Digest for April 1991).

³⁵ Letter of 2 April 1991, S/22435.

³⁶ Letter of 4 April 1991, S/22442.

³⁷ Letters of 3 and 4 April 1991, S/22436 and S/22447.

³⁸ Keesing's Record of World Events, Vol. 37 (1991) 38, 127 (News Digest for April 1991)

protect the human rights of Kurds in northern Iraq by establishing a no-fly zone over Iraq north of the 36th parallel, and imposing economic sanctions against Iraq.⁴⁰ Consequently the government of Iraq withdrew its civilian administration from the Kurdistan region.⁴¹

Since then, within the 'safe haven' that was established, the UN and non-governmental organizations have helped the Kurds rebuild their villages and resume their traditional way of life in rural areas. Unfortunately, many observers saw it as a matter of time before the Iraqi government re-asserts total control of the region.⁴² This was indeed a bleak prospect for the Kurds.

On 29 May 1991, the United States announced that the allies would begin withdrawing their troops from northern Iraq on 15 June 1991.⁴³ However, on 21 June 1991, this withdrawal was suspended following a decision by a number of America's allies to deploy a rapid reaction force (RRF), based in the south of Turkey, to ensure further protection of Kurdish refugees.⁴⁴ With the consent of Turkey, an intervention force (Operation Raised Hammer)⁴⁵ of about 5,000 soldiers from the US, UK, France, Italy, the Netherlands and Turkey⁴⁶, remained positioned in the south of Turkey (Silopi and two other cities), ready to intervene in Iraq if necessary.⁴⁷ These troops left on 10 October 1991, although some US and British aircraft stayed on at the Turkish

mentions that the permanent representative of Iraq to the UN lodged with the Secretary-General a formal protest against the resolution.

³⁹ Keesing's Record of World Events, Vol. 37 (1991) 38, 127 (News Digest for April 1991) mentions the following: On 5 April 1991 NATO, accusing the Government of Iraq of 'massive human rights violations', demanded that 'every pressure ... be brought to bear to bring Iraqi authorities to stop the repression without delay'. Germany's Foreign Minister, Hans-Dietrich Genscher, described Iraq's actions as 'genocide' on 5 April 1991 and, on 13 April 1991, suggested a trial of President Saddam Hussein for 'crimes against humanity'. According to reports, the Prime Minister of Australia, Bob Hawke, also called for international action in favour of the Kurds.

⁴⁰ Insights Into The world: The dilemma of intervention criteria, The Yomiuri Shimbun/Daily Yomiuri – Japan, 18, December 2000.

⁴¹ The UN designated Kurdish "safe haven" in northern Iraq was set up the last time the Kurds had entered the Western consciousness, following the Gulf War in 1991, when Iraq crushed a Kurdish uprising, killing thousands, and creating 2 million refugees.

⁴² See David McDowall, Minority Rights Group report, "The Kurds", 1997.

⁴³ Keesing's Record of World Events 37 (1991) 38, 211 (News Digest for May 1991).

⁴⁴ Keesing's Record of World Events 37 (1991) 38, 308 (News Digest for June 1991) notes that US Secretary of State, James Baker, indicated on 7 June, after talks in Copenhagen with UK Foreign Secretary, Douglas Hurd, that the USA would consider postponing troop withdrawals until "the security of the Kurdish population is assured". On 25 June UK Prime Minister, John Major, stated that the UK forces would remain in northern Iraq until the Kurdish population received assurances guaranteeing their safety.

⁴⁵ According to Hottinger: "Die arabische Welt nach dem Golfkrieg" (1991) 16 Europa-Archiv 442. Other sources mention the name 'Poised Hammer': 12 September 1991, NRC Handelsblad 12.

⁴⁶ See Arnold Hottinger, 'Die arabische Welt nach dem Golfkrieg', Europa-Archiv 16, p.442, 1991. Other sources mention the name 'Poised Hammer', NRC Handelsblad, The Netherlands, 12 September 1991 p.12.

⁴⁷ Hottinger, alleges that this force was not only placed there to intervene in case the Iraqi Government once more resorted to the massive use of force against its own civilians, but also in case cease-fire conditions were not met. However, there is no indication that this particular assembly of forces was designed to do more than protect the Kurds. See Arnold Hottinger, 'Die arabische Welt nach dem Golfkrieg', Europa-Archiv 16, p.442, 1991.

base of Incirlik. United Nations Security Council Resolution 688 remained in force, and the no-fly zone was still allowing the Kurds to re-build their region. This has been greatly assisted by a reconciliation agreement signed by the leaders of the two main Kurdish political parties – the KDP and the PUK – signed in Washington DC, in 1998.⁴⁸

Whether a New World Order will establish mechanisms to ensure that major emergencies receive appropriate attention and, where necessary, humanitarian intervention seems uncertain. As the vaunted harbingers of the New World Order, the Gulf War and post-war rescue of the Kurds were justified.⁴⁹

New World Order aside, developments in Kurdistan offered hope that in a changed international environment⁵⁰, humanitarian needs were viewed more seriously. Recognition that unmet human needs exert a destabilizing influence on international peace and security is surely a milestone, even if that fails to acknowledge humanitarian imperatives as compelling in their own right.⁵¹ With concerted effort, progress may indeed be accelerated toward a humanitarian system that more effectively provided universal assistance and indispensable protection.

4. Conclusion

There is an African proverb: “When elephants fight, it is the grass that suffers, when elephants make love, the grass also suffers”.⁵² The Kurds were the grass in this part of the world. Despite the UN’s attempts to provide comfort for the Kurds in Northern Iraq,⁵³ people throughout the region continued to experience the effects of their ‘inferior’ status. Existence for the Kurdish people residing in the Middle East and Central Asia includes razed villages,⁵⁴ brutal human rights abuses,⁵⁵ and mass murder.⁵⁶

Although autonomy or federalism was then a realizable aspiration, but it was difficult to imagine Turkey, Iran and Iraq each relinquishing territory to allow the establishment of an independent Kurdish state. Hitchens said: “Kurdistan is

⁴⁸ Where US Secretary of State, Madeleine Albright, oversaw the creation of the agreement. See Agence Europ, *Kurdish Political Parties*, April 1999.

⁴⁹ Larry Minear, Humanitarianism and War Project of Brown University and the Refugee Policy Group, February 1992.

⁵⁰ The sudden change in the political atmosphere in the Kurdish question did not change with Iraqi invasion. But the worldview on Iraqi government transformed. The Iraqi leader swiftly became an international terrorist and "A contemporary, rather cheap copy of Hitler". For the first time newspapers and media started to write seriously about Iraqi governments war crimes against the Kurdish civilians. All this was because the Iraqi regime became a gigantic threat to international community, and particularly in the region.

⁵¹ Idid.

⁵² See Michel Fortin, *Against the Economic Sanctions*, *Africana Plus*, No.30 May 1998.

⁵³ Mousavizadeh, Nader, *Are the Kurds Really that Divided?* *New Republic*, p.16, 18 November, 1996, see also Rodan, Steve. *The People With No Rights*. *Jerusalem Post*, p.5, 13 November 1996.

⁵⁴ Bohlen, Celestine. *Kurd Villagers Have No Place to Turn*. *International Herald Tribune*, 18 July 1995.

⁵⁵ Hundley, Tom. *Turkey’s Crackdown Fans Kurdish Anger*. *Chicago Tribune*, N1, 15 March 1994.

⁵⁶ Greenaway, Norma. *Kurds Cannot Escape Fighting*. *Ottawa Citizen*, A9, 18 April 1995.

therefore best described as a geo-cultural reality that, for the time being, remains a geo-political impossibility".⁵⁷ However some described that the Kurdish problem may never be solved, but even incomplete advances can provide insights for similar trajectories. Employing a perspective that borrows from post-colonialism can, in Neil Postman's words, "fly into unexpected contexts."⁵⁸

⁵⁷ Quoted in CIA's Geographic Resources Division, *The Challenge of Ethnic Conflict to National and International Order in the 1990s: Geographic Perspectives*. Wash. DC: US Govt. Document Expedition Project, p. 101, October 1995. See also Hitchens, Christopher. (1995, April 16). Kurds Struggle On. San Francisco Examiner, A6.

⁵⁸ Postman Neil, *Amusing Ourselves to Death*. New York: Penguin Press, p.18, 1995.

NO-FLY ZONE MAP



CHAPTER TWO

DEFINITION OF HUMANITARIAN INTERVENTION

1. Introduction

Humanitarian intervention has come to the fore in international law, politics, international relations and philosophy since the United States led intervention in Kurdistan 1991, and the United Nations intervention in Somalia in 1992.⁵⁹ Humanitarian intervention, however, remains a problematic instrument of foreign policy: its basis, formulation, and implementation are widely discussed yet no consensus seems to have emerged so far. All of the major multilateral humanitarian interventions of the past decade – Somalia, Bosnia, and, with qualifications, Rwanda have proven more than problematic.⁶⁰ There is no universally accepted definition of humanitarian intervention, nor has agreement been reached on its constituent elements. Moreover, in the past, widely varying interpretations of the term have often led to misunderstandings.⁶¹

The purpose of this chapter is to provide an understanding of humanitarian intervention. The first section seeks to define humanitarian intervention, to distinguish between the various definitions adopted by legal scholars and

⁵⁹ In the post-Cold War environment, the UN Security Council Resolution 688 broke new ground in terms of interference in what had previously been regarded as the domestic affairs of a member state. The resolution had a humanitarian objective in its insistence on an immediate end to repression of the Kurdish population of Iraq by the Iraqi government. In Somalia, the Security Council in December 1992 sanctioned military intervention to stop Somali clan leaders and freelance thieves from interfering with international efforts to distribute food to starving Somalis. “The intervention was not solicited by anyone who could credibly claim to be the sovereign government of Somalia; it was initiated by the Security Council at the request of concerned aid organizations and member-states.” See Robert H Jackson, “Armed humanitarianism” *International Journal*, Autumn, p 595, 1993.

⁶⁰ Only the operation to provide a safe zone for the persecuted Iraqi Kurds in the wake of the Gulf War has, under very particular conditions, been a relative success. “Relative” because the underlying problem — how to respond to systematic and gross human rights abuse — has not been addressed. The serious implications of the “safe zone” policy for Iraqi sovereignty are tolerable only under the extraordinary conditions existing in the region. See Tobias Vogel, “The Politics of Humanitarian Intervention” *Journal of Humanitarian Assistance*, 4 June 2000; see, also, “Issue Paper on Humanitarian Intervention by the Permanent Representatives to the United Nations for Consideration of the Ministers for Foreign Affairs of the Rio Group, New York, October 2000”.

⁶¹ There are two separate concepts of “humanitarian” and “intervention”. The first concept, “humanitarian” can be used to explain the various actions for the improvement of the wellbeing of individuals. But for this thesis and the subject with which it is concerned, the concept will be defined specially as “human rights protection”. The concept of “intervention” has been the subject of much debate in the United Nations and among scholars over a long period of time. Its Latin etymology (*inter*, meaning “between”, and *venire*, meaning “to come”) and its dictionary definition “to come between as an influencing force, as in order to modify, settle, or hinder some action, argument, etc” are accepted. Different opinions arise when the concept is applied to politics. From the view of traditional international law, “intervention” was generally considered to be an external power’s unlawful interference with the territorial integrity or political independence of a state, for example through invasion, intimidation, or subversion. See *Webster's New World Dictionary of the American Language* (New York: The World Publishing Company, 1972). See also L. Oppenheim, *International Law*, (London: Longmans, Green, 1955, 8th ed), vol 1, sec 134.

analysts, and, finally, to identify some commonality among these definitions. The second section explains just and unjust means of intervention, while the following section outlines criteria to be applied to justify humanitarian intervention. The final section discusses whether the international community should intervene when human tragedy occurs, despite the absence of an internationally agreed definition.

2. Definition

In a nutshell, humanitarian intervention involves initiatives and activities that addresses and removes the root causes of humanitarian disasters, whether responding to natural or human disasters or operations relating to complex political emergencies, which inevitably involve hostilities or the threat of them. However, the complex situations giving rise to such interventions demand a more complex definition.

In determining a working definition of “humanitarian intervention” it is widely acknowledged that a comprehensive and proactive approach to dealing with grave humanitarian crises is essential.⁶² Lack of clarity on how to define “humanitarian intervention”, as understood in international law and practice, is a problem because the range of activities that potentially fall under this rubric is so wide.⁶³ It is sometimes identified with unilateral actions, such as the US intervention in Kurdistan, Grenada and Panama, or with multilateral military action without expressed UN Security Council approval, as in Kosovo.⁶⁴ Sometimes it has been understood to refer to economic and diplomatic⁶⁵ forms of multilateral intervention.⁶⁶

Some analysts have shied away from definitions entirely or, at best, have limited themselves to descriptions or provisional definitions. Other analysts have tried to repaint puzzle pieces to show an *acceptable* definition picture.

The classical definition of intervention is the

dictatorial interference by a sovereign state, a
group of such states, or an international
organization, involving the threat or use of force

⁶² This approach could include a range of methods, such as preventative diplomacy, conflict resolution, national reconciliation, and nation building.

⁶³ The term “humanitarian intervention” has been used in much broader ways and includes a full range of actions by the international community. See “The Ethics of so-called ‘Humanitarian Intervention’”, World Council of Churches Discussion Paper, February 2000.

⁶⁴ The cases in Kurdistan and Kosovo are good examples of the flexibilities of the definition under different flags.

⁶⁵ Intervention can come in many forms and by using all the instruments of national and international power diplomatic, economic, and military intervention to prevent and stop conflicts and large-scale abuses of human rights. See Lee H. Hamilton, US Institute of Peace, May 2, 2001

⁶⁶ The Role of Intervention. "Report of Conference Key Findings, Ideas, and Recommendations," in *Managing Conflict in the Post-Cold War World*, August 2-6, 1995, (Aspen, Colorado: Aspen Institute, 1996) p.10, see also Miriam Ready Prost, “Humanitarian Intervention: An ethical dilemma” WCC Feature, 17 April 2000.

or some other means of coercion, in the domestic jurisdiction of an independent state against the will or wishes of the government of the targeted country.⁶⁷

But a typology, if it is to be of any practical use, will depend on a clearer understanding of what intervention is and, perhaps more importantly, what it is not. And if nothing else, tentative descriptions and provisional definitions, along with the general conceptual discussions of intervention that accompany them, provide a good starting point from which to edge towards a precise meaning.

Since the issue of humanitarian intervention is related to international law, political science, morality and international relations, one may come across different definitions, interpretations, understandings, and categorizations. Humanitarianism is controversial because it does not require consent by the target state, that is, it does not respect that state's sovereignty and it appears to go beyond the UN Charter with respect to legitimate self-defence and international peace and security.⁶⁸ Yet, according to Sahnoun, the Charter does provide for a broader interpretation that would permit interference in domestic affairs. Articles 1 and 34 both refer to "situations" that might lead to a breach of the peace.⁶⁹ Article 34 calls on the Security Council to investigate whether "the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security".

To better understand the meaning of necessary intervention, as intended by the framers of the Charter, it should be should be read in conjunction with the Declaration of, the Geneva Convention, the UN Convention for the Prevention and Punishment of Genocide, and the 1951 Convention on Refugees and their Protocols. More than any Security Council Resolution, this initial, comprehensive, and fully persuasive body of international legislation gives the right, and the obligation, to both the United Nations and regional organizations, to come to the rescue of endangered populations by providing relief and active contribution to the resolution of the conflict.⁷⁰

The majority of writers⁷¹ agree with coercive military intervention,⁷² which is defined as the threat or use of force by a state, group of states, or international

⁶⁷ One of the problems today, however, is the incidence of situations such as that in Somalia, where the will of the government is immaterial since no effective governmental structures still survive. See Jackson, Robert H "Armed humanitarianism", Autumn International Journal, 1993, p.581.

⁶⁸ Jackson, *ibid*, p 584.

⁶⁹ Mohamed Sahnoun, remarks at the conference "Beyond Development Cooperation", International Development Research Centre, Ottawa, 1994, p 5.

⁷⁰ *Idit*.

⁷¹ See: Murphy, Sean D *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996, pp. 11–12; Ramsbotham and Woodhouse, pp xii–xiii, 1996; Charney, Jonathon "Anticipatory Humanitarian Intervention in Kosovo" (1999) 32 *Vanderbilt Journal of Transnational Law* 1243; Howe, Jonathon T "The United States and United Nations in Somalia: the limits of involvement" (1995) Summer, *The Washington Quarterly* 49; Weiss, Thomas G. "Triage Humanitarian Interventions in A New Era" *World Policy Journal* 59; Karen A Feste, "Intervention Issues in the Post Cold War"

organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised human rights.⁷³ Such intervention is seen to be justified if it:

- a. Prevents widespread human rights violation;⁷⁴
- b. Provides humanitarian assistance;⁷⁵ and

paper presented at the XVII World Congress of the International Political Science Meetings Seoul, 1997, 4; Danish Institute of International Affairs, “Humanitarian Intervention: Legal and Political Aspects” Submitted to the Minister of Foreign Affairs, Denmark, 7 December 1999, p.107.

⁷² Since early 1948, humanitarian intervention has been defined as the cross-border use of force taken to prevent or stop crimes against humanity or other atrocities by the International Community under the 1948 Genocide Convention, and signatories to the 1949 Geneva Conventions have an obligation to act. In a proper legal sense, according to Verwey, humanitarian intervention is understood “as referring only to coercive action taken by states, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state” (Wil D Verwey, “Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective”, in Jan Nederveen Pieterse (ed), *World Orders in the Making* (London: Macmillan, 1998) p 180). Consider, too, Knudsen’s understanding of humanitarian intervention as a “dictatorial or coercive interference in the sphere of jurisdiction of a sovereign state motivated or legitimated by humanitarian concerns” (Tonny Brems Knudsen, “Humanitarian Intervention Revisited: Post-Cold War Responses to Classical Problems”, in Michael Pugh, *The UN, Peace and Force* (London: Frank Cass, 1997) p 146. Gordon and Wrick argue that the definition of humanitarian intervention is “dictatorial interference by a sovereign state/states, or an international organization, involving the threat or use of force or some other means of coercion, in the domestic jurisdiction of an independent state against the will or wishes of the government of the targeted country” (Nancy Gordon and Gregory Wrick, *Humanitarian Intervention*, March 1996, pp 1–5). In addition, what constitutes wide-scale violations of internationally recognised human rights also varies among writers. For more details, see Cassese Antonio, “*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *European Journal of International Law* 10, 1999, p 27, and Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, (The Hague: Kluwer Law International, 1998) p 79.

⁷³ In fact, humanitarian justifications for military action are nothing new but there is a perception that the post-Cold War environment is more conducive to successful interventions. NATO action in Kosovo, has become a new justification for military action. Political leaders, scholars, and commentators are now regularly enunciating this concept. Also, most states have now agreed to obligations on the protection of human rights that involve duties to observe them. NATO’s definition of humanitarian intervention: “Humanitarian intervention is an armed intervention in another state, without the agreement of that state, to address (the threat of) a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights.” There are two lines of thought which may underlie possible answers to the NATO’s definition. First, common misuse of the term: any action by external entities to relieve a humanitarian crisis for which the territorial authorities are responsible or with which they are unable to cope. Second, the legitimate use of armed force to terminate or prevent (stop) the continuation of egregious violations of elementary principles of humanity on a massive scale in a country with the authorities which are either perpetrating the violations or are unwilling to allow international action to end them. NATO’s definition was adopted by a NATO seminar in Scheveningen on the topic in November 1999. See *Humanitarian Intervention: Definition and Criteria*, CSS Strategic Briefing Papers, vol 3, pt 1, June 2000.

⁷⁴ Both Charney and the Danish Institute Report suggest using the definitions of genocide, crimes against humanity, and war crimes, which are set out in the Statute of the International Criminal Court. Using these definitions would be useful since there is already international consensus on their meaning. However, because there may be gross violations of human rights which do not fall into these categories, reference to the major human rights treaties may also be useful: Charney, *op cit*, p 1243, 1999; Danish Institute, *op cit*, p 107.

c. Fulfils a moral duty.⁷⁶

In addition, since the end of the Cold War, human rights concerns have largely overridden the principles of non-intervention and sovereignty,⁷⁷ and humanitarian intervention continues to occur without target states' consent,⁷⁸ with or without UN Security Council's authority.⁷⁹ Finally, Kurth⁸⁰ sees that there are four models of intervention defined along a continuum consisting of:

1. Abstention, or no military intervention at all (Rwanda).
2. Relief of the disaster without addressing its political causes (the policy of the US administration in Somalia).

⁷⁵ Some recent international relations literature defines humanitarian intervention as a range of actions which include humanitarian assistance and forcible military intervention, such as that developed by Murphy, who defines humanitarian intervention as the "threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised human rights". According to Murphy, the latter phrase is a broad formulation "used to capture the myriad of conditions that might arise where human rights on a large scale are in jeopardy" and includes acts committed by both state and non-state actors: Murphy, *op cit*, pp 11–12. See Ramsbotham and Woodhouse, 1996, pp xii–xiii.

⁷⁶ Strausz-Hupe wrote "moral duty, especially when it uses service to humanity as its vessel, puts me on my guard. Yes, let us do our duty when our forces must be used to rescue humanity from man-made disasters. But we should do so understanding that foreign policy, and military forces, are very imperfect instruments in a very imperfect world." See Alexander M Haig Jr, former Secretary of State, "The Question of Humanitarian Intervention" Foreign Policy Research Institute, WIRE: A Catalyst for Ideas 9(2), 12 February 2001.

⁷⁷ Strict definitions in the Cold War period created the idea that intervention was illegal *per se* because it breached the principles of sovereignty and self-determination. But the shift of focus from Article 2(4) to Article 2(7) of the UN Charter has opened the whole matter to reinterpretation, so that now "...it is no longer tenable to assert whenever a government massacres its own people or a state collapses into anarchy that international law forbids military intervention altogether" The definition asserts that (i) for an action to be intervention, the sovereignty of the state being intervened in must be breached and (ii) for an intervention to be humanitarian, the desire to address violations of human rights should be the driving force in the intervention decision, See Christopher Greenwood, "Is There a Right of Humanitarian Intervention?" 49(2) *World Today* (February 1993) p. 40 (also published in German in *Europarchiv*).

⁷⁸ According to Finnemore, humanitarian intervention is a "military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants" (Martha Finnemore, "Constructing Norms of Humanitarian Intervention", in Peter Z Katzenstein (ed), *The Culture of National Security: Norms and Identities in World Politics* (New York: Columbia University Press, 1996) p 154. In the words of Parekh, humanitarian intervention is "an act of intervention in the internal affairs of another country with a view to ending the physical suffering caused by the disintegrations or gross misuse of authority of the state, and helping create conditions in which a viable structure of civil authority can emerge" (Bhikhu Parekh, "Rethinking Humanitarian Intervention", in Jan Nederveen Pieterse (*op cit*), p 147). See, also, Adam Roberts, "Humanitarian War: Military Intervention and Human Rights", *International Affairs* 69(3), July 1993, p 426.

⁷⁹ There are strategic and moral advantages to expressly articulating a right of humanitarian intervention (*jus ad interventionem*) under international law to stop or prevent genocide or violent mass ethnic expulsions. See Charles B. Shotwell and Kimberley Thachuk, *Humanitarian Intervention: The Case for Legitimacy*, Strategic Forum, Number 166, July 1999.

⁸⁰ See James Kurth, "Models of Humanitarian Intervention: Assessing the Past and Discerning the Future", WIRE 9(6), August 2001.

3. Relief of the disaster plus imposing a semblance of political order by securing in power a particular local and friendly political figure (Haiti and Sierra Leone).
4. Reconstruction of the entire political system of the afflicted country, along the lines of some sort of liberal, democratic, and even multicultural system (Bosnia, Kosovo, East Timor).

3. Just and Unjust Intervention

War is one possible intervention, and it is an accepted reality that such direct action may be concluded in just and unjust forms. Even the UN Charter does not forbid member states from all forms of war. In the case of humanitarian intervention, there must be room for just and unjust forms of all possible interventions. Here, the rules of war are modified and then applied to all varieties of political intervention. This will clarify whether humanitarian intervention is, like war, a “neutral” term, with just and unjust forms, or whether locating the unjust “mirror” form of humanitarian intervention can help explain the phenomena of “failed” attempts, such as those in Somalia, Kosovo and Haiti. If there is such a thing as a just humanitarian intervention, it follows that the creators of international law will be required to explain why it should be forbidden without exception while the potentially more destructive option of war is not.

4. Criteria to Establish Definition

There is an emerging debate as to how the application of certain criteria for humanitarian intervention might help increase the chances of success and secure support for future intervention.⁸¹ Some states are supporting the establishment of formal criteria that have to be met before any intervention can take place, although questions remain as to who would set the criteria and who would oversee their application. Presumably, the United Nations would play a major role in this process, although its members often have divergent views. Such criteria would seek to establish a set of rules that advance the goal of building a legal definition process to overcome the sovereignty/human rights disconnection. They are:⁸²

- a. The threat or occurrence of grave and large-scale violations of human rights.
- b. There is clear and objective evidence of such a threat or occurrence.
- c. There is clear urgency.
- d. The use of force should be the last resort.
- e. The government of the state is unwilling or unable to take remedial action.
- f. The purpose is limited to stopping the human rights abuses.
- g. There should be a high probability of success.
- h. Those for whom it is intended support the action.
- i. There is support from regional states.

⁸¹ Centre for Strategic Studies, Victoria University of Wellington, “Humanitarian Intervention, Definition and Criteria” Strategic Briefing Papers 3(1), June 2000.

⁸² Ibid.

- j. There should be a mapped-out transition to post-conflict peace building.
- k. The use of force should be proportionate to achieving these goals.
- l. The purpose is clearly explained to the international community.

An important debate is whether a group of states should undertake an intervention without UN authorization. If UN authority were not required for humanitarian intervention, this would alter the present restrictions on the use of force and represent a major dilution of UN power. However, if these criteria were simply adopted by the United Nations, this might be seen as a pillar to the definition and refinement of Chapter VII [of the X] and reinforce the notion that a humanitarian disaster is a threat to international peace and security.⁸³

5. Conclusion

Throughout the past decades, there have been normative developments on the issue of humanitarian intervention. However, there remains a lack of consensus regarding the legitimacy and appropriate definition of circumstances under which humanitarian intervention whether authorised by the UN or not – can take place. However, it is significant that in his report to the Security Council on the Protection of Civilians in Armed Conflict, the UN Secretary-General recommended that the Council consider certain criteria when contemplating enforcement action in situations of humanitarian crisis.⁸⁴ The Security Council has responded to the report,⁸⁵ expressing, among other things, “willingness to respond to situations of armed conflict where civilians are being targeted” and resolving to establish a mechanism to review the recommendations in the report.⁸⁶

A clear, flexible definition of “humanitarian intervention” is central to this process, especially given the ever-widening range of situations emerging. A useful definition, then, would be that humanitarian intervention constitutes the threat or use of force by a state, group of states, and international organizations with the primary purpose of protecting the nationals of the target state from widespread deprivation of their human rights.

⁸³ Ibid

⁸⁴ Kofi Annan argues elsewhere “that it is essential that the international community reach consensus not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom” 1999.

⁸⁵ UN Security Council Resolution 1265, 17 September 1999.

⁸⁶ Ibid

CHAPTER THREE

HISTORY-PRE UNITED NATIONS/1945

1. Introduction

The concept of humanitarian intervention has a complex religious, political, and legal history. Therefore, in order to better understand present situations we must, first, unearth the historical roots that have fed them and thereby view them in their full historical context.

One of the perennial realities of human existence is war. From the earliest recorded events all the way through to modern times, human communities have engaged in armed conflict as a method of dispute resolution. While war has been a constant part of the human experience, there has also been a tendency within virtually all human civilizations to limit its extent via the methods by which it may be conducted.⁸⁷ In Western civilization, this limitation has taken the form of ‘rules’ determining when war is appropriate and what battle methods may be employed in the pursuit of victory.⁸⁸

The basic theory that has arisen within Western culture to evaluate the legitimacy of military action is called ‘just war theory’.⁸⁹ The just war theory has received widespread acceptance in the international community as a means by which a war may be justified or not.⁹⁰ The purpose of this chapter is to

⁸⁷ James Turner Johnson, “Just War Tradition and Low-Intensity Conflict” in Alberto R Coll, et al (eds) *Legal and Moral Constraints on Low-Intensity Conflict* (1995), pp 147–148. For examples of the diverse background of theories to limit warfare, see the dissenting opinion of Judge Weeramantry of the International Court of Justice in the ICJ’s decision “*Legality of the Threat or Use of Nuclear Weapons*”, ICJ, 8 July 1995 (1996).

⁸⁸ Examples of the efforts of the international community to limit warfare are quite extensive and stretch back well into the Middle Ages. As Judith Gail Gardam points out in her article “Proportionality and Force in International Law” (1993) 87 *American Journal of International Law* 391, 395, the Catholic Church was active in the Middle Ages in limiting warfare, as seen by the Second Lateran Council’s prohibition in 1139 of the use of crossbows, bows and arrows, and siege weapons in conflicts between Christian nations. In the 19th century, secular attempts were made to limit warfare, such as the 1868 St Petersburg Declaration which prohibited the use of weapons that caused unnecessary suffering and also forbade the practice of denying quarter to a vanquished enemy (ibid, at 397). Finally, during the 20th century several conventions, such as the Hague Convention (No IV) of 1907, the Hague Rules of Air Warfare (1923), the Geneva Convention (1947), and the United Nations Charter, sought to limit the extent of the means of warfare.

⁸⁹ “Just war” is the name for a diverse literature on the morality of war and warfare that offers criteria for judging whether a war is just and whether it is fought by just means. Hence, the “just war” tradition analyzes our moral obligations in relation to violence and the use of lethal force. The thrust of the tradition is not to argue against war as such, but to surround both the resort to war and its conduct with moral constraints and conditions. See Johnson, op cit, p 148.

⁹⁰ The widespread use of just war theory by both Western countries and the international community can be seen in the use of just war theory by the International Military Tribunal at Nuremberg. The Nuremberg Tribunal used the basic just war categories to determine if the actions taken by the Axis powers were in accordance with international law. See Article 6(a) and (b) of the Nuremberg Charter, reprinted in Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992) p 648. See, also, Nicholas Rostow, “The World Health Organization, The International Court of Justice, and Nuclear Weapons” 20 *Yale Journal of International Law* 151, 163–175 (1995) for a general overview of the law of armed conflict, and especially pp

describe and evaluate the application of just war theory to the concept of international humanitarian intervention in early 20th century. The first section presents a general overview of just war theory. The second section explores the sources of just war with particular reference to Christian theology, which made a large contribution to forming the UN Charter. The third section examines the history of the legal concept of just war and discusses its role in justifying humanitarian intervention. The fourth section explains the principles of just war. The last section concludes that just war theory was recognised and used widely in pre-1945 in an attempt to limit the horrors of war, and was then incorporated into international law bodies.

2. An Overview of the Just War Theory

The purpose of this overview is to show that the just war framework is able to encompass most of the main arguments in the current humanitarian intervention literature and, consequently, that the debate on humanitarian intervention would benefit from more explicit use of this framework. The theory of just war has been influenced by many religious and legal sources over the course of centuries. Therefore, it is helpful to make a brief overview of those sources before delving into the main task of explaining and applying the just war theory to the particular problem raised in this thesis.

Just war theory has a varied and diverse background.⁹¹ The just war tradition includes the contributions of philosophers and theologians dating back to Roman times. As Johnson has pointed out, just war theory has an historical tradition formed by experience and reflection, including much that is neither specifically theological (or even religious), nor philosophical. It has been strongly influenced by international law, the traditions of chivalry, and soldierly practices derived from the experience of many battles.⁹² Just War Theory, as a method of evaluating military actions, has been recognised historically by thinkers as varied as Cicero, Augustine, Aquinas, Grotius, and Daniel Webster.⁹³

It is a theory that has been used by Christians and non-Christians alike to determine whether or not the decision to go to war, and the means used to prosecute that war, are just.⁹⁴ It is crucial to keep this varied and complex

169-170 for the use of just war concepts such as proportionality and legality by the Nuremberg Tribunal.

⁹¹ Johnson, *op cit*, pp 147–149. According to Johnson, just war theory incorporates, among other things, moral reflection, theology, philosophy, chivalric custom and military practice, ecclesiastical canon law, secular civil law, and diplomatic precedent.

⁹² *Ibid*, p 148.

⁹³ Marcus Tullius Cicero (106–43 BC), Roman orator, lawyer, politician, and philosopher. Augustine (354–430). Thomas Aquinas (1225–1274). Hugo Grotius, author of *De jure belli ac pacis* (1625). Daniel Webster (1782-1852), statesman, lawyer, and orator, was his era's foremost advocate of American nationalism

⁹⁴ Just war theory has also gained a general acceptance among Christian theologians, philosophers, and jurists as a method of passing judgment on the morality or immorality of a particular conflict. The general Christian conception of just war theory forms the core of secular just war theory and as such has had a tremendous influence on the secular conception of the just war. See, generally, Paul Ramsey, *War and the Christian Conscience* (1961) and *The Just War: Force and Political Responsibility* (1968). See, also, the National Conference of

pedigree of the just war tradition in mind when dealing with just war theory, otherwise it becomes possible to restrict the “breadth and diversity of the tradition”,⁹⁵ which could, in turn, lead to a serious misapplication of the theory in a particular circumstance.

3. Sources of the Just War Theory

The first notable Christian theologian to address himself to the task of determining the circumstances under which war is legitimate was Augustine of Hippo.⁹⁶ Augustine held that the natural order, which is suited to the peace of moral things, requires that the authority and deliberation for undertaking war be under the control of a leader. For Augustine, war was a permissible part of the life of a nation, and the power of prosecuting a war was part of the natural powers of a monarch, ordained to uphold peace.⁹⁷ War, far from being something that Christians should shun, was part of the life of a nation, ordained by God.⁹⁸

Augustine’s concept of the just war did not create *carte blanche* for bloodshed. In formulating his ideas on war, Augustine was careful to state the purpose for which war may be fought, and the procedural means that must be satisfied in order for a war to be just. “[F]or it makes a great difference”, he wrote, “by which causes and under which authorities men undertake the wars that must be waged”. For Augustine, in order that a war to be just, it must be fought for the right reasons, and it must be waged under rightful authority.⁹⁹ He held that the only reason that justified war was the desire for peace. “Peace is not sought in order to provide war, but war is waged in order to attain peace.” Augustine also included, under the subject of necessity, the just treatment of prisoners and conquered peoples, making it clear that mercy should be shown to the vanquished, particularly if they were no longer a threat to peace.¹⁰⁰

The second major Christian thinker to deal with the issue of war was Aquinas.¹⁰¹ Aquinas based his thinking on Augustine’s view of war, elaborating on the teachings of the Bishop of Hippo.¹⁰² In explaining his theory regarding the justness of a war, Aquinas focused on defining the right to wage war and the importance of the intention behind the decision to go to

Catholic Bishops, *The Challenge of Peace* (1983); Richard J Mouw, “The Spiritual Thrust of Just War Doctrine”, *New Oxford Review*, March 1988, at 11; Mark Juergensmeyer, “The Terrorists Who Long for Peace”, 20-Spg. *Fletcher F World Aff*, 1, 5 (1996).

⁹⁵ Johnson, *op cit*, p 149.

⁹⁶ St Augustine of Hippo, “Against Faustus the Manichaeon” XXII 73-79, in Michael W Tkacz and Douglas Kries (trans), Ernest L Fortin and Douglas Kries (eds), *Augustine: Political Writings*, (1994) p 222.

⁹⁷ *Ibid*, p.220.

⁹⁸ See Romans 2:14–15 (Douay-Rheims Version) where the Apostle Paul writes that there is a natural law written on the human heart by which the actions of men may be evaluated.

⁹⁹ St Augustine of Hippo, *op cit*, p 220.

¹⁰⁰ *Ibid*, 220.

¹⁰¹ St. Thomas Aquinas deals with the question of the legitimacy of war in his *Summa Theologicae*, Part II, II, Q 40, Art 1.

¹⁰² *Ibid*, especially Reply Obj 1–3, where St. Thomas bases his arguments heavily on the writings of St. Augustine.

war.¹⁰³ In his attempt to formulate a simple rule that would give guidance on these issues, Aquinas argued that a war is justified only when it meets three basic conditions:

1. The war must be prosecuted by a lawful authority with the power to wage war;
2. It must be undertaken with just cause; and
3. The war is undertaken with the right intention, that is, “to achieve some good or to avoid some evil”.¹⁰⁴

Together with Augustine, Aquinas’s views on the justification of war formed the basis of just war theory, and it was from this basis that the theory of just war was adapted and expanded by later thinkers. There is a comparable concept in the Koran, and a similar debate in Islam. Canon lawyers, legal scholars, secular philosophers, and military strategists have also influenced the tradition.¹⁰⁵

The secular sources for just war theory span a considerable length of time. They include such philosophers as the ancient Roman Cicero, and Grotius. Modern decrees on justifiable warfare, such as the Commission to the Nuremberg War Crimes Tribunal, and the United Nations Charter, also act to flush out the modern conception of just war theory. Cicero was one of the first to deal with the question of justifiable war. He held that the use of force was justifiable only when the war was declared by appropriate governmental authority acting within specific limits.¹⁰⁶ For Cicero, the ability to wage war rested with the state, and the state alone, and could only be lawfully waged “after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made”.¹⁰⁷

In addition, Cicero also proposed the existence of a universal norm for human behaviour, which transcended the laws of individual nations and governed their relations with each other. Cicero's belief in this universal norm was grounded in his view that there was a “society of mankind rather than of

¹⁰³ Thomas Aquinas’s “treatise on law” in the *Summa Theologicae* consolidated much of the earlier thought on this subject since Plato’s *Republic* and Aristotle’s *Nicomachean Ethics*. Aquinas’s definition of natural law is encapsulated in a condensed phrase, *participatio legis aeternae in rationali creatura*: the participation of the eternal law in rational creatures. It is an operation between our capacity to understand and existing universal laws. This principle is comparable to: the Tao, or way, of Lao Tzu; Confucian rites or “style of life”; Hindu and Buddhist dharma, or right action; Islamic Sunna, or model behaviour of the Prophet; Japanese giri, or rules of behaviour. Aquinas, op cit. See further, Rene David and John EC Brierly, *Major Legal Systems in the World Today* (London: Stevens, 1985), p.403.

¹⁰⁴ Id.

¹⁰⁵ Mona Fixdal, and Dan Smith, “Humanitarian Intervention and Just War” 42 *Mershon International Studies Review*, 1998, p. 285.

¹⁰⁶ David J Bederman, Essay “*Reception of the Classical Tradition in International Law: Grotius’ De Jure Belli Ac Pacis*”, 10 *Emory International Law Review* 1, 31–32, 1996. The standard English text of this work is the Francis W. Kelsey translation, *Classics of International Law*, ed. 1925, number 3, volume 2 of the series). This edition was drawn from the second, vastly revised version by Grotius in 1646, near the conclusion of the Thirty Years War. See Edward Gordon, Book Review, 89 *AM. J. INT’L L.* 461, 463 (1995)

¹⁰⁷ Id.

states”.¹⁰⁸ This view of a universal standard of behaviour for nation-states, which exists outside of promulgated law, would have a profound impact on later just war theorists, particularly Hugo Grotius. It was largely Grotius who secularised just war theory, making it more acceptable for the age of the Enlightenment. For Grotius, a war was just if three basic criteria were met:

- a. The danger faced by the nation is immediate;
- b. The force used is necessary to adequately defend the nation's interests, and;
- c. The use of force is proportionate to the threatened danger.¹⁰⁹

Grotius also argued in favour of the right to use force for humanitarian intervention. However, there is a lack of consistent consensus (*opinio juris communis*) under international law. He grounded his agreement with Cicero's notion of the need for a declaration of war in the natural law, and also argued that the purpose of just war theory was to provide “succour and protection for the sick and wounded in war, combatants and civilians alike”.¹¹⁰

A result of this view is the notion that just war theory exists externally of any recognised legal system; that it is a part of the “law of nations” which ought to be followed by all civilized nations. For Grotius, it was not necessary to prove just war theory by consulting with any of the established laws of the nations of Europe, or their customs.¹¹¹ Rather, those laws are known through the universal medium of the natural law, a law that transcends nations and their own particular legal codes, a law that is binding on all human societies in their interactions with each other.

Furthermore, in his opinion, a right to revolution existed, in extreme cases of tyranny, for the subjects of a prince. If, in this context, the suppressed subjects asked for support from a foreign power it might rightfully be given. So, Grotius’ defence of humanitarian intervention was linked to the doctrine of legitimate resistance to repression and was, ultimately, based on the fact that a prohibition on the use of force was non-existent until the 20th century.

Many other eminent legal scholars subsequently supported Grotius’ ideas of humanitarian intervention. In the 19th century, they were reflected in the majority of publications on the subject. Although the principle of non-intervention gradually gained ground during the 19th century, it is generally acknowledged that by the beginning of the 20th century most legal experts still acknowledged the legitimacy of humanitarian intervention.

Throughout the 19th century, though, the legitimacy and limits of intervention in international relations were matters of intense discussion.¹¹² However,

¹⁰⁸ Id.

¹⁰⁹ Hugo Grotius, *The Law of War and Peace*, Bk II, Ch 1 (1949), cited in Ziyad Motala and David T Butle Ritchie, “Self-Defense in International Law, the United Nations, and the Bosnian Conflict” 57 *University of Pittsburg Law Review* 1, 10 n75, 1995.

¹¹⁰ Op cit, n79, at p 32.

¹¹¹ Ibid, p. 32

¹¹² Nicholas Greenwood Onuf, “The Principle of Non-intervention, the United Nations and the International System” *International Organization* 25(2), Spring 1971, pp 209–227.

standard texts in international law offered little guidance. For example, the most important English language treatise on international law at the time, commonly called Oppenheim-Lauterpacht, states, “intervention in the interest of humanity is legally permissible”.¹¹³ There follows a single instance of practice: “Great Britain, France and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle.”¹¹⁴ The same treatise also tells its readers that one instance of any practice is unlikely to suffice for it to acquire the normative weight of customary law. International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions, are according to International Law, obligatory or right.¹¹⁵

But the theoretical underpinnings of intervention can be manipulated in practice for the interests of the manipulator. If that manipulator has sufficient power to mobilize the political will of a majority, but more correctly a more powerful section of the (global) community, then it is likely that they will be able to intervene for their own sake with minimal obstruction except in the place in which they seek to intervene. “Who is the proper defender of humanity?” becomes a question that has no simple answer in most cases. For instance, European states ‘often’ intervened in Turkey to put an end to the persecution of Christians.¹¹⁶ But while this might constitute a continuous practice, it could hardly be a *clear* one. In fact, the use by Oppenheim-Lauterpacht of the term “clear” is troublesome because the clarity of “human rights” is clouded by differing conceptions of that which each human is entitled to. It might be argued that repeated intervention in Turkey had produced a “special custom” as an exception to the general rule of non-intervention.¹¹⁷ Instead, various 19th-century commentators merely agreed to disagree in reference to the existence of humanitarian intervention as a general legal rule.¹¹⁸

4. The Development of Humanitarian Intervention as a Specific Doctrine

During the remainder of the 19th and early 20th centuries, just war theory underwent modest development. There were treaties, such as The Hague

¹¹³ Quoting more fully, “there is a substantial body of opinion and of practice in support of the view that ... when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.” L Oppenheim, *International Law: A Treatise*, Vol I: *Peace*, 8th ed, H Lauterpacht (ed) (New York: David McKay, 1955) p 312.

¹¹⁴ John Daly, *See, Oil, Guns, and Empire: Russia, Turkey, Caspian "New Oil" and the Montreux Convention*, Caspian Crossroads Magazine, Kansas State University, 1999.

¹¹⁵ *Ibid.*

¹¹⁶ Richard L Chambers, *The Ottoman Empire 1600-1923* (The University of Chicago, 1998).

¹¹⁷ On “special custom”, see Anthony A D’Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971), pp 233–263.

¹¹⁸ Ellery C Stowell, *Intervention in International Law* (Washington: John Byrne, 1921), pp 51-62; Stephen Kloepfer, “The Syrian Crisis, 1860-61: A Case Study in Classic Humanitarian Intervention” *Canadian Yearbook of International Law* 23 (1985), pp 255–258; Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996) pp 47–49.

Conventions, which codified just war theory, but there was little major development.

To begin, the doctrine of just war provides the broad philosophical background to the idea of humanitarian intervention. It provides two considerations that divide the justice of war and correspondingly the justice of intervention into two categories: one, *jus ad bellum*, considers under which conditions it may be permissible to go to war at all; the other, *jus in bello*, governs the issue of what means are or are not acceptable for waging a war once it has started. It is an ancient doctrine, as old as war itself. It has long been part of the inventory of European power politics. Early legal philosophers like Grotius, Vattel,¹¹⁹ and Pufendorf¹²⁰ had already considered the concept.

A closely related, yet vague, “natural right” of people to resort to arms against the tyranny of a neighbouring state has also been recognised recently.¹²¹ However, a specific doctrine of humanitarian intervention was developed only in connection with Europe’s Oriental policies during the 19th century. During this time, an elaborate doctrine of humanitarian intervention (*intervention d’humanité*) evolved and was applied to provide a kind of moral justification for the repeated interventions of European powers on the territory of the Ottoman Empire. This moral justification, in turn, was supposed to give such actions a semblance of legal validity armed interventions such as the French expedition in Syria (1860) demanded justification not merely in general moral terms, but in specific legal terms as well. Hence, the concept of ‘legitimate intervention’ was created.

One of the basic criteria justifying intervention, according to the definition of this concept, was that a government though acting within the limits of its “sovereign rights” could violate the rights of humanity (*droits d’humanité*). This could occur in two ways, namely, the action might be contrary to the interests of other states, or the state exercised “excesses of injustice and cruelty” that deeply injured European-Christian morals and civilization.¹²² This criterion was formulated in relation to the European powers’ action during the events in Bosnia-Herzegovina and Bulgaria (1875–1877).

Indeed, the “right of intervention” was claimed by the European powers for a series of interventions on Turkish-controlled territory, whether in Greece (1826), Syria (1860), Crete (1866, 1894), Armenia (1896), or Macedonia (1905). A “law of solidarity” was postulated that was based on the notion that states are not isolated entities, free to act in whatever manner within the

119 Emer de Vattel, *Le droit des gens* (1758).

120 Samuel Pufendorf, *De jure naturae et gentium* (1694).

121 See Hans Köchler, “Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of the ‘Just War’ Compatible with the International Rule of Law?”, research paper first presented at the China Institute of Contemporary International Relations in Beijing, 22 December 2000.

¹²² See Gustave Rolin-Jaequemyns, “Note sur la théorie du droit d’intervention, à propos d’une lettre de M. le professeur Arntz” *Revue de droit international et de législation comparée* vol 8 (1876), p 675.

confines of their sovereignty, but members of a higher “community of nations” (*société des nations*), as explained at the time by Bourgeois.¹²³

The persistent interference of the European powers in the internal affairs of the Ottoman Empire found a kind of ideological expression, or legitimisation in the Treaty of Berlin of 13 July 1878. In this agreement between the major European powers and Turkey, the former authoritatively obliged the Sublime Porte to apply specific legislative and administrative measures in areas within its own jurisdiction.¹²⁴ In fact, they established a regime of permanent control over the internal administration of the Ottoman Empire in order to guarantee, as they claimed, a minimum standard of rights, in particular “religious freedom”, to the citizens under Turkish rule.¹²⁵ With this treaty, *intervention d’humanité* became a basic tenet of “public law” regulating Europe’s relations with Turkey.¹²⁶

The doctrine of humanitarian intervention remained an integral part of the European powers’ foreign policy from this time until the First World War. In a diplomatic note addressed to the Sultan of Morocco the European powers, signatories of the General Act of Algeciras,¹²⁷ commanded the Sultan in 1909 to stop the alleged practice of “cruel punishment” and “*d’observer à l’avenir les lois d’humanité*”.¹²⁸ In his comprehensive analysis of the doctrine and practice of humanitarian intervention during the 19th century, Rougier¹²⁹ has aptly described the theory as a doctrine. This theory implies, as stated by Rougier, that whenever the “human rights” of the population of a given state are violated by its very government, another state or group of states has the right to intervene in the name of the so-called “international community” (*société des nations*), thus temporarily imposing their own sovereignty for that of the state against which the intervention is directed.

This early doctrine of ‘limited sovereignty’ claimed to be inspired by purely humanitarian motives. While respect for the rights of the Christian minorities under Turkish control was emphasized, and the sovereign acts of the Turkish Sultan were effectively put under foreign control in the name of ‘humanity,’

¹²³ Léon Bourgeois, *Pour la société des nations* (Paris: E Fasquelle, 1910).

¹²⁴ The Treaty of Berlin (Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey). [Berlin] 13 July 1878. See the provisions of Article XIII concerning Crete.

¹²⁵ See, especially, Article LXII (“In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil or political rights ...”).

¹²⁶ For details, see Antoine Rougier, “La théorie de l’intervention d’humanité” *Revue générale de Droit International Public* (1910) vol 17, n1, pp 468–526, esp p 475.

¹²⁷ General Act of the Algeciras Conference relating to the Affairs of Morocco (Great Britain, Austria-Hungary, Belgium, France, Germany, Italy, Morocco, Netherlands, Portugal, Russia, Spain, Sweden, United States). Signed at Algeciras, 7 April 1906.

¹²⁸ Quoted in Antoine Rougier, “MAROC...La question de l’abolition des supplices et l’intervention européenne [Communication de M. Antoine Rougier]” *Revue générale de Droit International Public* (1910) vol 17, p 99.

¹²⁹ “[Q]ui reconnaît pour une droit l’exercice du contrôle international d’un État sur les actes de souveraineté intérieure d’un autre État contraires ‘aux lois de l’humanité’, et qui prétend en organiser juridiquement le fonctionnement.” See Antoine Rougier, “La théorie de l’intervention d’humanité”, op cit, p 472.

the European powers were more interested in the pursuit of their own geopolitical interests than the interests of humanity, in general.

This policy of double standards was veiled in the metaphysical and moral teachings of Christianity. The euro-centrism of the 19th century implied an assumption of superiority over all other religions and cultures. The common principles of humanity were defined on a dogmatic religious basis, with the *droit commun de l'humanité* (common right of humanity) being described within the parameters of the Christian religion. Thus, the powers of Europe acted as a kind of self-appointed *ministère public au nom de l'humanité*.¹³⁰ The self-declared guardians of humanity failed, however, to define the normative principles on which their right to intervene was based. They also failed to demonstrate that their interventions, which they justified under *intervention d'humanité*, were purely, or at least primarily, motivated by their concern for the human rights of the population in the country targeted by an intervention, and not dictated by specific geopolitical interests.

This approach may be better understood when placed in the specific historical context. The Treaty (known as the Holy Alliance) concluded in 1815 was indicative of the European ideology of supremacy in the religious, moral and cultural fields that characterized the European arena up until the First World War. In their treaty concluded in Paris, 14-26 September 1815, the Emperor of Austria, the King of Prussia, and the Emperor of Russia solemnly declared their

fixed relations with every other Government, to take for their sole guide the precepts of that Holy Religion, namely the precepts of Justice, Christian Charity, and Peace, which, far from being applicable only to private concerns, must have an immediate influence on the councils of princes, and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections.¹³¹

In Article I of the Treaty, the signatories proclaimed a spirit of fraternity based on the words of the Holy Scriptures, and professed, in Article II, “to consider themselves all as members of one and the same Christian nation”. They declared, in Article III, the universalisation they reserved for their alliance by acknowledging

how important it is for the happiness of nations, too long agitated, that these [Christian] truths should henceforth exercise over the destinies of mankind all the influence which belongs to them.¹³²

¹³⁰ Ibid, p 479.

¹³¹ See “Text of the Holy Alliance”, in James Harvey Robinson and Charles Beard (eds), *Readings in Modern European History*, vol 2 (Boston: Ginn, 1908), pp 354–355.

¹³² Id.

The religious fervour and dogmatism behind this proclamation shaped the European powers' self-righteous policies and in particular their imperialist strategies vis-à-vis the non-Christian world. The objective: "to protect Religion, Peace, and Justice" (Article I of the Act of the Holy Alliance) was used to justify the use of force against third parties when those supreme values were threatened and they ignored the sovereignty of other states in the name of their own "higher moral" values. The Christian values underlying the Holy Alliance were later referred to as "principles of humanity". The change in terminology did not change the pretence used to legitimise mere acts of power politics as actions to preserve the very principles of humanity.

This kind of criticism drew from Prince Metternich¹³³ the defensive statement that, the Holy Alliance was not an institution for the suppression of the rights of nations. In Metternich's words, the Alliance was solely an emanation of the pietistic feelings of the Emperor Alexander and the application of the principles of Christianity to politics.¹³⁴

However, it has been the iron law of power politics since the beginning of inter-state relations that the real motives of political action are concealed by an emphasis on values and principles, which are generally acceptable. Economic or political interests are justified through the proclamation of values, irrespective of whether the state actors believe in these values or not. The lessons learned from 19th-century European imperialism should be sufficient to demonstrate the intricate link between ideological legitimisation (religious, moral, humanitarian) and the actual interests behind political action.

A measure, which in "humanitarian" terms is qualified as intervention to protect the rights of Christian minorities, may in reality be intended to contain the power of a strategic competitor. This becomes all the more obvious when one takes into account that the respective intervening powers did nothing to enforce those very humanitarian principles within their borders, or in the colonial territories under their rule.

It is no surprise that the doctrine of humanitarian intervention was criticized by the legal scholars of the time. Not only did it lack precision in regard to the definition of specific "humanitarian" values (or basic human rights), but it also had an inconsistent practice dictated by power politics. For some 19th century legal theorists it was clear that the practice of humanitarian intervention was one of double standards and that the "respect of human rights" was only an accessory motive of intervention.¹³⁵

¹³³ Prince Metternich (1773–1859), Austrian statesman. Austrian foreign minister in 1809, Prince von Metternich took a prominent part in the Congress of Vienna and dominated European politics from 1814 to 1848. He acted as the restorer of the "Old Regime" and the reconstruction of Europe after the Napoleonic wars. To safeguard the balance of power, Metternich formed a "Holy Alliance" between the monarchies of Austria, Russia, Prussia, and France.

¹³⁴ Quoted in Martin Spahn, "Holy Alliance" in *The Catholic Encyclopedia*, vol VII (1910); online version (1999) at www.newadvent.org.

¹³⁵ In his comprehensive legal evaluation of the concept of humanitarian intervention, Rougier rightly observed "qu'il est pratiquement impossible de séparer les mobiles humains

In the absence of any international division of powers, the more powerful nations themselves decided on the criteria for application of the doctrine, much like the veto powers in today's Security Council.¹³⁶ Those criteria were usually dictated by the prevailing constellation of interests, not by lofty humanitarian principles.¹³⁷ Because of the non-existing division of powers between the authority (state entity) executing an intervention and the authority formulating the criteria of applicability on a case-by-case basis, action was taken by a state (or a group of states) only where its own interests were at stake.

The "humanitarian practice" vis-à-vis the Turkish Empire amounted to what suggested the imposition of a specific but not necessarily universal concept of humanity, namely that of the intervening power upon the country against which the action was directed, and which may have been governed by a different value system and a different perception of that which is "human". The euro-centric orientation and the direct link to the hegemonic interests of the 19th century European powers made the concept of humanitarian intervention liable to suspicion in the eyes of legal theorists from the very beginning. Those who identified it as a tool of power politics challenged its use.

In the period of joint European action against non-European rulers, prior to the First World War, the concert of European powers claimed, vis-à-vis their supposed adversaries or competitors, a right to intervene "in the name of humanity". This euro-centric strategy corresponded to a situation of fundamental inequality in terms of power and control of resources between Europe and the rest of the world (apart from the United States), in particular the countries and nations under colonial rule. If one takes into consideration the unequal constellation of power, under which humanitarian intervention was practiced, and if one considers its inconsistent application in a 19th-century 'policy of double standards,' it is no exaggeration to state that the doctrine of humanitarian intervention was part of the ideological legacy of European imperialism.

Thus, the humanitarian intervention of the late 20th and early 21st centuries can be seen in two lights. It is either a rebirth of the moral consciousness that was supposed to have inspired the Act of the Holy Alliance of 1815, or it is simply a corollary to a system of hegemonic politics, which in its intricate mechanisms has been developed to preserve the global status quo instead of helping those who are suffering inhumanities, thereby resembling the euro-centric order of the 19th century.

d'intervention des mobiles politiques et d'assurer le désintéressement absolu des États intervenants" (Rougier, "La théorie de l'intervention d'humanité", op cit, p 525).

¹³⁶ See "Analysis of the structure of the Security Council: The Voting Procedure in the United Nations Security Council. Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations." Studies in International Relations, XVII. (Vienna: International Progress Organization, 1991).

¹³⁷ Rougier, "La théorie de l'intervention d'humanité", op cit, p 525.

5. The Patterns of Intervention

It is interesting and instructive to note the patterns of intervention and the motivations behind interventions identified by Ortega in 2001.¹³⁸ Although the centuries have changed, the motivations that he identified correlate in large part to those that existed when the Holy Alliance was established, and when the Western powers imposed their euro-centric views on others. His scheme of ‘patterns’ identify those variations that might be said to be more accurate labels for interventions than the term “humanitarian”:

- a. An imperialistic pattern — A powerful state invades another state in order to gain some advantage, to further its interests and to increase its influence both in the target state and on the international scene.¹³⁹
- b. Colonial — National interests of powerful colonialist states are coercively imposed upon weak (newly independent) states.¹⁴⁰
- c. Balance of power — For centuries, the main feature regulating relations between European states was the balance of power between sovereign states, and in practice this led to non-intervention. However, war and intervention were sometimes used as tools to redress that balance and to prevent the transformation of a multi-polar system into a hegemonic one dominated by one actor.¹⁴¹
- d. Ideological — An intervening state seeks to change the political system of the target state for ideological reasons. For instance, from 1815 until 1830 the Holy Alliance intervened to support monarchical regimes in the face of democratic revolutions in Europe, while some US interventions in the 1980s were designed to uphold democracy.¹⁴²
- e. Self-determination — Military intervention in civil wars may have ideological motivations, but the intention may also be to support one of the parties claiming the right to national self-determination. Similarly, foreign intervention may also be intended to help peoples who are struggling against colonialist occupation.¹⁴³

¹³⁸ See Martin Ortega, *Military intervention and the European Union*, Institute for Security Studies of WEU, Chaillot Paper 45, March 2001.

¹³⁹ A well-known version of this pattern is hegemonic intervention.

¹⁴⁰ The Opium Wars against China and the “gunboat diplomacy” employed against Latin America republics in the 19th century are examples of this pattern.

¹⁴¹ In the War of the Spanish Succession at the beginning of the 18th century, for instance, the apparent justification for foreign intervention was the strength of the claims of the respective pretenders to the throne; however, the real objective was to prevent Bourbon France from becoming too powerful.

¹⁴² Democratic intervention. During the Cold War, and especially in the 1980s, a few cases of intervention were allegedly based on the need to uphold democracy in the target state. However, this justification was never accepted by the international community. Of course, many international measures in support of democracy can be taken, but the use of armed force is not the most efficient means to impose democracy. See Antonio Remiro Brotons et al, *Derecho Internacional* (Madrid: McGraw-Hill, 1997), chap XXXVII.

¹⁴³ In this sense, (collective and state-led) intervention in South-Eastern Europe in the 1990s cannot be construed as having been supportive of self-determination. As the then US Deputy

- f. Self-defence — Armed force is used against a neighbouring state in response to armed incursions from that state's territory that is not restrained by its government. In principle, the aim of this type of intervention is not to overthrow the government of the target state, but to prevent the attacks. Israel in the 1980s, Turkey and, more recently, Iraq all intervened following this pattern. The French and Zairean military presence in Chad in the 1980s,¹⁴⁴ for instance, was not military intervention but collective self-defence to help territorial defence against aggression.
- g. Humanitarian intervention — One state or a group of states use armed force to alleviate the suffering of human beings in the territory of other states. Two situations may be distinguished: (1) protection of nationals abroad, for instance the Israeli intervention in Entebbe, Uganda, in 1976, or the French intervention in Kinshasa, Zaire, in 1991; (2) protection of the population of other states or of minorities, in the event of humanitarian catastrophes, even those provoked by their own governments (Operation Provide Comfort in Kurdistan in 1991 was a case that falls into this category; NATO's intervention in Kosovo in 1999 also belongs to this type, as will be discussed more thoroughly below).
- h. Collective intervention — The international community as a whole decides to intervene militarily in a state to maintain international peace and security.¹⁴⁵
- i. Punitive intervention — Some states carry out selected armed attacks on another state to penalize previous wrongdoings attributed to the target state.¹⁴⁶

From this scheme, the “humanitarian element” of politics is seen within a wider scheme of motivations. Humanitarian action has rarely been the sole motivation for intervention; frequently, it is a catch phrase used to justify action but is properly viewed as secondary to other influences.

In the chequered history of humanitarian intervention, the use of force has frequently been coloured by a clash of values and cultures, as seen in several examples of Western and Russian interventions against the Turks: in Greece in

Secretary of State, Strobe Talbott, put it, the aim was rather “to remake the politics of the region without, this time, having to redraw the map...We are trying to define and apply the concept of self-determination in a way that is conducive to integration and not to disintegration.” (Strobe Talbott, “Self-determination in an interdependent world” *Foreign Policy*, Spring 2000, pp 152–164, 155.

¹⁴⁴ See René Lemarchand, *The Green and the Black: Qadhafi's Policies in Africa* (Bloomington: Indiana University Press, 1988) pp 65, 106, 108, 112–113, 119–120.

¹⁴⁵ The authorizing actor in this type of intervention is the UN Security Council. The objective is to maintain or restore international peace. Forceful interventions authorised by the UN Security Council during the 1990s include Iraq, Somalia, Bosnia, Haiti, and East Timor.

¹⁴⁶ The US air attack on Libya in 1986 or the American missile attacks against Afghan and Sudanese objectives in 1998 might be included in this category.

1827; in Syria in 1860; in Bosnia, Herzegovina, and Bulgaria in 1877; and in Bulgaria, Greece, and Serbia in 1913. Hegemons and aggressors have found 'humanitarian' intervention to be a useful tool. An example of an intervention, which led to growing disrepute for the doctrine, was Hitler's use of force to 'defend' ethnic Germans in the Sudetenland as a pretext for his invasion of Czechoslovakia.

6. Conclusion

The practice of humanitarian intervention had become a "policy of double standards" that was used to serve a Christian ideology. The development of the practice of humanitarian intervention grew from an overtly Christian set of values, and therefore drew its motivations from a Christian tradition to the exclusion and suppression of other competing traditions. The Act of Holy Alliance was the political manifestation of such a value system acted for its own strategic benefit. The argument put forward in this chapter is that "humanitarian intervention" in the 19th century and early 20th century followed a pattern and served a set of particular ideals, but that more importantly these ideals were not general ideals of humanity.

In the next chapter, the development of international law in the course of the 20th century is reviewed, so as to be able to evaluate the nature of what I suggest is a sudden revival or "rehabilitation" of a 19th-century concept in the 21st century's environment of power politics; that is, I consider the similarities between the euro-centric power politics of the 19th and early 20th centuries and the emergence of another era of hegemonic power politics during the late 20th century, particularly during the Cold War era. The relationship between the United Nations and its constituent member states during this period is of prime importance.

CHAPTER FOUR

1945–1990 COLD WAR INTERVENTION

1. Introduction

Since the end of the Second World War, and especially during the Cold War, intervention has been characterised by superpower moves into other countries for the preservation of ideological interests. In contrast to early civilization, ideological rivalry between the East and West complicated the purpose of Cold War intervention. Cold War intervention involved not only economic, social, and political rivalry, but also geopolitics and technology. Religious rivalry, such as existed in some contexts during the prior age, transformed into a conflict between capitalism versus communism.

This chapter is an attempt to discuss what intervention meant during the Cold War period. Although a number of interventions have been exercised by the winning superpower, this chapter selects four cases as they significantly represent different issues, response, and policies. The first section provides a brief definition of the Cold War. The second section gives an overview of the ideology connected to military intervention during Cold War. The third section explains the Cold War interventions and territorial defence conditions during the Cold War. The fourth section evaluates the cases of legitimate intervention during the Cold War, and then moves to the reasons for the Cold War intervention. The fifth section analyses the 1945–1990 official UN rules and focuses attention on the relevant international legal norms. The last section describes the 1945–1990 intervention problems, before concluding this chapter.

2. What was the Cold War?

From 1941 until 1945, the United States saw the Soviet Union as its most important ally, in the fight against fascism. With the defeat of the Axis powers, the United States saw the Soviet Union as its principal rival. Both countries were suspicious of the other's intentions on the international stage.¹⁴⁷

Despite much pretence, national security had not been a major concern of US planners and elected officials; historical records reveal this clearly. Few serious analysts took issue with Kennan's position that "it is not Russian military power which is threatening us, it is Russian political power"¹⁴⁸ or with Eisenhower's consistent view that the Russians intended no military conquest of Western Europe and that the major role of NATO was to "convey a feeling

¹⁴⁷ See American Heritage Center, University of Wyoming World War II (1939-1945), May 29, 2002.

¹⁴⁸ See Efstathios T Fakiolas, "George Kennan's Long Telegram and NSC-68: A Comparative Analysis" *East European Quarterly* 31(4), January 1998. See, also, Noam Chomsky, *What Uncle Sam Really Wants*, 1993.

of confidence to exposed populations, which was supposed to make them sturdier, politically, in their opposition to Communist inroads”.¹⁴⁹

According to the conventional Western view, the Cold War was a conflict between two superpowers, caused by Soviet aggression, in which the United States tried to contain the Soviet Union and protect the world from it. On the Soviet side, the events of the Cold War were repeated interventions in Eastern Europe: tanks in East Berlin and Budapest and Prague. These interventions took place along the route that was used to attack and virtually destroy Russia three times in the 20th century alone. On the US side, intervention was worldwide, reflecting the status attained by the United States as the first truly global power in history.¹⁵⁰

Indeed, every attempt in other countries to uphold communism or democracy through intervention can be seen as an extension of superpower confrontation. Naturally, substantive justifications for military intervention based on ideology were widely rejected. When the United States claimed that it was supporting military and paramilitary activities against Nicaragua to protect human rights and democracy, the International Court of Justice reflected a broadly shared view when in 1986 it stated:

...while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.¹⁵¹

In addition, a marked evolution of the self-determination pattern occurred after 1945. Through a series of resolutions, the UN General Assembly attributed a certain degree of legitimacy to self-determination struggles waged by national liberation movements. Although there was no general agreement as to the extent of that legitimacy, some interpreted it to mean that colonised peoples were entitled to act militarily and to receive military support, including legitimate military intervention. Several newly independent countries, such as Algeria, and some communist countries, like Cuba, offered military assistance to liberation movements. However, it is not always easy to detach the zeal for self-determination felt by the interveners from what was the predominant environment of the inter-bloc confrontation.

3. 1945–1990 Official UN Rules

The formation of the International Commission on Intervention and State Sovereignty¹⁵² in 2000 suggested a moral and legal commitment by the United

¹⁴⁹ See Bill Vann, “US propagandists invoke the Cold War”, World Socialist Web Site, 30 October 2001.

¹⁵⁰ *Id.*

¹⁵¹ International Court of Justice Reports, 1986, Nicaragua case (merits), para 268.

¹⁵² Responding to this challenge from the UN Secretary-General, Canada’s Prime Minister Jean Chrétien announced the establishment of the International Commission on Intervention and State Sovereignty at the United Nations Millennium Summit in September 2000.

Nations to take responsibility for stopping genocide if ever, and wherever, it recurred.¹⁵³ The hope was that we would not again debate our responsibility to act, finding excuse for inaction in narrow conceptions of our national interest. However, international law at times seems hopelessly irrelevant to contemporary challenges in foreign relations, and the law in this area is still evolving. Still, established principles go a long way toward addressing central issues in the domestic policy debate.

The United Nations Charter and its attempt to generate such principles generally prohibits both member states and the UN itself from deploying military forces to the territory of another state. Designed to protect states' territorial and political sovereignty, these prohibitions can be surmounted in only two circumstances:

- a. When the host state, or relevant parties, consent to the deployment; or
- b. The deployment is in response to a threat to international peace, a breach of the peace, or an act of aggression (as noted below, this second circumstance comprises two distinct situations).

In the first instance, which has been the basis of UN peacekeeping operations, consent obviates the concern about sovereignty underlying the general prohibition against intervention. In the second circumstance, because military action entails a significant encroachment on sovereignty, the UN Charter erects substantial barriers to its use. Military force is only permitted where:

- a. It is an act of self-defence, either individual or collective, in response to an armed attack by another state.
- b. The Security Council has determined the existence of a threat to international peace, a breach of the peace, or an act of aggression, and has authorised (or, in theory, even ordered) military measures to maintain or restore international peace and security.¹⁵⁴

¹⁵³ International law draws one bright line: when genocide is being practised or threatened, the international community has a duty to end the crime's further sweep, even to the point of military intervention. While demanding, the duty to stop genocide has narrow scope; few human rights disasters — however atrocious — pass the high threshold established by the definition of this international crime, which requires an intent to destroy certain groups, in whole or in part, "as such". But the practices that constitute "ethnic cleansing" are one of the rare instances since World War II in which these crimes have been committed. In a preliminary decision on a case against Serbia and Montenegro brought by the Bosnian government, the International Court of Justice came close to saying that the defendants were committing genocide in Bosnia. Significantly, too, when the UN Security Council established an international tribunal for crimes committed during the Balkan conflict, it gave the tribunal jurisdiction over genocide in 1993.

¹⁵⁴ Even when it has determined the existence of a threat to international peace, the Council is not free to authorise military action unless it also concludes that non-military measures, such as economic sanctions, would be inadequate or have already proved inadequate. Further, the Council may authorise only those military measures that are "necessary" to restore peace and security, in effect requiring that authorised means be proportionate to legitimate ends. But while the UN Charter establishes significant barriers to the use of military force, it does not preclude humanitarian intervention. It is doubtless an exaggeration to say that a "threat to the peace" is whatever the Council says it is — but it's not much of an exaggeration. More to the

4. The Realities

The UN legal framework has several implications for superpower policy: first, the law of the UN Charter places significant restraints on superpower options, allowing them to deploy military missions for purely humanitarian missions only when:

- a. The host state or relevant parties consent.
- b. The UN Security Council has determined the existence of a threat to international peace and has authorised enforcement action — even then, the superpowers may use only that force that is proportionate to the authorised goal.

While the framework established by international law goes some way towards guiding US policy as the only superpower in terms of humanitarian intervention, it still leaves large questions of policy unanswered. While the United States participates in UN peacekeeping operations that have a humanitarian purpose, it also contributes troops to coercive humanitarian operations authorised in accordance with international law.

At one level, the United States can do anything it likes. Whether it should is another matter. Significantly, US involvement is often constrained by UN consensus. The problem is, though, that if one sector of countries amalgamates and it possesses enough power, it can follow its objectives without the action being generally consented to. This is the same kind of problem that was associated with the politics surrounding the Holy Alliance in the previous chapter and also the usefulness of the Ortega Scheme mentioned therein. The creation of consistently binding norms of intervention seems a problem that has stretched through the ages.

5. International Legal Norms

It is generally understood that Article 2(4) of the Charter forbids any use of force in international relations, not only in international war but also in armed intervention in another state. Article 2(4) declares: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” As mentioned earlier, there are only two valid exceptions to this general statement: individual or collective self-defence.¹⁵⁵ During the Cold War, these two exceptions evolved in different ways.

The use and abuse of the veto prevented the Security Council from undertaking any substantial collective action until the 1990s, thereby blunting

point, legal experts agree that some (though few) humanitarian crises may threaten international peace and warrant intervention.

¹⁵⁵ See the UN Charter, Articles 39–53.

the main instrument for maintaining international peace that was envisaged by the Charter. This paralysis left self-defence as the only effective exception to the general ban. However, while there were some cases of justifiable self-defence, the concept was commonly exploited, leading to several attempts to embroider its meaning. Indeed, throughout the Cold War, illegitimate use of armed force in international relations and armed interventions were repeatedly justified on the grounds of spurious claims of “self-defence” normally closely connected to earlier alleged interventions, and often at the request of “legitimate governments” which were not accepted by the international community as a whole.

Article 2(7) of the UN Charter effectively prevented the United Nations from intervening in matters that were essentially within the domestic jurisdiction of any state. That provision has, nevertheless, remained ambiguous, since there is no indication of what is to be understood by “domestic jurisdiction”. The Permanent Court of International Justice (PCIJ), interpreting a similar provision in the Pact of the League of Nations, made some useful remarks that are still considered authoritative.

The PCIJ affirmed that the scope of “domestic jurisdiction” should not be determined solely by states, but should be defined “within the limits fixed by international law”. The Court stressed that the question of whether a matter is solely within the domestic jurisdiction of the state is a relative question, the answer to which depends on the development of international relations.¹⁵⁶ During the Cold War, a number of decisions by UN organs showed that the *domaine réservé* was slowly shrinking,¹⁵⁷ and, in particular, could no longer apply in cases of colonial administration or racial discrimination.

Article 2(4) and (7) of the UN Charter, as well as other purposes and principles described in it, have been generally interpreted in the light of General Assembly Resolution 2625 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Cooperation, which was adopted by consensus in 1970 and widely recognised as a valid development of the Charter’s provisions.¹⁵⁸ The Declaration contains the following principle of non-intervention:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. 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 in violation of international law... Every state has an inalienable

¹⁵⁶ Case “National Decrees Issued in Tunis and Morocco” (1923) PCIJ Series B (4), 24.

¹⁵⁷ For more details, see Ortega, Martin *Military intervention and the European Union*, Institute for Security Studies of WEU, March 2001.

¹⁵⁸ General Assembly resolutions have only a recommendatory value, but it is accepted that some important resolutions, called declarations and widely adopted on special occasions, represent an authoritative restatement of international law, for instance the Universal Declaration of Human Rights of 1948.

right to choose its political, economic, social and cultural systems, without interference in any form by another state.¹⁵⁹

In spite of general support for the Declaration, the equal condemnation of both “armed intervention,” and “other forms of interference,” led to criticisms from several Western countries. The principle of non-intervention was also introduced in bilateral and multilateral treaties, thereby reaffirming its applicability in specific relationships or geographical regions, thus adding to its general value. Moreover, the principle was also endorsed in the Helsinki Final Act 1975 in the following clear terms:

The participating states will refrain from any intervention, direct or indirect, individual or collective, in the internal affairs falling within the domestic jurisdiction of another participating state, regardless of their mutual relations. They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating state.¹⁶⁰

Although the Helsinki Final Act is a political agreement, not a binding treaty, it is generally recognised that the principles embodied in the Final Act are compulsory for the participating states.

To complete this synopsis of the status of non-intervention in international law, two other issues should be mentioned: intervention in civil wars and intervention in wars of colonial liberation.

In relation to civil wars, there are no definitive written rules, so the customary norms apply even if their exact contents are disputed. The customary rule in classical international law was that in civil wars other states could assist the legitimate government, but not the rebels. This rule was subject to doctrinal criticism and abuse in practice during the Cold War, for it depended wholly on recognition of the ‘legitimate’ government, and recognition of governments is a political decision taken by states. Consequently, the superpowers intervened in different ways in civil wars, supporting what they considered to be the ‘legitimate’ government. For this reason, a new norm was drawn up, in keeping with the principles of non-use of force and non-intervention, according to which international law forbids military assistance to either side in a civil war. The Declaration on Friendly Relations of 1970 contains a distinctive manifestation of this new rule:

No state shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow

¹⁵⁹ See General Assembly Resolution 2625, 1970.

¹⁶⁰ Conference for Security and Co-operation in Europe, Summit Helsinki, Final Act, 1 August 1975.

of the regime of another state, or interfere in civil strife in another state.¹⁶¹

With regard to wars of colonial liberation, third world countries, as well as communist countries, maintained the view that the colonial peoples had the right to fight against occupation. Thus, foreign military help for those under colonial occupation was not intervention but legitimate assistance in self-defence. This view was reflected in the Declaration on Principles of 1970 (and in other General Assembly resolutions, often even more controversially).¹⁶² However, this argument was only applicable to colonial self-determination, and could not be construed as authorising or encouraging any action which would dismember or impair...the territorial integrity or political unity of sovereign and independent States.¹⁶³

The various written and customary norms of international law considered in the last few pages present a principle of non-intervention that was both too strict and too inflexible but which was, nevertheless, the legal regulation that prevailed until the 1990s. During the 1980s, however, a conviction emerged among scholars, the public, and states alike that some cases of intervention were justified, even if international law did not formally acknowledge that right.

As early as the 1980s, some experts on international law conceded the dilemma when they reckoned that some punctual humanitarian interventions were legitimate even though, in theory, proscribed by international law.¹⁶⁴ Incidentally, the debate over humanitarian intervention was started almost at the same time as another debate on the possibility of legitimate intervention in support of democracy, which did not generate the same consensus.

Finally, there are enough arguments extant to claim that a customary rule is developing, which could allow humanitarian military interventions by states in particular circumstances.¹⁶⁵ Prior to the 1990s (Bangladesh 1971, Uganda 1978, Central Africa 1979) practice was not accompanied by a general belief that states were acting according to international law (*opinio iuris*).

161 Resolution 2131 UNGA Declaration of Principles Concerning Friendly Relations and Cooperation Amongst States 1970.

¹⁶² “The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention” (Declaration on Principles of 1970). GA Resolution 2621 of 1970 and Resolution 3314 of 1974 (Article 7) did not receive the same support as the Declaration on Principles.

¹⁶³ On this aspect, see, inter alia: Albrecht Randelzhofer, “Use of force”, in Max Planck, *Encyclopaedia of Public International Law*; and “Article 2(4)”, in Bruno Simma (ed), *The Charter of the United Nations, A Commentary* (Oxford: Oxford University Press, 1995).

¹⁶⁴ Some scholars on international law (see works by Ronzitti and Teson in the bibliography) started to express their concern over the scope of the principle, which was criticized primarily because it rejected rescue of nationals abroad and some humanitarian intervention.

¹⁶⁵ Many studies have considered the legal aspects of the Kosovo intervention. See, for instance, the debate in *American Journal of International Law*, vol 93–4, October 1999.

6. Humanitarian Intervention During the Cold War (General)

During the Cold War, international willingness to collectively intervene for humanitarian purposes was almost non-existent.¹⁶⁶ Nobody wanted to risk a third world war on that account. In addition, the majority of the UN members considered the notion of humanitarian intervention a relic of colonialism and vigorously dissociated themselves from it. However, the number of gross violations of human rights, including genocide, throughout this period was a strong moral challenge to international public opinion as well as to governments, which were forced, in most cases, to remain passive witnesses to the violations. The feeling of impotence gave rise to a dispute as to whether humanitarian intervention might be justified under specific circumstances.¹⁶⁷

With the establishment of the UN Charter, responsibility for the maintenance of international peace and security was vested in the Security Council. Moreover, the great powers equipped themselves with a right of veto, an act that reflected the realization that use of force to secure international peace against the will of one of the permanent members of the Security Council would be destabilizing and might undermine the international order. At the same time, the UN Charter and subsequent Conventions set out as a fundamental purpose the promotion of universal observance of human rights, prevention of genocide, and protection of civilian victims of war. The UN Charter reflects the idea that maintenance of order and pursuit of justice can be reconciled within states as well as on the global level.

However, if armed combat is fought between government forces and loosely organized irregulars, and takes place within the borders of a state, the “threat to peace”, “breach of the peace”, or “act of aggression” that must exist before the Security Council can take action may involve the interference with state sovereignty. If the Security Council cannot agree to take action in the face of genocide and gross and systematic violations of human rights, then, even though there exists something that breaches humanitarian standards, action will not be taken for reasons other than humanitarian ones. These moral and political dilemmas arising from the new sort of intra-state warfare were not anticipated by the creators of the UN Charter and the UN security system and represent a profound moral and political challenge.¹⁶⁸

Shortly after the UN Charter had been signed, however, the ideological competition and global confrontation between the two superpowers eroded any possibility of a reconciliation of order and justice as envisioned in the UN security system. Similarly, the Cold War stalemate made reflections about the appropriateness of the UN Charter in the face of wars of the third kind redundant for all practical purposes.¹⁶⁹ The paralysis of the Security Council

¹⁶⁶ There were some cases covered with humanitarian dresses, which will be explained in detail in the next section.

¹⁶⁷ This was, for instance, discussed in the International Law Association in the 1970s.

¹⁶⁸ “Humanitarian Intervention. Legal and political aspects”. The report “Humanitarian Intervention” was commissioned by the Government on 25 January 1999 from the Danish Institute of International Affairs (DUPI) and was submitted to the Minister for Foreign Affairs on 7 December 1999.

¹⁶⁹ For example, civil wars and internal troubles

from the end of the 1940s ‘lame-ducked’ the UN security system and left little room for humanitarian intervention mandated by the Security Council. According to a Danish report, the nuclear deterrent had its desired effect:

None of the superpowers were willing to upset the global political order by intervening militarily in the sphere of influence of the other part without UN authorisation for the sake of human rights protection and genocide prevention. Considerations of order prevailed over the pursuit of justice because the perceived stakes were too high: the fear of nuclear Armageddon had sobering effects.¹⁷⁰

Furthermore, universal conventions on human rights and genocide prevention, notwithstanding the concept of justice itself, were subject to a contest that contributed to the absence of humanitarian intervention. The contest took place not only between East and West, but also between North and South. The latter was closely related to decolonisation and the state formation process in the Third World. The new post-colonial states were often “possessed” by rulers engaged in various mixtures of state-building by persuasion and coercion and proved to be strong supporters of Westphalian¹⁷¹ norms of sovereignty and the concomitant principle of non-intervention. For that reason, the prevailing attitude in the General Assembly, where the post-colonial states obtained the voting majority in the 1960s, was decidedly against intervention in internal conflicts. Civil wars and internal troubles were to be regarded as domestic matters of no relevance to the United Nations, and the General Assembly took the position that what constituted a “threat to the peace” should be interpreted restrictively. For most third world governments the idea of outside intervention in domestic affairs without the consent of the government in question was regarded as an expression of neo-colonial thinking.¹⁷²

The strong anti-colonialist rhetoric of the General Assembly helps explain why it was politically impossible to designate human rights violations and genocide in black sub-Saharan Africa¹⁷³ as a threat to international peace. And it explains why racist practices in Southern Rhodesia and South Africa could be defined as a threat to international peace against the will of several Western great powers. As a consequence of the high priority given to global order maintenance and the contested nature of justice, the world witnessed, with depressing regularity, massive violations of human rights and genocide without any substantial reaction from the international community. The most

¹⁷⁰ “Humanitarian Intervention. Legal and political aspects”. The report “Humanitarian Intervention” was commissioned by the Government on 25 January 1999 from the Danish Institute of International Affairs (DUPI) and was submitted to the Minister for Foreign Affairs on 7 December 1999.

¹⁷¹ The roots of the modern idea of sovereignty are routinely traced back to the Peace of Westphalia, signed in 1648, in which major European powers — with the notable exception of England — agreed to abide by the principle of territorial integrity.

¹⁷² *Ibid.*

¹⁷³ See Leila Loupis, “Effective post-war reconstruction through decentralization: The regional meetings — Sub-Saharan Africa, Rwanda”, World Education Forum UNESCO Harare, 2000.

conspicuous examples are Tibet (1950s), Suez Canal (1956),¹⁷⁴ East Pakistan (1971), Biafra (1967–70), Sudan (1956–72, 1983-present), East Timor (1975–99), Uganda (1971–79), Cambodia, (1975–79), and Iraq (1980s).¹⁷⁵

The almost complete absence of humanitarian intervention during the Cold War was, therefore, not due to any lack of human suffering in civil wars around the world at that time. It was more that political (and to some extent moral) considerations precluded humanitarian intervention as a course of action for the international community and the UN Security Council to contemplate or pursue. As a result, the discrepancy between human rights' abuses and international action against such abuses and the regimes allowing such abuses was profound.

7. Cold War Interventions

During the Cold War, civil wars or wars by proxy, usually fought in developing regions with for ideological reasons, were the battlegrounds of the superpowers. While the Korean Civil War was the first, the Vietnam conflict became the most significant and dramatic example for the West. The two superpowers intervened militarily across their spheres of influence: the United States in the Dominican Republic (1965), Grenada (1983), and Panama (1989);¹⁷⁶ the USSR in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979). Moreover, both superpowers exerted political control over a number of satellite states, and whenever those states tried to escape from their hegemonic political influence they were restrained, sometimes by direct-armed intervention, but usually through indirect intervention.

Furthermore, in the 'grey areas' outside their spheres of influence, the two superpowers competed for control over fragile states, often exacerbating local conflicts to that end. This was the case particularly in South-East Asia, Central America, and sub-Saharan Africa, where the United States and the USSR were either directly involved in armed conflicts or supported belligerents, overtly or covertly.

¹⁷⁴ Franco-British-Israeli intervention in the Suez Canal in 1956. Perhaps the most clear contemporary example of this was the intervention in the Suez Canal, on the grounds of defending economic interests. Indeed, the general condemnation that this intervention provoked marked the end of the traditional colonialist pattern. Equally, another type of colonialist intervention, the annexation of territory by a neighbouring state, was also strongly rejected, as demonstrated by the international condemnation of South Africa's occupation of Namibia, and Indonesia's occupation of East Timor. In the wake of the failure of the Suez episode, and following the 1958 revolution in Iraq, the United Kingdom and the United States considered military intervention, but these plans were not carried out. The failure of previous interventions of this nature, and the reactions they produced, were a decisive factor in the decision. See Stephen Blackwell, "A desert squall: Anglo-American planning for military intervention in Iraq, July 1958-August 1959" *Middle Eastern Studies*, vol 35-3, July 1999, pp 1–18.

¹⁷⁵ *Ibid.*

¹⁷⁶ The United States carried out extremely serious interventions into more than 70 nations in this period (see Appendix A).

Moreover, after the Second World War the USSR alone orchestrated the reorganization of Central and Eastern Europe. Dealing with the newly created situations, Fritchey, a noted columnist of the *Evening Star*, represented the opinion of the majority of diplomatic historians when he stated:

It is hardly a secret that the United States, in looking the other way over Czechoslovakia and Hungary, recognised Russia's hegemony in eastern and central Europe.¹⁷⁷

But even with the ideological conflicts that existed during the Cold War, there were cases of intervention where the motivation for intervention was simply that there had been real breaches of an acceptable standard of treatment. Hereafter, these are referred to as “legitimate interventions.”

8. Cases of Legitimate Intervention — Cold War

Among the interventions mentioned above, a number of military interventions having a strong humanitarian element have been widely “accepted”. Using a preliminary and purely intuitive approach for the time being, the following four historical cases can be considered as having been legitimate.¹⁷⁸

i. *India's intervention in East Pakistan, November 1971:*

During the civil war in East Pakistan, West Pakistani forces committed serious violations of human rights and forced around 10-million refugees into Indian territory. Full-scale military intervention by India put an end to the humanitarian catastrophe, allowed the return of refugees, and stimulated the creation of a new independent state, Bangladesh, before the withdrawal of Indian troops. The intervention was not immediately accepted by the international community, owing to the support that the Soviet Union had provided to the Indians. However, it was generally acknowledged later as a clear example of a legitimate action, and therefore a precedent for humanitarian intervention. One of the most eloquent defences of this precedent was made by Michael Walzer, who pointed out that the Indian armed forces were in and out of the country quickly, that they defeated the Pakistani army but did not replace it, and that they imposed no political controls on the emergent state. His conclusion was that “the intervention qualifies as humanitarian because it was a rescue of a people being massacred, strictly and narrowly defined”.¹⁷⁹ It is now uncontested that the intervention was necessary to stop a humanitarian catastrophe.

ii. *Vietnam's intervention in Cambodia, December 1978.*

¹⁷⁷ Clayton Fritchey, “Spheres of Influence in Europe and Asia” *Evening Star*, Washington DC, 11 October 1968, p A-17.

¹⁷⁸ Other lists of legitimate interventions may be found in the works by: Arend & Beck (1993), pp 112–137; Teson (1988), pp 155–200; Akehurst (1984), pp 95–99; Verwey (1985), pp 357–370; and in the Danish Report, op cit, (pp 88–93).

¹⁷⁹ Michael Walzer, *Just and Unjust Wars* (New York: HarperCollins, 1977), p 105.

From April 1975, when the Khmer Rouge acceded to power in Cambodia, indescribable atrocities were committed against the general population. The Khmer Rouge's hostility towards Vietnam resulted in several incursions into Vietnamese territory, ultimately provoking a counter-invasion, in December 1978. Thereafter, Vietnamese forces occupied most of Cambodia, and stayed in control for ten years. Once again, Cold War politics led to condemnation by the UN General Assembly of Soviet-backed Vietnam and, consequently, the Khmer Rouge representative sat for 10 years in the United Nations. However, a more balanced assessment of that intervention has been undertaken. More recently, Haar points out that the political situation in the region, so shortly after the fall of Saigon, left the West with no other option but to strongly criticise Vietnam. For years after Vietnam, Western governments still feared communism might steadily one swallow up one Southeast Asian country after another. It came to be accepted, though, that although "the human rights record of Vietnam itself was very bad... the Vietnamese invasion put an end to the Cambodian massacres and that Vietnam has not, as was feared, misused the invasion to occupy Cambodia permanently. On balance and in retrospect, the Vietnamese invasion therefore seems justified".¹⁸⁰

iii. *France's intervention in Central Africa, 1979.*

For 14 years, Jean-Bedel Bokassa maintained a despotic regime in the Central African Republic, which was increasingly oppressive towards its own citizens.¹⁸¹ Reports of grave violations of human rights, including a massacre of students, led the French to intervene in 1979, following requests by some African countries that had suffered from Bokassa's provocations. In this case, as Louis Balmond affirms, the reversal of the humanitarian situation required a change in the leadership.¹⁸² The operation was criticized by only a few states, and today is generally regarded as having been a just humanitarian intervention.

iv. *Tanzania's intervention in Uganda, 1979.*

During Idi Amin's eight-year rule over Uganda, his regime tortured and murdered ethnic rivals, and expelled large numbers of the Asian minority. Following frontier skirmishes in October 1978, Tanzanian troops entered Ugandan territory, captured the capital Kampala in April 1979, and forced a change of government.¹⁸³ This intervention, which was justified on the grounds of self-defence, was condemned by only a few countries.

¹⁸⁰ Barend ter Haar, *Peace or Human Rights?*, The Dilemma of Humanitarian Intervention, The Hague, Netherlands Institute of International Relations, Clingendael, 2000, pp 21–22. The previous quotation is from the same author, p 21.

¹⁸¹ See Martin Ortega, *Military intervention and the European Union*, Institute for Security Studies of WEU, Chaillot Paper 45, March 2001

¹⁸² Louis Balmond, "Les fondements juridiques des interventions militaires françaises en Afrique", in Louis Balmond (ed), *Les interventions militaires françaises en Afrique* (Paris: Pedone, 1998), p 20. See, also, John Chipman, "French military interventions in Africa", Adelphi Paper 201, 1985.

¹⁸³ See John C. Clark, *Conflict Profile: Uganda*, International Relations at Florida International University, Jan/30/2002.

Although international leaders who now support the idea of humanitarian intervention are generally reluctant to cite precedents, Kofi Annan has highlighted the Tanzanian action in Uganda and the Indian intervention in East Pakistan as two valid examples.¹⁸⁴ In the next chapter, important differences concerning legitimacy, between the four 1970s cases outlined here, and four more which took place in the final decade of last century.¹⁸⁵

9. Conclusion

During the Cold War, humanitarian intervention was very rare and certainly controversial.¹⁸⁶ Although there were plenty of instances where, by today's standards, involvement would have been considered a reasonable response to massive violations of human rights, there was no willingness on the part of most states to contemplate such a drastic departure from the norm of non-intervention. Nevertheless, even in the 1960s and 1970s, the United Nations began to reverse that norm by censuring the white governments of Rhodesia and South Africa. It was the beginning of what the UN Secretary-General of the day, Javier Perez de Cuellar, would observe was "an irresistible shift in public attitudes toward the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents".¹⁸⁷

In addition, humanitarian intervention during the Cold War was carried out unilaterally, with one sovereign state invading another, supposedly to rescue endangered populations. Even today, if intervention by individual states in the internal affairs of others is argued as necessary for humanitarian purposes, the international community is sceptical.

¹⁸⁴ Kofi Annan, speech at the Ditchley Foundation, 26 June 1998.

¹⁸⁵ See the last chapter in this paper.

¹⁸⁶ There were three cases of intervention during the Cold War which many legal scholars have identified as justified on humanitarian grounds: the Indian intervention in East Pakistan (Bangladesh) in 1971, the Tanzanian intervention in Uganda in 1979, and the Vietnamese intervention in Kampuchea in 1979. But the interveners themselves justified their actions on the grounds of self-defence. See Robert H Jackson, "Armed humanitarianism" *International Journal*, Autumn 1993, p 588.

¹⁸⁷ Quoted in Michael Mandelbaum, "The Reluctance to Intervene" *Foreign Policy*, Summer 1994, p 13.

CHAPTER FIVE

THE LEGALITY OF THE INTERVENTION IN KURDISTAN

1. Introduction

The proposition that states now have a right to intervene in humanitarian emergencies can be deduced or codified. The argument is contingent, of course, on the assumption that international law is not a ‘disposable abstraction’. Humanitarian intervention would be a poor servant of justice if it were to undermine international order and the Rule of Law, or if ill-considered and precipitate action were to make a bad situation even worse.¹⁸⁸

Humanitarian intervention has not become a generalised legitimate practice among states so far. However, the humanitarian intervention in Kurdistan in 1991 has established a legal and practical precedent. Had Iraq given its consent to the occupation of part of its territory by US-Allied forces for the purpose of helping the Kurdish refugees, there would have been no legal problem. But that was not the case. Moreover, what constitutes the limits of acceptable legitimate humanitarian intervention is shifting in favour of ‘human rights’. The international reaction to the Kurdish crisis marked a defining moment in the international legitimacy of humanitarian intervention. In addition, it is fact that there had been a humanitarian catastrophe in Kurdistan, but Kurdistan was not really different from many other cases of internal ethnic disputes.¹⁸⁹ Further discussion on internal ethnic disputes of the same scale would help decide into which pattern the Kurdistan incident fits.

This Chapter examines under international law the legality of the US-Allied intervention in northern Iraq during the Kurdish Crisis in 1991.¹⁹⁰ Through the Kurdish case study, I will draw meaningful implication that can be applied to the other unilateral humanitarian intervention. The first section gives an overview of the creation of the no-fly zone, and the move towards direct intervention. The second section gives the reasons put forward for the eventual intervention in Kurdistan. The third section discusses the legitimacy in the Kurdish case. The fourth section analyses whether the no-fly zone in Kurdistan is permanent. The fifth section argues that intervention in Kurdistan was legal, by relying on two pillars: (i) humanitarian motivations and (ii) where there was a threat to international peace and security. The last section concludes that the Kurdistan model was successful and legal.

¹⁸⁸ See Jim Whitman, “A Cautionary Note on Humanitarian Intervention” *Geo Journal* 34(2), October 1994, p 167.

¹⁸⁹ In Laos, thousands of civilians mostly children and poor farmers were killed every year in the 1960s and 1970s from what appears to have been the heaviest bombing of civilian targets in history, and arguably most cruel. In this case, the international community reaction was “to do nothing”. The media also has kept silent. This is very similar to the case in Cambodia during March 1969. On the other hand, there has been many cases of abuse of “humanitarian rhetoric”, for example, in historic invasions, such as Japan’s attack on Manchuria, Mussolini’s invasion of Ethiopia, and Hitler’s occupation of parts of Czechoslovakia. These cases imply how simple and naïve the support for the interventions with humanitarian rhetoric is.

¹⁹⁰ This paper and particularly this chapter will not discuss the issue of the southern no-fly zone in Iraq.

2. The Move to Intervention

The President of Turkey, Turgut Ozal, under direct pressure during the Kurdish refugee crisis that followed the Gulf War, played a central role in introducing the idea of a safe haven in Kurdistan/Northern Iraq.¹⁹¹ Ozal argued that the best way to help the refugees was to bring them down to the plains on the Iraqi side of the border. This was also a pragmatic recognition of the urgency of the crisis facing Turkey. However, he also knew that to ensure the return of refugees and extend assistance, there was an immediate need to stop Iraqi aggression and create a secure environment. What Ozal seemed to have in mind was the creation of a safe haven along the Iraqi border.¹⁹²

Ozal's safe haven was found to be somewhat problematic. Western officials feared that this might create a "Gaza Strip"-like situation. Instead, British Prime Minister John Major pushed for an "enclave" (later changed to "safe haven") large enough to ensure the return of refugees to their own villages.¹⁹³ On 5 April 1991, the Security Council passed Resolution 688, which condemned,

the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security.¹⁹⁴

On 16 April 1991, the US, authorized by UN resolution 688,¹⁹⁵ expanded Operation Provide Comfort¹⁹⁶ to include multinational forces with the additional mission of establishing temporary refuge camps in northern Iraq. This saw a fundamental shift in conventional views on how to deal with the world's refugees. It would no longer be a reactive, band-aid approach, waiting until the refugees crossed international frontiers before providing assistance. In the Kurdish case the approach was to be proactive: to get inside the country of

¹⁹¹ *Newsweek*, 29 April 1991.

¹⁹² The turning point was 8 April: President Bush Senior had not only heeded Ozal's calls by ordering US military air-drops to refugees in the mountainous areas, he also dispatched Secretary of State James Baker to Turkey. Baker's visit to the border area on 8 April lasted only seven minutes, but what he observed was enough to convince him that something urgent and out of the ordinary had to be done. *Ibid.*

¹⁹³ *Time*, 22 April 1991; *The Economist*, 13 April 1991, p 14; *Newsweek*, 29 April 1991, p 11.

¹⁹⁴ Security Council Resolution 688 of 5 April 1991. "Condemns the repression of the Iraqi civilian population" in the post-war civil war and "[d]emands that Iraq ... immediately end this repression". 688 is claimed to provide legal basis for the UK and US "no fly zone". it lies to the north of the 36th parallel covering an area of 19,000 square miles.

¹⁹⁵ The UN Security Council adopted Resolution 688, which addressed itself not only to the fundamental issue of stopping the Iraqi Government's human rights abuses, but also to deal with the more immediate threat of a "massive flow of refugees towards and across international frontiers". Thus, the victims were transformed into a threat of international peace and security in the region.

¹⁹⁶ Statement of Lt.Gen. John M. Shalikashvili US Commander, Operation Provide Comfort, House of Representatives, Committee on Armed Services, Defense Policy Panel -- Rep. Les Aspin, chairman of the panel, presided over the review of Operation Provide Comfort. Washington, D.C., September 4, 1991

origin and prevent refugee flows before they happened by creating safe havens. This would keep the refugees close to home and put pressure on states that were violating humanitarian rights to clean up their act and restore the rights and security of their own citizens.

3. Why Intervention in Kurdistan?

At the United Nations General Assembly in 1999, and again in 2000, Secretary-General Kofi Annan made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues, to “forge unity” around the basic questions of principle and process involved. He posed the central question starkly and directly: ...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?¹⁹⁷

So for human protection purposes intervention should focus not on “the right to intervene” but on “the responsibility to protect.” The proposed change in terminology is also a change in perspective, reversing the perceptions inherent in the traditional language, and adding some additional ones: First, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention. Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. In many cases, the state will seek to acquit its responsibility in full and active partnership with representatives of the international community. Thirdly, the responsibility to protect means not just the responsibility to react, but the responsibility to prevent¹⁹⁸ and the responsibility to rebuild as well.¹⁹⁹

In the event, military intervention in Kurdistan made a huge difference in terms of saving lives and restoring civil order.²⁰⁰ In other words, intervention presented an early and a new era of peace and democracy in the region.²⁰¹ If one were to consider the five touchstones postulated earlier in this paper as justifying intervention, the situation in Kurdistan before intervention affirms the need for intervention in each instance.

¹⁹⁷ The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001.

¹⁹⁸ The responsibility to protect means a broader determination overall to ensure that early warning translates into early action.

¹⁹⁹ Ibid

²⁰⁰ The use of force may be applied when the UN Security Council is unable or unwilling to act to prevent or halt genocide and there is broad collective support for action to intervene in the otherwise sovereign affairs of the state affected. The use of force should be applied in concert with pacific means of dispute settlement (Article 33, UN Charter) and economic sanctions (Chapter VII), to halt or deter genocide (as defined by the 1948 Genocide Convention).

²⁰¹ It is not an easy task to start a peace process and plant the seeds of democracy in such areas as Kurdistan when it is surrounded by countries which have very bad human rights records.

- i. The lives of large numbers of people were at stake.²⁰²
- ii. Some people truly were victimized.
- iii. The international community had a strong will to provide humanitarian assistance.
- iv. The intervention was within the economic means
- v. There was a high probability that the intervention will make a *sustainable* difference

It has also been argued that the intervention can be justified on an exceptional basis, and that any precedential character should be denied.²⁰³ Not many authors contend that the intervention was in conformity with international law.²⁰⁴

4. Legitimacy in the Kurdish Case

Assessments of legitimacy must be based on rational grounds. It follows that an approximate definition of legitimacy must be established. Legitimacy is, then, in the broadest sense a collective judgement that attributes the qualities of goodness or morality or righteousness to behaviour.²⁰⁵ According to Lawson legitimacy is the condition of being considered to be correctly placed in a particular role and to be carrying out the functions of that role correctly. Political legitimacy means having widespread approval for the way one exercises political power.²⁰⁶

In a sense, legitimacy pre-supposes legality, or the existence of a legal system and of a power of issuing orders according to its rules.²⁰⁷ When the total legal order has lost its efficacy, a new legitimacy must be sought, as the principle of legitimacy is restricted by the principle of effectiveness.²⁰⁸

What was urgently needed in the Kurdish case was a clearly defined basis for legitimate, multinational military intervention to end gross abuses of human rights by the Iraqi government.

²⁰² Since unilateral intervention can only be justified – if at all – as the sole remaining means to avert systematic human rights violations, military force should aim directly at protecting the endangered population. See Preu B, Ulrich K.: *Zwischen Legilitat und Gerechtigkeit*, *Blatter fur Deutsche und Internationale Politik*, 44(7), juli 1999, p.826.

²⁰³ Simma, Bruno: NATO, the UN and the use of force: legal aspects, *European Journal of International Law*, 10(1) 1999, Chapter 3, p.2 and p.6 respectively.

²⁰⁴ Quoted in: War with Milosevic, *The Economist*, 3rd April 1999. A number of observers admit the illegality but defend the legitimacy of the strikes: Roberts, Adam: Willing the Ends but not the means, *The World Today*, 55(5), May 1999; Glennon, Michael J: The New Interventionalism, *Foreign Affairs*, 78(3), May/June 1999.

²⁰⁵ S Ball-Research, “The Legitimation of Violence”, in JF Short and ME Wolfgang (eds), *Collective Violence* (Chicago: Aldine Atherton, 1972) p 101.

²⁰⁶ Kay Lawson, *The Human Polity: An Introduction to Political Science* (Boston: Hughton Mifflin, 1989) p 41.

²⁰⁷ AP d'Entrèves, *The Notion of the State: An Introduction to Political Theory* (Oxford: Oxford University Press, 1967) p 141.

²⁰⁸ *Ibid*, p 147.

5. The Legality of Unilateral Intervention in Kurdistan

The Kurdistan example is significant in the sense that the US-Alliance force actively conducted 'humanitarian intervention' without UN authorisation, and the intervention was successful²⁰⁹ In order to clarify why humanitarian intervention by the UN is of greater significance than unilateral action in the development of a structure for intervention, I will examine unilateral humanitarian intervention without the Security Council's authorisation by relying on humanitarian motivations and where there is a threat to international peace and security. Although the necessity of humanitarian intervention has been generally recognised.²¹⁰

In the case of Bosnia-Herzegovina, the international community undertook various actions. The Security Council determined the situation as a threat to international peace and security in Resolution 713, and with Resolution 770, it authorised intervention. The action had one purpose, which was to provide assistance to Bosnian civilians being deprived of internationally recognised human rights,²¹¹ but it was the threat to peace that was the explicit reason action.

In the case of Somalia, the reason for intervention was not self-defence, but to prevent deaths resulting from civil violence, starvation, and lack of basic medical supplies. The Security Council authorised humanitarian intervention in resolutions 794 and 814. The Council asserted that it was taking action against a "threat to international peace and security." However, both resolutions limit reference to cross-border effects such as refugee flows towards neighbouring countries.²¹²

In the Resolution 794, the Security Council determined that the human tragedy caused by the conflict in Somalia constituted a threat to international peace and security. Then it authorised "all necessary means" to create a secure environment for humanitarian relief. The significance of Resolution 814 lies in the fact that it marked the first instance that the United Nations itself deployed an armed force with specific orders to use all the force necessary to accomplish its mission for humanitarian purposes. The intervention in Somalia serves as a precedent for UN Security Council's humanitarian intervention in the sense that it authorised states to intervene for humanitarian purposes without the target state's consent.

²⁰⁹ Security Council resolution 688 which apparently set a new standard for UN intervention declared that the Iraqi repression of Kurdish populations constituted a threat to international peace and security. Later in this section, I will also connect Resolution 688 with other Security Council Resolution to strengthen my argument that Security Council "authorized" intervention in Kurdistan, and for that reason the US/Alliance intervention was legal.

²¹⁰ Since the beginning of human rights era, public opinion seems likely to continue to favor humanitarian action. See Brian Urquhart, "Current and Future Arrangements for Intervention," in *Managing Conflict in the Post-Cold War World: The Role of Intervention*. Report of the Aspen Institute Conference, August 2-6, 1995, (Aspen, Colorado: Aspen Institute, 1996) p. 97.

²¹¹ See Security Council Resolutions 713 (25 September 1991), 770 (13 August 1992)

²¹² See UN Doc. S/RES/794, 3 December 1992, UN Doc. S/RES/814, 26 March 1993

In the case of Rwanda, the UN Security Council expressly authorised intervention by France. France was in a position to stop the wholesale slaughter of Rwandan citizens and its actions fit the mould of humanitarian intervention. Deployment into Rwanda in June 1994 was for the creation of conditions conducive to the protection of Rwandan citizens. The Security Council's saw the genocide being perpetrated against the Tutsi minority as the principal threat to peace rather than refugee flows into neighbouring countries. (Although the Council expressed concerns about displaced people within Rwanda.²¹³ With Resolution 912 the Council expressed its intention to protect Rwandan human rights²¹⁴, and it determined Rwanda situation as "threat to international peace". In its Resolution 918, passed on 17 May 1994, Council said it was "deeply disturbed by the magnitude of the human suffering caused by the conflict," and was "concerned that the continuation of the situation in Rwanda constitutes a threat to peace and security in the region," reiterating, "that the situation in Rwanda constitutes a threat to peace and security in the region...under Chapter VII of the Charter of the United Nations." This and other subsequent resolutions, notably 955, show that the Council considered human rights deprivation through ethnic cleansing and genocide, as a threat to international peace²¹⁵.

Intervention in Haiti following efforts to resolve a crisis in the country, proved insufficient.²¹⁶ The Security Council then recognised this situation as the threat to international peace. Resolution 841 imposed economic sanctions on Haiti on 7 June 1993. However, the Security Council saw that both military and economic enforcement action was needed to alleviate the violence taking place in Haiti and to restore the democratically elected President Jean-Bertrand Aristide. The intervention was conducted under the auspices of Chapter VII of the Charter. The United States, as a neighbour, sought to stem the flow of illegal immigrants from Haiti. It also emphasised that the human rights violations taking place was one reason why it sought to "restore democratic government to Haiti". Thus, the US and the UN were motivated partly by refugee concerns and partly by the preventing human rights abuses in Haiti.

In the resolutions that mandated enforcement action against Haiti, the main purpose of the intervention as well as the nature of the "threat to the peace" identified by the Security Council is somewhat remote. In Resolution 841, the Security Council considered the threat to peace to be the possibility of refugee flows into neighbouring countries. In the resolutions re-imposing economic sanctions against Haiti, the Council considered the failure of Haiti's *de facto* leaders to abide by the Governors Island Agreement as a threat to peace. In Resolution 940, the Council expressed a broader definition of the threat to peace, determined by a "deterioration of the humanitarian situation", "systemic

²¹³ Security Council Resolution 812(1993. 3.12)

Gravely concerned by the fighting in Rwanda and its consequences regarding international peace and security.

²¹⁴ Security Council Resolution 912(1994. 4.21) (4), (5)

²¹⁵ Security Council Resolution 918(1994. 5.17)

²¹⁶ See W. Howard French, "Jacson, in Haiti, Cautions Military" *New York Times*, 24 January 1999

violations of civil liberties,” and the “desperate plight of Haitian refugees.” The main purpose of intervention seemed to be the restoration of democracy, for which the Council was severely criticised.²¹⁷

Intervention in Liberia. In 1990, the Economic Community of the West African States (ECOWAS) deployed armed forces into Liberia to put an end to killings and promote peace between various factions and ethnic groups²¹⁸. However, the Security Council did not authorise the intervention by the ECOWAS Cease-fire Monitoring Group (ECOMOG) intervention, even though it declared that the “deterioration of the situation in Liberia constitutes a threat to international peace and security.” The Council expressed a desire to undertake action under Chapter VII. It omitted any mention, though, of Chapter VIII of the Charter, which states in Article 53 that no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.

The legality of the ECOWAS intervention is a controversial issue that persists in other cases of unilateral humanitarian intervention, by a state or regional organisation, as in the case of Kurdistan. The Liberian example, though, is meaningful in the sense that the Security Council was able to develop an expanded interpretation of a “threat to peace” to include internal disorder.

The Kurdistan case. When Iraq invaded its neighbour Kuwait²¹⁹ on 2 August 1990,²²⁰ the Security Council reacted with unusual speed and decisiveness. On the same date, the Council passed Resolution 660.²²¹ The resolution determined a breach of international peace and security under Articles 39 and 40, and called for the immediate withdrawal of Iraqi forces from Kuwait. Between 2 August and 29 November 1990, the Council adopted 12 Resolutions on different aspects of the Kuwait crisis, under Chapter VII of the Charter.²²² It imposed sanctions and a naval embargo²²³ and on 29 November²²⁴, authorised the use of force if Iraq did not comply with its resolutions by 15 January 1991.²²⁵ Under Resolution 678 the multinational coalition force expelled Iraq from Kuwait.

²¹⁷ In the face of these failures, the UN Security Council adopted a resolution in July 1994 authorizing, under Chapter VII of the UN Charter, a multinational force to use all necessary means to facilitate the departure of the military regime, the return of the legally and restoration of the legitimate government authorities in Haiti. UN diplomatic efforts continued in August 1994 but yielded no positive results.

²¹⁸ “8-Nation African Force is Peacekeeping Model in War-Tone Liberia”, *Washington Post*, April 1, 1994

²¹⁹ The Kurdish case is strongly connected to the Iraq’s invasion of Kuwait, for this reason, I will mention Kuwait crises in this paper. Also Kurdistan is a part of the region

²²⁰ See Paul Taylor and AJR Groom, *The United Nations and the Gulf War 1990–1991: Back to the Future?* (London: Royal Institute of International Affairs, 1992).

²²¹ Security Council Resolution 660 Adopted by the Security Council at its 2932nd meeting, on 2 August 1990

²²² Security Council Resolution 660 (2 August 1990) condemning the Iraqi invasion of Kuwait

²²³ Security Council Resolution 678 (29 November 1990).

²²⁴ *Ibid.*

²²⁵ Brian Urquhart, “Security After the Cold War”, in Adam Roberts and Kingsbury Benedict (eds), *The United Nations, Divided World*, (North Yorkshire: Clarendon, 1993) pp 82–83.

At the end of the conflict, the Iraqi Government began repressing anti-government elements emboldened by Iraqi army's defeat. It executed opposition leaders and attacked Iraqi Kurdish rebels on a massive scale.²²⁶ Within two weeks, around two million Iraqis had fled to Iran and Turkey.²²⁷

With this refugee crisis in the background, the Security Council adopted Resolution 687 on 3 April 1991.²²⁸ This sought to involve Iraq co-operatively in post-war measures to establish permanent peace and stability in the region. Soon after that the Council passed a landmark resolution, number 688²²⁹ which apparently set a new standard for UN intervention within the boundaries of a state. The resolution declared that the Iraqi repression of Kurdish populations constituted a threat to international peace and security, and stated that Iraq's repression had led to a massive flow of refugees towards and across international frontiers, and to cross-border incursions, which threaten international peace and security.²³⁰ This resolution was the result of a dramatic and straightforward link between the upholding of human right and international peace and security.

However, Resolution 688 did authorise states to deploy military forces into Iraq.²³¹ Military intervention to prevent Iraqi repression of Kurds happened under the auspices of resolutions 678 and 688. This combination is problematic, and can be interpreted in different ways, since Resolution 688

²²⁶ N. Boustany, "Iraqi Troops Reportedly Hang Rebels from Tanks: Refugees Say Opposition Losing Ground" *Washington Post*, 13 March 1991.

²²⁷ G Frankel, "An Uphill Fight to keep Kurds from Graveyard" *Washington Post*, 24 April 1991.

²²⁸ For the implementation of Resolution 687, the Security Council adopted Resolutions 700(1991) and 715(1991). These resolutions itemized the types of arms, material, and activities proscribed by the Council, and defined the responsibilities of the Sanctions Committee in regard to developing mechanisms for monitoring future sales or supplies with Iraq on the sanctions items. As to the Iraq's unsatisfactory attitude on sanctions, the Council took on Resolutions 1115 (21 June 1997), 1134(23 October 1997), and 1137(12 November 1997), consecutively. In 1998, the Council reaffirmed its intention, by Resolutions 1154, 1194, and 1205, to act in accordance with the relevant provisions of Resolution 687.

²²⁹ The Security Council Resolution 688, adopted by the Security Council at its 2982nd meeting on 5 April 1991

²³⁰ Iraq's repression had "led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security".

²³¹ It has been interpreted as evidence that the Security Council may adopt measures under Chapter VII with regard to an internal situation if a massive violation of human rights amounts to a threat to or breach of the peace, in spite of Article 2(7) of the Charter. However, a closer analysis of the statements made in the Security Council on the occasion of the adoption of the resolution reveals that even those states which were supporting the resolution carefully balanced the role of the Security Council in this matter with the principle of non-interference in the internal affairs of Iraq. Today, it is commonly understood that these rules must be read in conjunction with other provisions of the Charter, in particular those focusing on the protection of fundamental human rights. Of particular importance is Article 39 of the Charter. Under this provision, the Security Council shall decide what measures shall be taken in accordance with Articles 41 and 42 of the Charter to maintain or restore international peace and security. This means that the Security Council has a clear obligation to act. The question is whether the members of the Council can find a common position when the need arises. See Rüdiger Wolfrum, Heinz, "Zweiter Golfkrieg: Anwendungsfall von Kapitel VII der UN-Charta" 39 Vereinte Nationen, 1991, pp 121–125. See also UN Doc S/PV.2982, 5 April 1991.

makes no reference to Resolution 678, and there is no clear reason given as to why Resolution 678 was revived in relation to Resolution 688. Nonetheless, the states that conducted the intervention into Iraq are capable to argue that their actions were authorised by the Security Council, with the logic that “the security” in Resolution 688 is connected to the “security” in Resolution 678.²³² There were other motivating factors, including concern about the potentially destabilising effect of refugee flows into Turkey²³³ and Iran.²³⁴ These states said they would not tolerate such an influx, with Turkey even deploying military forces into Iraq to stem the flow.²³⁵ The Security Council had to consider the possibility that the Iraqi repression of Iraqi-Kurds could spark a regional conflict.

Thus, Resolution 688 condemned Iraq’s repression of its civilian populations and found that the consequences of that repression threatened international peace and security.²³⁶ On analysis, however, three rationales emerge which justify international involvement in Iraq’s internal crisis:

- i. The massive flow of refugees across borders;
- ii. The severity of Iraq’s violations of human rights; and
- iii. The United Nations’ special responsibility given its previous authorisation of force against Iraq in defence of Kuwait.

In addition, the lack of global condemnation of the interventions was most likely not founded on a perception that states have a right to intervene unilaterally for humanitarian purposes. It was based rather on the perception that the Security Council authorised the intervention, because of it was a threat to international peace and security, and for humanitarian purposes, which can be defined as legal under Chapter VII of the Charter.

The criticism that the US recklessly stretched the boundaries of what constitutes a threat to peace is worth keeping in mind. Nevertheless, the international community is likely to accept the Kurdistan Case, as it has up to now, as an exceptional case in terms of threat to peace justifying the Security Council’s humanitarian intervention, as they have done in the recent cases of

²³² Resolution 678 authorised states to use “all means necessary means” to restore “peace and security”, in the region, and Resolution 688 defined Iraqi repression as a threat to international peace and security.

²³³ On 2 April 1991, at the meeting of the Security Council, Turkey stated “The threat posed by these events to the security of the region needs no elaboration” (UN Doc S/PV.2982 (1991)).

²³⁴ On 4 April, Iran notified the Security Council that an estimated 500 000 Iraqi nationals were crossing into Iran, and that, if it continued, the situation would have consequences that would threaten regional peace and security (letter dated April 1991 from Iran to the Secretary-General, UN Doc S/22447).

²³⁵ This was one of the reasons why States with internal problems of their own were fearful that Resolution 688 could establish a precedent that might be misused in the future. Jane E. Stromseth, “Iraq’s Repression of Its Civilian Population: Collective Responses and Continuing Challenges,” in *Enforcing Restraint*, ed. Lori Fisler Damrosch (New York: Council on Foreign Relations Press, 1993), pp.84-89.

²³⁶ The Iraqi government may claim that legality of Resolution 688, is impossible to fulfil because the Kurds are rebels and every government has the right to defend itself against internal rebellion, but this argument very weak when the massive flow of refugees across borders.

Angola,²³⁷ Sierra Leone²³⁸ and Haiti. In this sense, Resolution 688 stands as a very precedent and a good guide for what can constitute a threat to international peace.²³⁹

The UN Resolution 688 determined that the mass upheaval constituted precisely such a threat. The Security Council insisted that humanitarian organisations receive access to the dislocated civilian population within Iraq and authorised military force to guarantee that access.²⁴⁰

Moreover, the US-Alliance operation in Kurdistan has significant implications:

- i. Superpowers have shown a willingness to play an active role in humanitarian intervention; and
- ii. The United Nations' ability to intervene for humanitarian reasons is constrained by the veto power of the Security Council.

It is also certain that the Charter has as one of its main objectives, the protection of human rights as articulated in the Universal Declaration of Human Rights, and it is this that provides the legal grounds for humanitarian intervention. The legal justification put forward for the US-Alliance intervention into Kurdistan was to save civilian lives.²⁴¹ We might agree that the supremacy of sovereignty over law is untenable.²⁴² The task before US/Alliance was to construct an international order which to the extent that some states such as Iraq, cannot or will not internalise the most basic tenets of human rights offers redress which is codified as legal, perceived as legitimate, unbiased and proportional in application, and effective. What was required was not a legal or *quasi* legal empowerment of US/Alliance to assert that their intervention is undertaken on behalf of the international community, but a range of measures (including intervention when appropriate), which are collectively determined, sanctioned and controlled; in other words, not expediency and pragmatism, but law enforcement.²⁴³

²³⁷ Security Council Resolution 864 (1993. 9.15) (5), (6).

²³⁸ The case of Sierra Leone was related to military coup resulting in mass violence. *The Council determined the Sierra Leone situation as a threat to international peace and security* and condemned the military junta who had denied to hand over the authority to the democratically elected government. It adopted resolution 1132 on 8 October 1997 imposing oil embargo as well as travel of the junta members.

²³⁹ Thomas Pickering, then the US ambassador to the UN, remarked that this was the first time 'a significant number of governments' denied a state's right to 'the sovereign exercise of butchery' Gardner and G. B. Helman. Washington, D.C.: United States Institute of Peace, 1992: 25-26).

²⁴⁰ See Larry Minear and Thomas G. Weiss, "Groping and Coping in the Gulf Crisis: Discerning the Shape of a New Humanitarian Order," *World Policy Journal*, no. 4 (Fall/Winter 1992), p.755.

²⁴¹ Systematic violations of human rights, especially those perpetrated by states within their borders, are not only practical problems, but issues of the organisation of political community. The tension between peace and justice and between sovereignty and human rights. See Chopra, J., Weiss, T.: "Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention" *Ethics & International Affairs* Vol.6, 1992, p.106

²⁴² *Ibid*, p.106.

²⁴³ Jim Whitman, A Cautionary Note on Humanitarian Intervention, *Geo Journal* 34.2, October 1994, p. 175.

This worked well for dealing with immediate military intervention in Kurdistan as well as in Kosovo. It is both inappropriate and shortsighted to diminish the scope or force of UN Charter Article 2(4); instead, the aim should be to interpret Articles 2(7) and 39 more broadly,²⁴⁴ so as to bring international human rights laws within the compass of the enforcement powers of the UN. I dispute the claim that Security Council resolution 688 and the intervention in Kurdistan was a watershed in terms of the right of states to intervene for humanitarian purposes.²⁴⁵ Rather, international community is witnessing a halting movement toward bringing human rights infringements of the largest and worst sort under collective that is, UN purview. This impetus behind this movement is less than universal; nevertheless, the indications were generally hopeful.²⁴⁶

One may also argue that humanitarian intervention is not incompatible with Article 2(4), when humanitarian intervention is not directed against the *territorial integrity* or *political independence* of Iraq and, is not inconsistent with the Principles of the UN Charter either, but rather in conformity with one of the fundamental purposes of the UN, the promotion of respect for human rights.²⁴⁷ In addition, the *link theory* might be a light to brighten this argument regarding humanitarian intervention is not incompatible with Article 2(4), in so far as it is based on a subsidiary responsibility of the Member States for the maintenance of international peace and security which applies when the Security Council is unable to fulfil its responsibilities under Article 24 and Chapter VII. It is also important to note that conditions on which the Charter was adopted have fundamentally changed, and since humanitarian intervention in Kurdistan 1991, Security Council has returned to its original capacity, and been able to enforce its resolution to save lives, and democracy rather than state sovereignty.

²⁴⁴ During the 1945 Senate hearings on the UN Charter, US Secretary of State John Foster Dulles testified, "[Article 2(7)] is an evolving concept. We don't know fifteen, twenty years from now what in fact is going to be within the domestic jurisdiction of nations. International law is evolving, state practice is evolving. There's no way we can definitively define in 1945 what is within the domestic jurisdiction. Let's just let this thing drift a few years and see how it comes out". Cited in David Scheffer, "Humanitarian Intervention versus State Sovereignty," in United States Institute of Peace, *Peacemaking and Peacekeeping: Implications for the United States Military - Special Middle East Program in Peacemaking and Conflict Resolution* (Washington, D.C., 1993) p.12.

²⁴⁵ See Christopher Greenwood's careful judgement on this point. Greenwood, C.: "Is There a Right of Humanitarian Intervention?" *The World Today*, Vol.49, No.2, February 1993.

²⁴⁶ Security Council Resolution 688 (1991) formally acknowledges Article 2(7) of the Charter but, more importantly, characterises the Iraqi suppression of the Kurds as a "threat to international peace and security" the language of Article 39, the first of the Charter's enforcement provisions. However, it is probable that the Security Council did not proceed formally under Chapter VII because of the likelihood of a Chinese veto. Similarly, China has long argued that "it is not within the purview of the Security Council to handle human rights issues." See Maria Chedid, "What is a Threat to the Peace Under Article 39?: The Extent of Legal and Prudential Authority of the Security Council Under Chapter VII," Background Paper, Conference on the Future of UN Collective Security, Center for International Studies, New York University School of Law, January, 1993, p.29. See also Thomas M. Franck, "The Security Council and 'Threats to the Peace': Some Remarks on Remarkable Recent Developments," produced for the same above Conference.

²⁴⁷ Article 1(3) provides that the solution of international economic, social and cultural problems are purposes of the UN Charter.

The other way to legalise the humanitarian intervention in Kurdistan is the special circumstances which may preclude the history of wrongfulness of the Iraqi government.²⁴⁸ Gross and massive violations of human rights by the Iraqi government against Kurdish people may be regarded as a violation against the international community as a whole. It is possible that such breaches of obligations towards the international community may be met by countermeasures in the form of humanitarian intervention, legally justified as reprisals,²⁴⁹ but the ILC draft in Article 50 prohibits countermeasures in respect of an international wrongful act by the use of force as prohibited by the Charter of the United Nations. In commenting upon this question, the ILC refers to Article 2(4), but, in the end, leaves the assessment to other UN organs.

It is also suggested that international law generally permits countermeasures in order to bring about the compliance of a wrongdoing state with its international obligations. The limits on countermeasures are far from clear, though there is general consensus that principles of proportionality and necessity apply.²⁵⁰ Furthermore, the doctrine of “a state of necessity” can provide a right of humanitarian intervention in extreme cases such as in Kurdistan, without Security Council authorisation.

First, since the new human rights era, the doctrine of “necessity” is not such extremely narrow in scope, it is only requiring an essential state interest at stake for the acting state with no comparable interest thereby violated in the target state. Second, it is not controversial whether the doctrine of “necessity” can in any case, apart from self-defence against an armed attack, justify the use of armed force against another state.

Since intervention in Kurdistan, international law concerned with human rights has burgeoned, and the Universal Declaration of Human Rights, while not a legally binding document, may be seen brighter as a milestone in the making of international society, and the substance of international human rights legislation does not remain curiously distant from enforcement measures. Article 56 of the UN Charter enjoins all Members [to] pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of...purposes which includes universal respect for, and observance of, human rights and fundamental freedoms for all.²⁵¹ International

²⁴⁸ According to the ILC draft, Articles 29-34, there are six circumstances which may preclude the wrongfulness of acts not in conformity with international law. Apart from situations where the state has given its *consent*, such a legal defence may be valid for acts undertaken in situations of *necessity* or in *defence* or where the international peace and security is in danger.

²⁴⁹ In the past, the use of force in international relations has often taken the form of reprisals. As for humanitarian intervention, justifying it as reprisals would surely run counter to the strictly humanitarian nature of the action. The ILC draft in Article 47 (2) The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

²⁵⁰ United States recommends that the ILC (1) clarify the definition of countermeasures, (2) substantially revise the dispute settlement provisions pertaining to countermeasures, (3) recast the rule of proportionality, and (4) delete or substantially revise the prohibitions on countermeasures. See Jay Smith US Statement on State Responsibility, Office of the Legal Adviser of the State Department, October 1997.

²⁵¹ Universal Declaration of Human Rights 1948, Article 55 (c).

law has indeed evolved, as Dulles predicted, and also state-practice has been changed since intervention in Kurdistan.²⁵²

Kurdish case was the starting point of developments in international relations to reflect a watershed change in attitude of the international community, it created a rule of law permitting some form of humanitarian intervention. One might plausibly argue, however, that the intervention did conform to the sovereignty by (1) clearly promoting human rights, (2) implicitly not earning UN authorisation, and (4) building counter argument on ambiguities in the Charter with regard to the authority.²⁵³

When the Charter was being drafted, it was with the fear of interstate war in mind, not the type of disputes that are spurring the intervention debate today. Some states may have been keen to elevate the sovereignty principle precisely because it gave them a free hand within their borders. However, there is considerable support for intervention in extreme domestic crises in contemporary international law.

"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 practice in support of the view that there are limits to that discretion; 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."²⁵⁴

What the US/Alliance intervention obtained was already existed in international law, but remained, almost untouched. In other words, intervention in Kurdistan polished the enforcement tools of Chapter VII of the Charter, which were contingent on a determination by the Security Council of a "threat to the peace, breach of the peace or act of aggression." Kurdistan case also changed the language of the doctrine of non-intervention,²⁵⁵ and Article 39 to be interpreted to bring gross violations of human rights within the remit of the Chapter VII provisions, thereby giving substance to Articles 55 and 56. This new interpretation contributed the Kurdish case to be legal.

This contribution prepared some of specialists to voice for the need for reappraisal of the question of humanitarian intervention in view of a number of

²⁵² Quoted in Jim Whitman, A Cautionary Note on Humanitarian Intervention, *Geo Journal* 34.2, October 1994, p 167.

²⁵³ International Year of the Cultural of Peace Conference on Culture of Peace: An Idea in Action, Paris, 24-25 November 2000.

²⁵⁴ L. Oppenheim in *International Law, Vol 1 (Longman, 1948), p. 279.*

²⁵⁵ Vincent puts forth three reasons why the doctrine of non-intervention should be upheld: First, there is no guarantee of impartiality, second, the action might be unwelcome because it comes from outside, and third, there is no common morality which transcends borders from which one could derive principles of intervention. See R. J. Vincent, *Non-intervention and International Order*, Princeton: Princeton University Press, 1974, p. 345.

events taking place after the end of the Cold War. They contend that notions of legitimacy are changing, with humanitarian reasons emerging as a third option²⁵⁶ for justified military intervention in a sovereign state.²⁵⁷ Greenwood contends that enough precedents of humanitarian interventions justify the claim that most states accept them as legal.²⁵⁸ For him, the emergence of "at least a limited right of intervention" is best exemplified by the US-Allied intervention in northern Iraq in 1991 on behalf of the Kurds.

In Greenwood's words,

It seems that the law on humanitarian intervention has changed both for the UN and for individual states. It is no longer tenable to assert that whenever a government massacres its own people or a state collapses into anarchy international law forbids military intervention altogether.²⁵⁹

Greenwood cites cases in which there was no state authority to request or allow outside intervention or, in the case of civil strife, where foreign help met with the consent of all parties to the conflict. These examples cannot bear the precedential character of cases when a state authority existed.²⁶⁰ This leaves the

²⁵⁶ A minority of jurists maintained in the period after 1945 that the institution of humanitarian intervention is permitted under customary international law, a recognised source of international law. They argued that the principles of non-violence and the protection of human rights must be balanced against each other in any particular case, with the result that in extreme situations involving seriously inhumane treatment, the latter principle should override the former. It was often adduced that humanitarian interventions were not precluded by Art. 2 (4) of the UN Charter since it only banned the use of force when directed "against the territorial integrity or political independence" of the target state, and not at the protection of its population. This argument is based on a wrong understanding of the terms in question, which were not added to the text in order to restrict its scope, but in the spirit of specifying the prohibition. Furthermore, it has been generally rejected as incompatible with the system of the Charter, since its framers had attributed a predominant role to individual non-violence. The recognition of humanitarian intervention as an exemption from this prohibition of Art. 2(4) was deliberately abnegated in order to prevent a confrontation of the two power blocks. This claim was voiced with regard to the war against Yugoslavia. See Guicherd, Catherine: *International Law and the War in Kosovo*, Survival, Vol.41, n 2, Summer 1999, p.23. See also Deiseroth's beyond the teleological explanation, Deiseroth has drawn attention to the unacceptability of the notion that military intervention does not affect the territorial integrity of a state: Deiseroth, Dieter: "Humanitäre Intervention" und Völkerrecht, *Neue Juristische Wochenschrift*, Heft 42, 1999, p. 3086.

²⁵⁷ See for instance Greenwood, Christopher: "Legal Limitations of the Prohibitions of Use of Force" in: Souchon, Lennard (Hrsg.): *Völkerrecht und Sicherheit*, Herford 1994.

²⁵⁸ Quoted in "War with Milosevic", *The Economist*, 3rd April 1999, p. 18. As a further sign of a growing international acceptance of humanitarian-grounded interventions, some commentators adduce that a principle recognising that populations in danger of starvation, massacre or other forms of massive suffering have the right to receive assistance was set out by General Assembly Resolution 43/131 of 8 December 1988. This resolution was later reaffirmed by another General Assembly Resolution 45/100 of 14 December 1990.

²⁵⁹ Greenwood, Christopher: Is there a right of humanitarian intervention?, *The World Today*, 49(2), February 1993, p. 40.

²⁶⁰ As were respectively the cases of Somalia and Liberia. The intervention of ECOWAS in Liberia in 1990 was carried out without a mandate, but was given post-facto legitimacy by

enforcement of a no-fly zone in Iraq as the only case of non-UN authorised state intervention that would qualify as a humanitarian intervention.²⁶¹ Likewise, the UK justified its participation on this basis, stating that it intervened.²⁶² Finally, there is no doubt that the US-Allied force's protective action in Kurdistan was noble and ethically sound in reducing massive human suffering, whatever its political motives and irrespective of the question as to why such action has been lacking in many other similar circumstances. However, the actions have been plagued by accusations of illegality.²⁶³

On the other hand, the humanitarian intervention in Kurdistan has caused considerable legal controversy in its debate about the potential consequences on international legal arena.²⁶⁴ The Iraqi government's rejection of both Resolution 688 and the creation of an exclusion zone north of the 36th parallel as a violation of its sovereignty²⁶⁵ has not been widely accepted. Nevertheless, the US/Alliance argued that these measures, that came to be known as Operation Provide Comfort, was fully consistent with UN Security Council Resolution 688.²⁶⁶

6. Is the No-fly Zone in Kurdistan Permanent?

The argument had been advanced, with greater or lesser degrees of explicitness, to justify the establishment and continued enforcement of the "no-fly zones".²⁶⁷ The argument relies on an approach to interpretation that, unlike the passage from the *Namibia Advisory Opinion*, accords considerably more weight to the supposed purposes of the resolutions than to the ordinary meaning of their terms.²⁶⁸ Paragraph 34 of Resolution 687 clearly states that the Council:

Security Council Resolution 788. In contrast to the above-mentioned interventions of the seventies (India in East Bengal in 1971, Tanzania in Uganda and Vietnam into Kampuchea in 1979), a declaration issued by the ECOWAS Heads of State and Government made clear that the peacekeeping force was sent with a humanitarian rationale, see UN Doc. S/ 21485, 9 August 1990. The Liberian case is a doubtful example since ECOWAS encountered the consent of all factions.

²⁶¹ Further the US-Alliance justify their unilateral campaign on the basis of the determination of a threat to international peace and security by the Security Council in a resolution. They indicated that they do not consider a UN mandate indispensable for the international military action, claiming that they still comply with international law. See Clara Portela, *Humanitarian Intervention, NATO and International Law, Can the Institution of Humanitarian Intervention Justify Unauthorised Action?*, Berlin Information-center for Transatlantic Security (BITS), *Research Report 00.4*, December 2000.

²⁶² *British Year Book of International Law*, vol. 63, 1992, p. 827.

²⁶³ The Soviet foreign minister stated that there is a "thin line that separates the necessity for humanitarian support and the concern for the sovereignty of a country." See George D. Kramlinger, *Sustained Coercive Air Presence Provide Comfort, Deny Flight, and the Future of Airpower in Peace Enforcement*, Air University Press Maxwell Air Force Base, Alabama February 2001, p.30.

²⁶⁴ Whatever the legal arguments might be, Operation Provide Comfort with the accompanying safe haven generated a sufficiently strong sense of security for voluntary repatriation

²⁶⁵ *Newsweek*, 29 April 1991, p. 10.

²⁶⁶ *Dispatch*, 27 May 1991, p. 379.

²⁶⁷ See, e.g.: Steven Greenhouse, "Baker Defends Refugee Plan at European Meeting," *New York Times*, 18 April 1991, A18.

²⁶⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*

Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.²⁶⁹

On the basis of the ordinary meaning of the terms, individual States are precluded from engaging in enforcement action without further authorization from the Council.²⁷⁰ In an even more extremely purposive interpretation of Resolution 687 and subsequent resolutions, the US, and some authors from the US, have gone on to argue that explicit authorization of the use of force is in fact not required, that all one needs is a determination by the Security Council that a situation constitutes a threat to international peace.²⁷¹

Should the Council fail to adopt a further resolution explicitly authorizing force, the determination of a threat to the peace may be taken as an implied authorization. This argument has been relied upon, not only vis-à-vis Iraq, but also to help justify the 1999 intervention in Kosovo.²⁷²

On the other hand, the many issues involved in the ongoing existence of the No-fly Zone make its permanency difficult to determine, especially because of its political ramifications. A few facts are important to mention:

- i. The zone was created by a superpower to stop the Iraqi Government's human rights violation. No future goals were planned.²⁷³
- ii. A second purpose of creating the zone was to stop the flood of refugees in to neighbouring countries. There is no sign that the zone was created under international law and it is not clear whether the zone was permanent or limited but it appeared to be a permanent measure, given that it has stopped Iraq government from attacking Kurdistan.

(South West Africa) Notwithstanding Security Council Resolution 276 (1971) I.C.J. Reports 15,p. 53.

²⁶⁹ Resolution 687 (1991) Adopted by the Security Council at its 2981st meeting on April 3, 1991.

²⁷⁰ Thomas Franck, "Legal Authority for the Possible Use of Force Against Iraq," (1998) 92 American Society of International Law Proceedings 136 p.139.

²⁷¹ See, e.g.: Michael Wines, "US and Allies Say Flight Ban in Iraq Will Start Today," New York Times, 27 August 1992, A1. In February 1999, President Clinton went so far as to say that Resolution 678 obligated the United States to enforce the "no-fly zones". See: Steven Lee Myers, New York Times, 25 February 1999, A5. On the no-fly zones, see generally: Peter Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War," 2 European Journal of International Law 114, 1991.

²⁷² See Barbara Crossette, "Conflict in the Balkans: At the UN; Council Seeks Punishment for the Kosovo Massacre," New York Times, 2 October 1998, A6; Neil Lewis, "The Rationale: A Word Bolsters Case for Allied Intervention," New York Times, April 4, 1999; Ruth Wedgwood, "NATO's Campaign in Yugoslavia," (1999) 93 American Journal of International Law 828 pp. 829-30.

²⁷³ Sustaining the no-fly zones is a costly exercise. See Sarah Graham-Brown, "No-Fly Zones: Rhetoric and Real Intentions", MERIP Press Information Note 49, 20 February 2001.

The issue of legality lies at the crux of the No-fly Zone issue. The zone is built on a *legal* basis, because Resolution 688 deemed intervention valid on humanitarian grounds because of the gross human rights violations by the Iraqi Government against its own citizens, and because these actions constituted a breach of the peace.²⁷⁴ From the criticism point of view, there is room to argue that the zone is *illegal*, simply because the UN Security Council did not mention its creation. That the zone's creation was based on political will rather than legal foundation of necessity makes it of limited duration. From a legal point of view, it would of course be possible to attempt to codify situations where humanitarian intervention would be allowed. However, it is more realistic to look at humanitarian intervention in the same way as "necessity" under national law.

Normally, necessity is not codified. Instead, by its very nature it can be identified when it occurs. In addition, the principle of limited intervention affects the international order and the UN Charter because the principle of limited intervention, along with the principle of collective intervention, constitutes a new version of the principle of non-intervention²⁷⁵ that is one of the cornerstones of present international society according to the UN Charter. Therefore, the introduction of both these new principles does not imply any contradiction with the UN Charter.²⁷⁶

Rather, the principles of collective and limited intervention are natural developments of the international order that are intimately linked to other recent developments, such as the new role of the Security Council or the enhanced respect for human rights.²⁷⁷ However, there is considerable support for intervention in extreme domestic crises in contemporary international law.

There also exists according to Oppenheim:

...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 practice in support of the view that there are limits to that discretion; when a state renders itself guilty of cruelties against and persecution

²⁷⁴ See UN Charter, Article 39

²⁷⁵ For example, after a slow response to the suffering and fighting which had engulfed Somalia since early 1991, the Security Council adopted Resolution 733 in January 1992, which asked for the consent of the warring parties to humanitarian intervention. In December 1992, the UN General Assembly passed Resolution 46/182, which aimed to improve the UN's co-ordination of humanitarian assistance.

²⁷⁶ This view implies that "limited intervention is an *exception* to the primary role of the Security Council that accords with the international order". See opposing points of view in: the Danish Report, p 128; Bruno Simma, "NATO, the UN and the use of force: legal aspects" European Journal of International Law, vol 10, 1999 p 211.

²⁷⁷ Booth, for example, has argued for a conceptual redefinition of security which recognises that people should be the primary referent of security thinking, and that this allows for the identification of threats to human security that emerge at sub-national, national and transnational levels. See K Booth, *A Security Regime in Southern Africa: Theoretical Considerations*, Southern African Perspectives, 30, p 3, 1994.

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.²⁷⁸

7. Conclusion

The Kurdistan case was and is unique because there were no sovereign authority within Kurdistan (if we separate Kurdistan from Iraq, as we did by creating no-fly-zone), which would be the focal point of either negotiations or intervention. Second, there was an obvious threat to the peace as a result of the massive flows of refugees (fleeing the fighting).

This means that while there is an indirect connection between human rights and UN action, the main rationale for action was still the traditional threat to the peace, although the conception of this threat has changed. Yet, the instance of Kurdistan also indicates, perhaps, the glimmerings of change in the reasons for a major actor on the international scene namely the US to become involved in forceful action.

Mention must also be made of UN action, or inaction, in Kurdistan as well as in the former Yugoslavia.²⁷⁹ The "ethnic cleansing" which had been carried out against Kurds in Iraq, and Muslims in Bosnia-Herzegovina surely qualifies as genocide. Yet, the response has been generally muted, especially the Kurdish genocide for more than fourteen years.

The above analysis falls within the traditional framework of contemporary international law and shows that there is a legal basis to justify the armed intervention in the Kurdistan.

The case that the intervention was legal is strengthened by the fact that the Security Council determined that there was a threat to international peace and security and that the internal strife was in some respects a consequence of the international military action. The coalition was placed in the position of taking responsibility of a political, legal and humanitarian obligation in order to prevent massive attacks by Iraqi forces against non-combatants belonging to particular ethnic and religious communities. The US-Allied action was limited to the necessary protective action for a relatively short period to allow for relief and the eventual return of the refugees, without seeking to impose an internal regime of autonomy or minority rights.²⁸⁰

A new rule in customary international law could well emerge from the experience of the Kurdish crisis, provided the crisis can find general acceptance as a precedent outside of the peculiar circumstances of the Gulf

²⁷⁸ L. Oppenheim in *International Law, Vol 1*, London, Longman, 1948) p 279.

²⁷⁹ For an in-depth discussion of the situation in the former Yugoslavia see James B. Steinberg, "Yugoslavia," in Lori Fisler Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts*, (New York: Council on Foreign Relations, 1993), p. 27-76.

²⁸⁰ Schachter, *op cit*, pp 452-468.

War. It is more likely that the majority of states, especially the less powerful ones, will resent such a development, seeing it as the imposition of Western values and a potential threat to their sovereignty. In addition the successful intervention in Kurdistan is a precedent that encourages the Security Council to take a more active role in incidents in the future.

In the development of international law the legal significance of the intervention to protect the Kurds will only become apparent in the long term. Of more practical importance is how to strengthen the role of the UN in dealing with the humanitarian aspects of such cases on the basis of the Kurdish experience. Intervention in Kurdistan was a rapid and successful response to a humanitarian emergency in special circumstances of considerable physical and logistical difficulty. Surely, then, it is all too easy to exaggerate the difficulties. But perhaps more worryingly, it is also possible to adopt an anomaly as a model. Intervention in Kurdistan was not Somalia and still less Bosnia, both of which it preceded. The intervention followed closely on the heels of the Gulf War and in large part explains the relatively compliant Iraqi military. The displaced Kurds were both isolated and in desperate need. It is also open to question whether outside the special circumstances of that time and place, such an operation is repeatable.

In the light of the preceding discussion, the humanitarian intervention in Kurdistan is legal²⁸¹ and has resulted in a sharper and more positive legal framework for determining future interventions.²⁸² This legal support, and its relationship to pre-1945 general law to uphold human rights, means that mixed motivations and political intrigues must take second place to a commitment to cement such actions into an international legal system, whether or not this happens with the blessing of the UN.

²⁸¹ On the basis of the ordinary meaning of the terms, individual States are precluded from engaging in enforcement action without further authorization from the Council. For further detailed analyses of these and other relevant Security Council resolutions, and the reactions of other States to the interpretations advanced by the United States, see: Rex Zedalis, "The Quiet, Continuing air War Against Iraq: An Interpretive Analysis of the Controlling Security Council Resolutions, (2000). See Also Thomas Franck, "Legal Authority for the Possible Use of Force Against Iraq, (1992) 92 American Society of International Law Proceedings 136 at 139.

²⁸² Unfortunately, more than a decade with Safe Haven and humanitarian assistance to Northern Iraq (Iraqi Kurdistan) has not brought the Kurds in Iraq the safe future they have been striving for. The Kurdish leaders have also disappointed the US/Alliance by inviting Iraq/Iran governments to safe heaven.

CHAPTER SIX

POST-COLD WAR HUMAN RIGHTS ERA

1. Introduction

The shift signalled by Perez de Cuellar intensified with the ending of the Cold War.²⁸³ This sea change in international relations had several effects. Primarily, one of the main purposes of the norm of non-intervention was eliminated: the prevention of conflict among great powers. The former protagonists were brought into a relationship where co-operation was possible and, on many occasions, was achieved. Secondly, the collapse of communism has resulted in a greater degree of international consensus concerning what constitutes proper domestic order.²⁸⁴ The end of ideology has, at least temporarily, undermined the option of non-alignment. Third World States can no longer enjoy the non-aligned space opened by superpower rivalry or place competitive bids for superpower support in an ironic inversion of the strategy of divide and rule.²⁸⁵ A third effect has been the increasing acceptance of the protection of individual rights as an international norm.

The consensus surrounding post-Cold War “humanitarian intervention” brings together two different points of view. For some, the end of the Cold War provides a real opportunity to set up a single international human rights standard. Because the clear ideological division nurtured by the Cold War has ended, those who benefited from the division now find themselves compelled to observe internationally accepted human rights standards. Failure to observe these standards, may invite armed humanitarian intervention.

For others, the end of the Cold War entails the danger that big powers may succumb to isolationism, and underlines the need to hold those powers responsible for international policing. From this point of view, the need for humanitarian intervention arises precisely in those cases where powerful nations do not have direct interests at stake and are, thus, unwilling to risk anything.

On the other hand, the increased regularity of international humanitarian intervention since the early 1990s means it has been left open to examination. A significant change is seen with direct military action becoming more and more acceptable.

The present chapter aims to set out the dynamics of post-Cold War conflicts and the new phase of humanitarian intervention in this era. The first section provides an overview of the changes in international relations. The second describes the political change throughout the 1990s while the third discusses

²⁸³ In 1991, then-UN Secretary-General Javier Perez de Cuellar argued that there are limits to sovereignty.. See The Ethics of so-called "Humanitarian Intervention", A World Council of Churches Discussion Paper February 2000

²⁸⁴ Michael Mandelbaum, “The Reluctance to Intervene” Foreign Policy, Summer 1994, p 14.

²⁸⁵ See Robert H Jackson, “Armed humanitarianism” International Journal, Autumn 1993, p 589.

the power of the United Nations to deal with humanitarian issues and humanitarian intervention. The fourth section describes the return of the classical, conventional war and the fifth explains the challenge to non-intervention and shows the need for humanitarian interventions. The remaining sections explore the changes in armed conflicts and the shape of the “New Humanitarianism”, analyses the changes in the international response to conflicts, with particular emphasis on the United Nations, and then briefly discusses the different types of humanitarian interventions following the end of the Cold War.

2. The Political Change of the 1990s

Although nothing changed in the legal framework concerning the use of force, humanitarian intervention again became an option in the 1990s, when world politics entered a less confrontational period. On several occasions, the Security Council agreed to authorise interventions and even non Security Council approved interventions became possible without the risk of major war. In the latter cases, the problem has been redefined since the Cold War: whether to accept relatively modest adverse effects on the international political and legal order in return for the possibility of saving the concrete victims in a given conflict. This however raises the broader question of whether in the longer term the principles of sovereignty, non-intervention, and non-use of force may continue to be challenged without provoking international instability. Among the milestones testifying to this trend towards the reduction of sovereignty in favour of humanitarian objectives are the interventions in Kurdistan, Somalia, Bosnia, Rwanda, Haiti, Kosovo, and East Timor.

In the words of one observer,

[f]or the foreseeable future, the security council's decision to intervene or not to intervene in a particular conflict will reflect not internationally agreed-upon objective criteria, but the domestic imperatives of the major powers.²⁸⁶

The same holds true for fundamental human rights values: that they are meant to be universally applicable does not ensure that they are in fact universally applied.²⁸⁷ Firstly, the Security Council is hampered by a lack of political will among its members. The issue of political will was tragically evident in the crisis in Rwanda. An independent investigation into the genocide in Rwanda, commissioned by the Organisation of African Unity, condemned the Security

²⁸⁶ See Barry R.Posen, "Military Responses to Refugee Disasters", *International Security*, 21:1 (Summer 1996), p.94.

²⁸⁷ This inconsistency in applying the supposedly universal norms of international law amounts in fact to a double standard: "when the bad guys are strong, such as Russia in Chechnya, little is said." See Barry R.Posen, "Military Responses to Refugee Disasters", *International Security*, 21:1 (Summer 1996), p.94.

Council and its members for having the opportunity to prevent the genocide but failing to do so. Among other things, it pointed to the role of the United States in blocking the deployment of a more effective intervention force during the genocide.²⁸⁸

Secondly, effective and consistent humanitarian intervention is made unlikely by the geopolitical realities of relations between the Permanent Five members of the Security Council, which leads to the use of the veto and inconsistent action in the face of humanitarian crises. Such difficulties were revealed when, for example, Russia launched its attack on Chechnya to crush the rebellion (killing and displacing thousands of Chechen civilians in the process) and the Security Council took no action.²⁸⁹

Further, as the ethnic conflict in Kosovo intensified in 1998 and early 1999, it became clear that, while the Security Council had classified the situation as a threat to peace and security in the region,²⁹⁰ Russia and China would exercise their power of veto on any resolution authorizing military intervention.²⁹¹ It is also arguable that armed humanitarian interventions authorised by the United Nations in the past decade reflect an emerging consensus in the international community that respect for fundamental human rights is now a matter of international concern. At the same time, however, the instances of Security Council inaction or lack of timely action in the face of humanitarian crises over the same period show that political and structural obstacles often outweigh this international concern.

Bonnefous notes that invariably the decision to intervene is going to be a political one and that humanitarian intervention is not going to be exercised in an egalitarian manner.²⁹² This is, however, a further indication that humanitarian politics may be politics after all.²⁹³

3. 1990s UN System and Humanitarian Intervention

Before discussing the practice of the United Nations, it might be useful to look at whether the United Nations has the power to deal with humanitarian issues arising from armed conflict. First of all, the Organization's objectives need to be considered. Article I of the Charter entrusts the United Nations, *inter alia*, with maintaining international peace and security, and empowers the Security

²⁸⁸ Organisation of African Unity (AOU), *Rwanda: The Preventable Genocide*, 7 July 2000, chap 10, para 10.16.

²⁸⁹ According to Marcus Gee, the Russian attack on Chechnya was "every bit as brutal as the Serbian offensive in Kosovo": Gee, "No excuses for silence on Chechnya" *The Globe and Mail*, 27 October 1999, p A15.

²⁹⁰ United Nations 1998, UN Doc S/RES/1036, 23 September 1998.

²⁹¹ Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" *European Journal of International Law* 10, 1999, p 7.

²⁹² M. Bonnefous, "L'ingérence: droit et politique", *Defense Nationale*, Vol. 48, No. 4, 1992, p. 77.

²⁹³ Tobias Vogel, *The Politics of Humanitarian Intervention*, *The Journal of Humanitarian Assistance*, 4 June 2000, <http://www.jha.ac/articles/a011.htm>.

Council to take the action necessary to maintain and to restore peace.²⁹⁴ In carrying out this duty, the Security Council must act in accordance with the Purposes and Principles of the United Nations.²⁹⁵ Article I of the Charter, like Article 55, enjoins the United Nations “to promote and encourage respect for human rights and for fundamental freedoms for all”.²⁹⁶ The Charter does not mention international humanitarian law.²⁹⁷

The suggestion that respect for sovereignty is conditional on respect for human rights has been reflected in the practice of the Security Council. Article 2(7) of the UN Charter prohibits the United Nations from intervening “in the domestic jurisdiction of any state”. Nevertheless, in the 1990s²⁹⁸ the Security Council availed itself of a right of humanitarian intervention by adopting a series of resolutions which progressively expanded the definition of a “threat to international peace and security under Article 39 of the Charter. These resolutions permit Security Council-mandated military intervention in response to grave humanitarian crises, even where such crises have been purely domestic in nature.²⁹⁹ According to the Danish Institute Report, developments in international law from the Universal Declaration of Human Rights (1948) to the Convention on the Rights of the Child (1989) have reduced the relevance of Article 2(7) with regard to the protection of fundamental human rights.³⁰⁰

It is noteworthy that even where these internal conflicts have had international repercussions, the Security Council has not always made reference to these repercussions in defining a threat to international peace and security.³⁰¹ Murphy argues that the Security Council has a legal right to intervene (or to authorise intervention by a group of states or a regional organization) in a target state to protect the latter’s citizens from widespread deprivations of internationally recognised human rights and that such a right is now generally

²⁹⁴ UN Charter, Articles 1, para. 1, and 24, para. 1.

²⁹⁵ UN Charter, Article 24, para. 2.

²⁹⁶ UN Charter, Articles 1, para. 3. See also Article 55, sub-para. c.

²⁹⁷ See Cornelio Sommaruga, *Improving respect for international humanitarian law: a major challenge for the International Committee of the Red Cross*, International Bar Association, Geneva, 3 June 1994

²⁹⁸ See Thomas Weiss, *Military Civilian Interactions: Intervening in Humanitarian Crises* (Lanham, Md: Rowman and Littlefield, 1999), p 1.

²⁹⁹ See Catherine Guicherd, “International Law and the War in Kosovo” *Survival* 41(2), 1999, pp 22-23; Mary Ellen O’Connell, “The UN, NATO, and International Law After Kosovo” *Human Rights Quarterly* 22, 2000, pp 68–69.

³⁰⁰ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, report submitted to the Minister of Foreign Affairs, Denmark, 7 December 1999, p 51 (the “Danish Institute Report”). See, also, O’Connell, *op cit*, pp 68–69.

³⁰¹ O’Connell, *ibid*, p 63.

recognised in international law.³⁰² However there are those who contest this idea.³⁰³

There is a crucial gap in international law with respect to humanitarian intervention. NATO's Kosovo campaign was particularly significant because it not only highlighted the deficiencies of international legal mechanisms when faced with potentially devastating humanitarian crises, but, as noted above, it brings back into public debate the question of the right of states to intervene for humanitarian purposes without the authorization of the Security Council.³⁰⁴ As UN Secretary-General Kofi Annan stated in 1999:

This year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority...On the one hand, is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?³⁰⁵

4. The Return of Classical, Conventional War

It took until the 1990s for the principle of non-intervention to be challenged head-on. Sovereignty was eroding the sense of the classic Westphalian model, but non-intervention was not really challenged.

The Gulf War³⁰⁶ represented the return of classical, conventional war. It was classical in its cause in that it was an open act of aggression across a recognised international boundary, and classical in its style of resolution, i.e. set-piece armies facing one another across the front lines, where major military initiatives were carried out with conventional weapons. Most conflicts in the previous 50 years had been fought by discussions about deterrence on the one

³⁰² See Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), pp 287–288; Christopher Greenwood, “Is there a right of Humanitarian Intervention?” *The World Today* 49, 1993, p 40; Ruth Gordon, “Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti” *Texas International Law Journal* 31, 1996, p 48; O’Connell, *op cit*, pp 67-69; Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Irvington-on-Hudson, NY: Transnational, 2nd ed, 1997) p 225.

³⁰³ Ero and Long argue that there is no consensus, either in scholarly opinion or state practice on a legal right to humanitarian intervention, and that the most that can be said is that “the UN has shown itself willing to take enforcement action in the last resort to assist victims of a humanitarian emergency where there was no existing government (as in Somalia) or where the existing government refused to consent to UN action despite the scale of emergency (as in Iraq)”: Comfort Ero and Suzanne Long, “Humanitarian Intervention: A New Role for the United Nations?” *International Peacekeeping* 2, 1995, pp 140–156.

³⁰⁴ According to O’Connell, since the US and the UK’s intervention in northern Iraq and until NATO’s campaign in Kosovo, no government had argued in favour of a right of unauthorised humanitarian intervention: O’Connell, *op cit*, p 71.

³⁰⁵ Kofi Annan, “Two Concepts of Sovereignty” *The Economist*, 18 September 1999.

³⁰⁶ The war began on 2 August 1990 with the Iraqi invasion of Kuwait, and ended on 3 March 1991 when Iraq accepted a cease-fire.

hand, and unconventional wars of various kinds on the other. One could define the terms and calculate the consequences; that is why the debate leading up to the war was so clear-cut.

The United Nations knew how to argue such cases³⁰⁷ and it was the kind of war that the UN system was designed to confront. It was also the kind that the traditional ethic of war, the Just War doctrine, was designed to assess. However, in the Gulf War followed by the intervention in Kurdistan, the international community experienced a classical confrontation. Two consequences flowed from this return to classical, conventional war: first, the authorisation process, that is the international community's authorisation of the use of force in a normative way, worked in a way in which it had not been able to work for 50 years; secondly, the implementation process, a kind of collective security response to the Iraqi invasion, fit the consequence of the authorisation process. So the international system, working on the *ius ad bellum* approach, found the demand that one should go to war worked neatly. There was a rather clear, moral argument, an internationally recognised authorisation process, and a collective response. These factors made for a broad consensus for intervention against Iraq.

5. Non-Intervention and the Need for Humanitarian Interventions

Yet, despite this characterisation of the return to classical war, there was one difference in relation to the civilian intervention. Warfare over the past century has been characterised by increased civilian involvement in conflicts. This intensified after the Second World War, and especially so after the end of the Cold War.

The question of the need for humanitarian intervention where intervention will increase the degree of human suffering, where the civilian population is not only indirectly touched by violence but also not distinguished from combatants³⁰⁸ and even becomes the direct target of armed conflicts. This highlighted the need to give humanitarian assistance to all suffering populations, particularly unarmed civilian populations. With increased civilian involvement, and the rise of, popular consciousness of the horrors of war grew. Consequently, a process of setting up an international humanitarian system began, based mainly on the building of a system of legal norms to humanise the conflicts.

Since the end of the Cold War, the situation has qualitatively changed. Wars have become total wars. In Rwanda and Bosnia, genocide, ethnic cleansing, and mass rape touched almost everyone in that country, causing immense suffering and leaving millions of dead. In Sierra Leone and Liberia, mutilations became tools of war. In Somalia and Afghanistan, the destruction

³⁰⁷ Bryan Hehir, A presentation paper was delivered at a conference at the Woodrow Wilson Center. The conference concluded a year-long series entitled "End of the American Century: Searching for America's Role in the Post-Cold War World", Harvard Divinity School, 3 June 1996.

³⁰⁸ For an interesting analysis of the moral basis of the combatant-non-combatant distinction, see JT Johnson, *Maintaining the Protection of Non-Combatants*, 2000.

became total, harming civilian prospects of recovery and reconstruction.³⁰⁹ The extent of civilian suffering has set new challenges for the International Humanitarian System. On many occasions, the legal system has proved inadequate, having been conceived for Clausewitsean wars between structured and organised armies, rather than for long-standing armed conflicts amongst non-state factions, often on the borderline with organised crime.

Indeed, within five years from 1992, the Security Council authorised interventions of a humanitarian nature in Somalia, Bosnia, Rwanda, Haiti, and Albania. Since many of these were launched only after a crisis had assumed catastrophic proportions, and were therefore judged by critics to be 'too little, too late,' states have come under considerable pressure to take more effective measures in advance of humanitarian disasters as NATO arguably did in the case of Kosovo.

Today, the principle of non-intervention is not strongly accepted in international law in fact, the principle of national sovereignty is not the cornerstone of the international system anymore. But there are numerous conventions, charters, statements and declarations asserting the principle of political independence, national sovereignty, and non-intervention in the affairs of other states. For example, the 1965 UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty stated that no State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign right or to secure from it advantages of any kind.³¹⁰

It was not always this way. Before World War II, customary international law recognized two grounds on which states could intervene in another state:

- (1) when its own citizens were at risk in another country; and
- (2) where a state mistreated its own citizens in a way "falling so far below the general standards recognized by civilized peoples" as to "shock the conscience of mankind."³¹¹

Borchard noted:

when a state under exceptional circumstances disregards certain rights of its own citizens, over presumably it has absolute sovereignty, the other

³⁰⁹ In all of these cases, there has been international intervention. Respectively: NATO intervened in Kosovo, March-June 1999; the British intervened in Sierra Leone, May 2000; the Economic Community Cease-fire Monitoring Group (ECOMOG) intervened in Liberia, 1990; the UN Security Council in December 1992 sanctioned military intervention to stop Somali warlords from interfering with international efforts to distribute food to starving Somalis; the situation in Afghanistan is not dealt with in this paper due to its ongoing nature at the time of writing.

³¹⁰ UN Document A/RES/36,103.

³¹¹ See Jean-Pierre L. Fonteyne, "Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations," ed. By Richard B. Lillich, *Humanitarian Intervention and the United Nations* (University Press of Virginia: Charlottesville, Virginia, USA), p. 198.

states of the family of nations are authorised by international law to intervene on grounds of humanity.³¹²

6. Unauthorised Humanitarian Interventions

All instances of unauthorised humanitarian interventions, which can credibly be advanced as precedents, would first need to be generally accepted as having established a “reasonable” justification for what is at least nominally an illegal action. That is, the state or states concerned will have defended intervention, in whole or in large measure by asserting a humanitarian motivation. It is a reasonable expectation that the international legal system should be sufficiently flexible to accommodate specific instances of law breaking which clearly serve the interests of justice, particularly those which address serious and large-scale humanitarian emergencies. Of course, there are many instances of state intervention that are plainly illegal, claims to humanitarianism notwithstanding. Indeed, there is sufficient in the UN Charter and in numerous affirmations by the UN General Assembly³¹³ to suggest that *all* such instances are illegal.

In Bosnia, a dispute between the United States and the Secretary-General arose as to whether air strikes against Bosnian Serb targets had to be authorised by the Secretary-General and approved by the UN commander. When most of its NATO allies supported the Secretary-General, the United States backed down and recognised UN authority. The Somalia authorisations accorded substantial authority to the Secretary-General as well.³¹⁴

Authorisations since the Gulf War have also focused on limiting the mandate granted by the Security Council. In both the Bosnia and the Somalia operations, the Security Council, instead of broadly mandating the use of force as in Resolutions 678 and 683, ratcheted up the level and more precisely delineated the purposes of force to be employed. In Bosnia, the Council enacted specific resolutions, the first of which authorised force to secure the delivery of humanitarian supplies, the next; enforcement of the no-fly zone and protection of safe havens.³¹⁵ In Somalia, the initial Resolution 794 gave

³¹² Borchard Edwin., *The Diplomatic Protection of Citizens Abroad*, 1916, cited by Michael Reisman, "Humanitarian Intervention and the Ibois," in Lillich, ed., *Humanitarian Intervention*.

³¹³ See Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press) 1963 and her assertion that General Assembly resolutions provide "a rich source of evidence about the development of customary law.", p.5.

³¹⁴ Resolution 794 authorised "the Secretary-General and the Member States concerned to make the necessary arrangement for the unified command and control of the forces involved" in the Somalia operation. Resolution 814, expanding UNOSOM's role, and Resolution 837 both authorised the Secretary-General to oversee the use of force. Because of the attempts at unified command and control, the Somalia resolutions were unanimously approved by the Security Council (SC Res 794, UN SCOR, 47th Sess, Res & Dec, at 63, UN Doc S/INF/48 (1992); SC Res 814, UN SCOR, 48th Sess, Res & Dec, p 80, UN Doc S/INF/49, 1993).

³¹⁵ On 13 August 1992, Resolution 770 was enacted, calling upon states to take all measures necessary to facilitate the delivery of humanitarian assistance to Sarajevo and other parts of Bosnia. While Britain, France, and the United States stressed the narrowness of the authorization, India, Zimbabwe, and China still objected to the lack of UN control over the

authority to “the Secretary-General and Member States to use all necessary means to establish a secure environment for humanitarian relief operations”.³¹⁶

This generally worded authorisation was interpreted broadly by the Secretary-General,³¹⁷ who supported the general disarming of Somalian factions, and more narrowly by the United States,³¹⁸ Security Council Resolution 814, adopted on 26 March 1993, over four months later, explicitly authorised the expansion of the mandate of UNOSOM, the UN force in Somalia.³¹⁹ After the attacks against the UN troops by the forces of General Aidid, the Security Council explicitly authorised the general’s arrest in Resolution 837. The Council and participating states did not rely on the arguably broad language of Resolution 794, but specifically authorised each escalation of force.

In addition, the Security Council has placed time limits on authorisations. France’s authorisation to intervene in Rwanda was limited to two months.³²⁰ Resolution 940, which permitted member states to use all necessary means to facilitate the military leadership’s departure from Haiti, also contained a more general grant of authority “to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement”.³²¹ The broad mandate under this resolution could arguably have been interpreted to be virtually unlimited. To counteract this problem, Resolution 940 required that the Security Council, not the participating states, should determine when a “stable and secure environment” had been established and the multinational force’s functions terminated.³²²

A termination provision was also included in Resolution 1031, which authorised NATO to use force to implement the Dayton Accords with respect to Bosnia. In that resolution, the Council terminated all its prior authorizations

operation and abstained. Almost two months later, the Council established a no-fly zone over Bosnia in Resolution 781, but refused to authorise force to enforce it. Not until 3 March 1993 did the Security Council in Resolution 816 authorise the enforcement of the flight ban and on 4 June adopt Resolution 836 to protect the safe havens.

³¹⁶ See Security Council Resolution 794, 1991.

³¹⁷ Boutros Boutros-Ghali, Improving preparedness for conflict prevention and peace-keeping in Africa, UN Document A/50/711 and S/1995/911, 1 November 1995.

³¹⁸ See Susan E Strednansky, Balancing the Trinity, The fine Art of conflict Termination, School of Advanced Airpower Studies, Air University, Maxwell Air force Base, Alabama, USA, JUNE 1995.

³¹⁹ Nonetheless, controversy continued as to the scope of the UN mandate, and an independent commission established by the Security Council to investigate the ambush of the peacekeeping forces accused the UN force of “overstepping” its mandate. See Murphy, op cit; Paul Lewis, “Report Faults Commanders of UN Forces in Somalia”, *New York Times*, 20 May 1994, at A10. The Somalia case demonstrates that the problem of having commanders interpret their mandate too broadly is present even where the operation is directed by a UN commander under the supervision of the Secretary-General. The problem is considerably exacerbated, moreover, by the contracting-out model.

³²⁰ See Security Council Resolution 929.

³²¹ Several governments objected to Resolution 940, criticizing, inter alia, the lack of a time frame for the proposed action (Mexico) and the similarity between its operative paragraph and Resolution 678 on the Gulf crisis (Brazil). UN Doc S/PV.3413, pp 5–9, 1994.

³²² See Security Council Resolution 940. In Haiti, the United States defined its mission narrowly: to return Aristide to power and provide the Haitians with a short rebuilding time. In January 1995, the Security Council determined that a sufficiently stable and secure environment was in place to transfer authority to a UN peacekeeping force.

in that regard and decided, “with a view to terminating the authorization granted” to the NATO force, to review it within one year to determine whether it should be continued.³²³ In Somalia, the original authorisation in Resolution 794 contained no time limit, but each subsequent resolution authorised UNOSOM II to use force for a limited period of time (usually about six months).³²⁴ That authorisation was periodically renewed until it was finally terminated on 31 March 1995.³²⁵

This admittedly brief survey suggests that substantive and temporal limitations on Security Council authorisations are possible, that relatively narrow authorisations are workable, and that contracting states can be required to seek new authorisations to undertake expanded uses of force.

Several objections could be made to the foregoing analysis. First, such limitations could be viewed as counterproductive, encouraging non-compliance by the nation being penalised by the Council. For example, the limits contained in post-Gulf War authorisations were criticised by some as being too weak and ineffective. While imposing temporal and substantive limitations on the use of force could possibly hinder UN military operations, the alternative of granting ‘contractee’ states virtually limitless discretion is more dangerous, in that it provides no international check on potentially devastating military escalations.³²⁶ Secondly, it could be argued that these recent efforts by the Security Council to control the scope and extent of the uses of force add little to our understanding. In contrast to the Korean and Gulf Wars, they involved relatively small-scale operations in which the major powers were reluctant to employ force. Thus, in the Bosnia crisis, the Western states and Russia were cautious or opposed to the assertive use of force, and often rejected draft resolutions proposed by the non-aligned members of the Security Council seeking broad authorisations.³²⁷ Similarly, in Somalia, the United States initially, and at various points thereafter, sought to narrow the objective for which force would be used, while the Secretary-General pushed to widen the mandate. In these situations, the major powers often willingly accepted temporal and substantive controls on the use of force, restrictions that

³²³ See Security Council Resolution 1031, para 19, 21, 15 December 1995.

³²⁴ See Security Council Resolution 814 (mandate for expanded UNOSOM authorised for an initial period through to 31 October 1993).

³²⁵ See Security Council Resolution 954, UN SCOR, 49th Sess, Res & Dec; Security Council Resolution 929 of 1994.

³²⁶ Security Council decisions regarding the use of force and its objectives are necessarily wiser than such decisions by individual nations. The Charter is not based on such a presumption. However, the Charter does embody the principles, first, that force should be employed in the interest of the international community and not in the national interest of particular states, and, secondly, that force should be used only as a last resort. The requirement that the Security Council control the use of force helps ensure that force is not used solely to promote national interest. It also acts, in the words of Thomas Jefferson written in the US constitutional context, “to chain the dogs of war”: Julian P Boyd (ed), *The Papers of Thomas Jefferson* (1958), p 397.

³²⁷ For example, the Non-Aligned Group circulated a draft resolution in April 1993 that would have “authorised Member States, pursuant to Article 51, to provide all necessary assistance to the Government of Bosnia and Herzegovina to enable it to resist and defend the territory of the Republic of Bosnia and Herzegovina against Serbian attacks”. The Non-Aligned Group generally criticized the narrow interpretations of the UN force’s role in Bosnia.

would have been rejected in a major war in which a permanent member had substantial interests.

It is to be hoped that the practices of calibrating and limiting objectives and imposing temporal limits and Security Council control evidenced post-Gulf War and in the intervention in Kurdistan should be transferable to a major conflict. Unfortunately, past experience and present reality do not make one sanguine about those prospects. More realistically, the momentum toward war, the assertion of national interest, and the perceived necessity for military flexibility and power to counteract aggression might once again, as in the Korean and Gulf Wars, overwhelm other Charter values: Council control, minimising authorised violence, and pursuing peaceful settlement. For these reasons, the Security Council should place strong emphasis on maintaining control over the *initial* decision to authorise the use of force and insist that nations not resort to non-defensive uses without a clear Council mandate.

Some scholars argue that recent UN practice allows for an exception to Article 2(4)'s prohibition on humanitarian intervention.³²⁸ They assert that the world's interest in countering serious human rights abuses cannot be blocked by the veto of a permanent Security Council member. They would legitimise unilateral military action in instances where the Security Council is silent, where it has condemned the human rights record of the target country, or where the United Nations is participating in the settlement of the war.³²⁹

The purported good that might come from allowing countries to intervene unilaterally based upon such arguments is, however, outweighed by the dangers that arise from weakening the international restraints on the use of force. In addition, the UN charter requires that the use of force be a last resort, taken only after all peaceful alternatives have failed. The UN's primary goal, as stated in UN Charter is to "save succeeding generations from the scourge of war."³³⁰ To further this goal, its Charter requires that decisions to go to war be made by a deliberative body of states representing a broad range of constituents (i.e., the Security Council).

Two cases make this point clear. The intervention in Kurdistan showed the positive face of an unauthorised intervention with a peaceful result, saving millions of lives, and also stabilising the pillars of democracy in the region. On the other hand, the Kosovo crisis illustrated the danger of bypassing the Security Council, which in turn lends credence to the argument that the intervention was not for humanitarian purposes.³³¹ Had the United States gone to the Security Council, it is possible that a settlement similar to the one that ended the air war could have been achieved without the use of force. There may, of course, be certain extreme cases of genocide where one country's veto

³²⁸ For example, W Michael Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)" *American Journal of International Law*, vol 78, July 1984.

³²⁹ Lori Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Col: Westview, 1991), p 37.

³³⁰ Bill Clinton, Remarks to the United Nations Security Council, September 7, 2000.

³³¹ Michael Mandelbaum, "A Perfect Failure: NATO's War Against Yugoslavia" *Foreign Affairs* 78(5), September–October 1999.

blocks the Security Council from authorising force. In dealing with those cases, it is preferable to recognise that in rare instances, a nation or group of nations may need to intervene without UN authorisation in order to save lives,³³² although the factual evidence indicates that Kosovo was not one of these. Such recognition is a less dangerous alternative to permitting an ‘escape clause’ on the prohibition of the unilateral use of force, an exception that could be widely and dangerously abused.

7. Criteria for Unauthorised Humanitarian Intervention

Although humanitarian intervention without Security Council authorisation is currently contrary to international law, as noted in the Danish Institute Report:³³³

it is hardly realistic in the foreseeable future that states should altogether refrain from such intervention if it is deemed imperative on moral and political grounds.³³⁴

It may therefore be important for the international community to develop guidelines where illegitimate intervention is legitimised, in to limit the potential for abuse, as to provide a code of conduct against which such interventions can be assessed. On the other hand, as Murphy³³⁵ notes, “developing criteria might serve less to restrain unilateral humanitarian intervention and more to provide a pretext for abusive intervention”.

For the Danish Institute, the development of criteria on the conditions and conduct of humanitarian intervention could serve only two purposes:

- a. Justification of *ad hoc* (case by case) intervention in extreme cases on moral-political grounds only (thus recognizing in principle the existing rules concerning non-intervention and non-use of force);
- b. Justification of intervention by asserting a new right of intervention (thereby contributing to the possible development of such a right in international law, in fact, a doctrine of humanitarian intervention).³³⁶

Under the first scenario, unauthorised intervention would remain illegal, while under the second it might eventually become a legal right of states and regional organisations in certain circumstances. While many scholars have attempted to devise criteria for legitimate humanitarian intervention, as Caplan

³³² Sarah A Ramage, “Panama and The Myth Of Humanitarian Intervention in US Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right” *Arizona Journal of International Law and Comparative Law* 10(1), 1993.

³³³ *Op cit*, p 103.

³³⁴ NATO officials and certain NATO member states, including Canada, have made statements indicating that NATO might be willing to use military force for humanitarian reasons without Security Council authorization. See, for example, Simma, *op cit*, pp 1–22, and Paul Koring, “Will fight if cause is right: Eggleton says Canada is willing to defy UN if need be” *The Globe and Mail*, 20 October 1999, A14.

³³⁵ Murphy, *op cit*, p 384.

³³⁶ *Op cit*, p 104.

rightly observes, “In the absence of major-power support...these efforts have had no palpable impact on international policy”.³³⁷ However, he notes that recently, the UK government has

begun exploratory discussions with its partner states in the hope of gaining agreement among the permanent five members of the Security Council as well as the Group of 77 in the General Assembly for some statement of policy guidelines.³³⁸

In addition, the Canadian Government has set up an independent International Commission on Intervention and State Sovereignty (ICISS) with a mandate to promote a comprehensive debate on the issues surrounding the problem of intervention and state sovereignty...to contribute to building a broader understanding of those issues, and to fostering a global political consensus.³³⁹

However, despite this progress, it is important to note that it is likely that there will be resistance in the international community to developing general principles on unauthorised humanitarian intervention since, as Roberts observes:

...most states in the international community are nervous about justifying in advance a type of operation which might further increase the power of major powers, and might be used against them³⁴⁰

and NATO members and other states are uneasy about creating a doctrine which might oblige them to intervene in a situation where they were not keen to do so.³⁴¹

Moreover, as the Danish Institute Report notes, Russia, China, and the developing countries would likely not be inclined to sanction guidelines on this issue:

Thus, it is not reasonable to expect in the foreseeable future the adoption, for instance, of a

³³⁷ Richard Caplan, “Humanitarian Intervention: Which Way Forward?” *Ethics and International Affairs* 14, 2000, p 32.

³³⁸ *Ibid*, p 33.

³³⁹ The Commission is an independent body intended to support UN discussion and action on this issue. It will focus on “the appropriate international reaction to massive violations of human rights and crimes against humanity, as well as address the question of preventive action through an international work program of consultation and outreach”. See the Commission website at www.iciss.gc.ca/.

³⁴⁰ Adam Roberts, “NATO’s ‘Humanitarian War’ over Kosovo” *Survival* 41(3), 1 October 1999, p 120.

³⁴¹ Murphy argues that despite resistance of the member states, it is appropriate to develop general principles for UN humanitarian intervention: *op cit*, p 322.

declaration within the framework of the UN on such criteria.³⁴²

According to the Report,³⁴³ since the formalisation of such criteria is unlikely, the legal status of such a declaration without the support of a large majority of states would be questionable and such a declaration could “provoke international tension and challenge the existing international legal order”. Thus, it would be preferable to leave development of any criteria to “professional discussion among international lawyers, and to general public debate”. Such criteria could then be used by states to justify their unauthorised intervention on an ad hoc basis.³⁴⁴ This would leave the formalisation of such criteria to state practice. Finally, it can be equally argued that the development and formalisation of such criteria could also have the effect of reducing the resistance of certain states to humanitarian intervention as a violation of sovereignty by providing for checks and balances against which legitimate intervention could be judged.³⁴⁵

8. Emerging Norms of Humanitarian Intervention

Wheeler and Morris maintain that none of the interventions authorised by the post-Cold War Security Council can be viewed as model examples of humanitarian intervention.³⁴⁶ In addition, they argue that states have been reluctant to participate in what is coming to be seen as a generalised erosion of the principle of non-intervention. This reluctance has forced the Security Council to underline the “unique and exceptional circumstances” of each forcible intervention.

Further, they maintain that any shift in the international community with respect to humanitarian intervention is confined to Western liberal democratic states. Williams, on the other hand, argues that the Security Council resolutions on the conflict in the former Yugoslavia demonstrate a significant shift in the attitude of the Council in favour of recognising universal human rights and granting them greater weight in promoting and protecting international peace and security. However, he adds that this is an incremental rather than fundamental transformation, that remains hamstrung by the absence

³⁴² Op cit, p 105.

³⁴³ Ibid, p 105.

³⁴⁴ Ibid, p 125.

³⁴⁵ Simon Duke argues that “[c]oncerns that humanitarian intervention is an open invitation for meddling in one another’s affairs, especially by the developed western countries into the affairs of the Third World, can be assuaged by codification and the framing of general principles conditioning humanitarian intervention. Abuse of humanitarian intervention may also be alleviated by strict UN control over humanitarian intervention and scrupulous observance of a voting system that ensures decisions are made on a collective basis....[I]t is of paramount importance that humanitarian intervention take place only as an expression of the collective will of the international community”: Duke, “The State and Human Rights: Sovereignty Versus Humanitarian Intervention” (1994) XII(2) *International Relations* 47. See also Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, 1998) 73.

³⁴⁶ Nicholas J Wheeler and Justin Morris, “Humanitarian Intervention and State Practice at the End of the Cold War”, in Rick Fawn and Jeremy Larkins (eds) *International Society after the Cold War* (New York: St Martin’s Press, 1996) pp 135–171, at p 162.

of consensus on the relationship of human rights to international peace and security, demonstrated by the Council's preference for the existence of agreements between the parties before consistently making such a connection.³⁴⁷

Smith, who notes that the Security Council has not yet developed a general doctrine of humanitarian intervention, but proceeds as is required on a case-by-case basis, supports this observation.³⁴⁸ Because of this, Smith argues that the normative scene is still cloudy, and the extent to which we have moved beyond traditional norms is dubious.³⁴⁹ However, Weiss acknowledges a fundamental but subtle change in political attitudes towards the concepts of sovereignty and domestic jurisdiction.³⁵⁰ Hoffman³⁵¹ too finds that there is a growing discrepancy between the norms of sovereignty and the traditional legal organisation of the international system on one hand, and the realities of a world in which the distinction between domestic politics and international politics is crumbling.³⁵²

These authors seem to be suggesting that changing attitudes towards sovereignty may signal a more widespread acceptance of the doctrine of humanitarian intervention. There appears to be general agreement among many of the international relations scholars surveyed who view humanitarian intervention as a legitimate course of action that interventions ought to be authorised and implemented collectively by the international community. Hoffman argues that “[t]he old [Cold War] *presumption* against unilateral intervention ought to stand”.³⁵³ There remains, however, ambivalence as to whether a regional organisation is a sufficiently broad and representative collectivity

Caplan, for his part, suggests that many states, particularly the European States, are rethinking historical prohibitions against humanitarian intervention in the wake of NATO's actions over Kosovo.³⁵⁴ For Caplan, the 1991

³⁴⁷ John Williams, “The Ethical Basis of Humanitarian Intervention, the Security Council and Yugoslavia” *International Peacekeeping* 6(2), 1999, p 1.

³⁴⁸ Michael J Smith, “Humanitarian Intervention: An Overview of the Ethical Issues”, in Joel H Rosenthal (ed), *Ethics and International Affairs: A Reader* (Washington DC: Georgetown University Press, 1999) pp 271–295, at p 277.

³⁴⁹ *Ibid.*

³⁵⁰ Thomas Weiss, *Military Civilian Interactions: Intervening in Humanitarian Crises*, (Lanham, Md: Rowman and Littlefield, 1999) p 21.

³⁵¹ See Stanley Hoffman, *The Ethics and Politics of Humanitarian Intervention* (Notre Dame, Ind: University of Notre Dame Press, 1996), p 29.

³⁵² *Op cit*, p 13.

³⁵³ *Ibid.*, p 21. Donnelly along with Wheeler and Morris maintain that “state practice indicates that the international community remains resolutely opposed to codifying a legal right of unilateral humanitarian intervention. The weakness of the normative claim in support of a right of unilateral humanitarian intervention is that in focusing on individual cases of human suffering it fails to see that issuing a licence for humanitarian intervention is likely to bring about a generalised erosion of the norms of non-intervention and non-use of force, and with it a long-term reduction in general well-being. The logic of this rule-consequentialist position is that even if military intervention could prevent or stop genocide, the absence of Security Council approval renders such an action not only illegal, but also illegitimate.” See Donnelly, *op cit*, pp 628-630. See also note 38.

³⁵⁴ Caplan, *op cit*, p 25.

unauthorised intervention in Iraq led by the United States and the United Kingdom, the ECOWAS intervention in Liberia, along with the NATO intervention in Kosovo, are part of a larger trend that has seen states give increased weight to human rights and humanitarian norms as matters of international concern – to the extent that the Security Council may now choose to characterise these concerns as threats to international peace liable to enforcement measures under Chapter VII of the UN Charter.³⁵⁵

In addition, Caplan notes that the international community has taken many significant steps to give international humanitarian law greater substance, and that [a]longside these developments and the broad shift in international concerns, NATO's enforcement actions in Kosovo, although unauthorised, begin to look somewhat less irregular. Still the challenge remains no less urgent for states to find a way to reconcile effectiveness in defence of human rights and humanitarian law with legitimacy of process.³⁵⁶

In sum, although the international relations literature reveals that there has been normative movement on the issue of humanitarian intervention since the end of the Cold War, there remains a lack of consensus regarding the legitimacy of and appropriate circumstances under which humanitarian interventions may take place, whether authorised by the United Nations or not.

9. Interpretations of the New Humanitarian Era

The UN Secretary-General Kofi Annan, made it his highest duty to restore the UN to its rightful role in the pursuit of peace and security, and to bring it closer to the peoples it serves. As we stand at the brink of a new century (new human rights era), the forces of globalization and international cooperation are redefining state sovereignty, in its most basic sense. The State is now he said widely understood to be the servant of its people, and not vice versa.³⁵⁷

Commentators have greeted the UN-led humanitarianism that now leads international policy with a variety of theories. Some of them are highly optimistic about the new international action and its emphasis on humanity.³⁵⁸ Others are more pessimistic about the elevation of humanitarianism and treat it with suspicion, disappointed with the lack of political follow-through or commitment by the international community where interventions are made.³⁵⁹ Somewhere in the middle, a more subtle view has emerged which combines highly localized and highly globalised accounts of the significance of civil war and the international humanitarianism that it attracts.³⁶⁰ This view describes the application of Western, pluralistic models to non-Western, non-pluralistic

³⁵⁵ Ibid, p 27.

³⁵⁶ Ibid, pp 24–25.

³⁵⁷ Secretary-General's Annual, Report to the General Assembly, *UN Press Release*, September 20, 199.

³⁵⁸ See, for example, John Keegan, *A History of Warfare* (London: Pimlico, 1993).

³⁵⁹ See O Ramsbotham and T Wodehouse, "Humanitarian Intervention in Contemporary Armed Conflict" *Polity*, 1995.

³⁶⁰ See Mark Duffield, "Relief in War Zones: Toward an Analysis of the New Aid Paradigm", *Third World Quarterly*, 18(3) 1997a; M Duffield, "Post-Modern Conflict, Aid Policy and Humanitarian Conditionality", ESCOR Research Paper, 1997b.

societies. This middle view – though the most challenging to understand – is probably closest to the truth.

Those who subscribe to theories of a post-war, post-military society give the most optimistic interpretation of the ascendancy of humanitarianism. Often formed from an essentially euro-centric viewpoint, such interpretations see the rise of humanitarian concern and intervention as signs of international society moving beyond war. Arguing that warfare is becoming increasingly unacceptable and obsolete, such theories point to the use of force in humanitarian interventions as signals of a new idealism in humankind's use of war. This view argues that wars in places like Somalia cannot be in the interests of great powers, and that recent UN military humanitarian interventions are part of an attempt to restrain and eradicate war per se rather than to wage war for specific material gain. Thus, Keegan writes of such operations as peace making “motivated not by calculation of political interest but by repulsion at the spectacle of what war does”.³⁶¹ For Keegan and others, the international community's new emphasis on humanitarian interventions is part of a deeper and increasing objection to war itself.

In contrast, pessimistic interpretations of the new era take completely the opposite view. Whereas they broadly share Keegan's analysis of the major powers' strategic disinterest in many civil wars, they draw a radically different conclusion about the subsequent emphasis on humanitarian intervention. They argue that it exists because the great powers that dominate UN policy have no strategic interest in most of today's civil wars and choose the softer ‘humanitarian only’ option. Thus, while the international community looks very busy in terms of humanitarian aid, it is essentially absent in terms of political commitment and concern for human rights.³⁶² This interpretation of a new world order in international humanitarian intervention might be described as the “feigned engagement” theory. It argues that humanitarian intervention is over-emphasized in current international action at the expense of concerted political engagement. Such a view lies behind the “partial solution” critique,³⁶³ which claims that the international community is abusing humanitarianism as a substitute for political action.³⁶⁴ More poetically, this interpretation has been dubbed the ‘fig leaf’ theory of international action, i.e., humanitarianism is worn by the international community to cover up a real political strategy of naked neglect.³⁶⁵

The most intricate current interpretation of the international community's new concern with humanitarian interventions is that made by Duffield.³⁶⁶ This

³⁶¹ Keegan, op cit, p 58.

³⁶² Ibid.

³⁶³ Oxfam, Briefing on Meeting with UN Security Council, Oxford, 1997a. See Hugo Slim, “International Humanitarianism's Engagement with Civil War in the 1990s: A Glance at Evolving Practice and Theory”, a briefing paper for Action Aid UK, Centre for Development and Emergency Practice (CENDEP), Oxford Brookes University, Oxford, 19 December 1997.

³⁶⁴ See John Prendergast, *Crisis Response: Humanitarian Band-Aids in Sudan and Somalia*, 1997.

³⁶⁵ By Medicine Sains Frontieres (MSF), 1993.

³⁶⁶ Duffield, “Relief in War Zones: Toward an Analysis of the New Aid Paradigm”, op cit; Duffield, “Post-Modern Conflict, Aid Policy and Humanitarian Conditionality”, supra n.256.

interpretation hinges on a particular understanding of globalisation and the responses it attracts at the local (national and sub-national) level and the global (inter-state and supra-national) level. Duffield's interpretation argues for a post-modern understanding of the violent conflict, which determines international responses to them. His understanding of post-Cold War humanitarian intervention leads to a view of the global system that is essentially beyond the control of states and prone to certain 'tendencies' pulling it in certain (and often contradictory) directions. Within this system, Duffield describes the recently triumphant project of Western liberal democracy attempting to replicate itself around the poorer, war-prone parts of the world while fundamentally failing to understand the political and economic implications of globalisation and misconceiving the nature of violent conflict in 'the south.' He argues that, "humanitarian actions have become increasingly identified with ideas of state repair and the cultivation of pluralistic civil society".³⁶⁷

10. Cases of Legitimate Intervention

A number of recent military interventions with a strong humanitarian element have been widely accepted. The following four cases are good examples.³⁶⁸

- i. *Economic Community Cease-fire Monitoring Group (ECOMOG), Liberia, 1990.*

The most effective attempt at ending civil war in Liberia came as a result of pressure from ECOWAS, which resulted in the creation of a military monitoring group (ECOMOG) in August 1990, which finally brokered a political agreement between the warring factions in October 1990. Implementation of the peace agreement required the strengthening of ECOMOG by up to 12 000 troops, 80 per cent of them coming from Nigeria. The UN Secretary-General advised the Security Council to support the agreement and the force, which was endorsed by the neighbouring states, who also asked for an increased UN presence. However, the Security Council declined. As Winrich Kühne has put it, "the Americans, busy with Saddam Hussein, were reluctant to get involved. [As] were the three African members of the Security Council... although they later changed their minds."³⁶⁹

- ii. *Operation Provide Comfort, Kurdistan, 1991.*

Immediately after the US-Allied action against Iraq, and the imposition by Security Council Resolution 687 of a wide range of sanctions, it became clear that Iraqi government's armed forces were about to carry out repressive military operations against the Kurdish population in northern

³⁶⁷ Id.

³⁶⁸ The emergence of global human rights is challenging longstanding doctrines of the inviolability of sovereign states. Studies of humanitarian intervention have concluded that they are legitimate. Lists of legitimate interventions may be found in the works by: Arend & Beck (1993), pp 112–137; Tenson (1988), pp 155–200; Akehurst (1984), pp 95–99; Verwey (1985), pp 357–370; and in the Danish Report, op cit, pp 88–93). In addition, even lists of legitimate interventions are different in understandings and interpretations, but the general agreement is the same.

³⁶⁹ Winrich Kühne, "Lessons from peacekeeping operations", Chaillot Paper 22 (Paris: Institute for Security Studies of WEU, December 1995), p 38.

Iraq. Consequently, the Security Council adopted Resolution 688 (5 April 1991) in which it “condemns the repression of the Iraqi civilian population... the consequences of which threaten international peace and security in the region,” and “insists that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance”.³⁷⁰ To this end, the Security Council “appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian efforts”.³⁷¹ In fact, it was mainly the Gulf War that aroused the Security Council’s interest in international humanitarian law. Legally speaking, the Resolution, which was not adopted under Chapter VII of the Charter, was not an explicit authorization of the use of force, although it amounted to what might be termed a quasi-authorisation, especially if interpreted in its political context.

As the Danish Report puts it, the intervention was “regarded by the world community as somehow emanating from the authority of the Security Council”.³⁷² Thirteen governments decided to send troops to Northern Iraq, with major participation from France, the United Kingdom, and the United States, under US leadership. Some states criticised the action, explicitly or implicitly, in the 1991 session of the UN General Assembly, but they were just a minority.³⁷³ Undoubtedly, the Operation Provide Comfort helped to prevent a humanitarian catastrophe, and recent reassessments of the case reinforce this perceived legitimacy.

iii. *NATO intervention in Kosovo, March–June 1999.*

The Kosovo case is referred to throughout this paper, and its details are already well established. In summary, NATO member states launched Operation Allied Force on 24 March 1999 without a mandate from the Security Council because they knew beforehand that a veto would have impeded an enabling resolution. Nevertheless, three elements assure, in principle, the intervention’s legitimacy.³⁷⁴

³⁷⁰ Resolution 670 of 25 September 1990 called upon Iraq to respect its international humanitarian obligations in occupied Kuwait. However, when the Security Council, in Resolution 678 of 29 November 1990, authorised member states to use “all necessary means” (ie, including military force) to liberate Kuwait, the resolution again did not mention the Geneva Conventions or international humanitarian law.

³⁷¹ The Resolution was adopted by 10 votes to three (Cuba, Yemen, and Zimbabwe), with two abstentions (China and India).

³⁷² Danish Report, op cit, p 92.

³⁷³ Murphy, op cit, p 193.

³⁷⁴ NATO governments gave three legally relevant justifications for the recourse to armed force: Firstly, they argued that the operation took place within the framework of UN Security Council Resolutions. Secretary-General Solana explained why NATO had issued the activation order, he made explicit reference to UN Security Council Resolutions stating that the FRY had not yet complied with the urgent demands of the International Community, “despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter”. Secondly, some within NATO claimed that military intervention in another state can be justified in cases of overwhelming necessity. While all leaders clearly put the emphasis on the humanitarian distress, reference to the theory of humanitarian intervention was sometimes made more explicitly than others. Thirdly, NATO’s moral obligations. See Letter from Secretary-General Javier Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998.

Firstly, they argued that the operation took place within the framework of UN Security Council Resolutions. Secretary-General Solana explained why NATO had issued the activation order, he made explicit reference to UN Security Council Resolutions stating that the FRY had not yet complied with the urgent demands of the International Community, “despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter”.

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iv. *British intervention in Sierra Leone from May 2000.*

The Lomé peace agreement of July 1999 sought an end to civil war in Sierra Leone through a range of limited political concessions to the Revolutionary United Front (RUF). Security Council Resolution 1289 (7 February 2000) noted the withdrawal of ECOMOG forces, which had made an “indispensable contribution towards the restoration of democracy and the maintenance of peace, security and stability”, and reinforced the UN force, UNAMSIL. At the beginning of May 2000, RUF rebels returned to arms and attacked UN forces, detaining about 500 of its members, thus breaking the agreement. The United Kingdom decided to intervene with four stated objectives: to protect and evacuate around 500 British nationals; to secure the use of Freetown airport; to provide technical advice to UNAMSIL; and to help stabilise the situation in Sierra Leone.³⁷⁵

There are important differences concerning legitimacy among the first four cases mentioned in the previous chapter (in the 1970s) and the four cases in this chapter (in the 1990s and in 2000). The first four were not made for humanitarian reasons, but rather (with the exception of France’s intervention in Central Africa) for self-defence, and they were launched by individual states. The last four were provoked by civil strife and resultant humanitarian crises, and were undertaken by coalitions of states (except in Sierra Leone). Moreover, the legitimacy of all four interventions in the 1970s was only recently conferred, whilst the last four instances were expressly recognised as the legitimate use of force by the majority of the international community at their outset. Equally, the last four were directly linked with Security Council decisions. However, in spite of the many differences, all eight cases help in the definition of legitimacy.

³⁷⁵ It is interesting to note how the aims of the operation are described in increasingly wider terms, from safeguarding nationals, at the beginning, to reinforcing UN forces, to improving the humanitarian situation. Compare statements made by Robin Cook (8 May), and Geoffrey Hoon (15 May) in the House of Commons, and Tony Blair’s statement of 19 May.

Military intervention always threatens the invaded nation's sovereignty and should never take place.³⁷⁶ But at times, military intervention is understood differently in customary international law, and the international situations of the past 10 years seem to have given humanitarian interventions added legitimacy.³⁷⁷ It has been argued that humanitarian intervention can be justified as an exception to the ban on force in that they are designed to protect human rights.³⁷⁸ This maxim has never been codified in any treaty form, since "the lesser powers fear that it is a concept subject to misuse by relatively powerful powers".³⁷⁹ Nevertheless, the prevalent international view appears to be that "humanitarian intervention is justified when it is a response (with reasonable chance of success) to acts that 'shock the moral conscience of mankind' ".³⁸⁰

11. Conclusion

The end of the Cold War, in 1990, represented a watershed in the history of armed conflict. With the termination of a determinant financial/political support to many states in the developing world, low-intensity but deadly conflicts have proliferated around the globe. Armed factions, usually with political interests and, more often than not, criminal links, have directly targeted civilians, using prejudice (ethnic, religious, nationalist, etc) as a powerful tool for mobilising supporters. Genocide and humanitarian crises have been the tragic outcomes. At the same time, the end of East-West standoff gave rise to the possibility of new consensus in the international arena, especially within the United Nations.

³⁷⁶ Article 2(7) of the Charter of the United Nations prohibits interference in states' internal political affairs

³⁷⁷ Interventions for self-determination (including civil wars) are certainly forbidden, but Walzer, in an eloquent dissertation, argues that counter-intervention might be allowed (since the norms of neutrality and non-intervention have already been infringed by another state), provided the intervention serves only to balance, and no more than balance, the prior intervention of another power. For the complete discussion on this issue, see Michael Walzer, *Just and Unjust Wars — A Moral Argument with Illustrations* (Toronto: HarperCollins, 1992) pp 86–101.

³⁷⁸ Although only a legitimate government can fight its own internal wars, if the same government turns savagely upon its own people, then the legitimacy of the government must be questioned, and the intervention by another state is often justified on that premise. The issue is less controversial when the governmental institutions have totally collapsed, but again this condition in a country is difficult to define most times.

³⁷⁹ Evidence in point of this abuse is the Indian intervention in Pakistan in 1971. India claimed humanitarian intervention when it used military force to stop the Pakistani army from slaughtering Bengalis in East Pakistan. Although Forsythe argues that, in the end, "India took the opportunity to dismember Pakistan by turning the region into the new state of Bangladesh, the precise reason states are reluctant to concede the right for other states to intervene". For contrasting views, see David P Forsythe, *The Politics of International Law* (Boulder, Co: Lynne Rienner, 1990) p 72

³⁸⁰ Some legal theorists believe that the UN Charter, with its prohibition on the use of force except for self-defence, has specifically outlawed forceful humanitarian interventions. Other critics argue that human rights are now more important than in 1945 when the UN Charter was conceived and, if this is not enough, the Preamble to the Charter gives primacy to the human rights provisions of the UN Charter. Davidson provides an interesting discussion on the validity of this deduction: Scott Davidson, *Grenada: A Study in Politics and the Limits of International Law* (Aldershot, Avebury, 1987) pp 119–121.

The reality of international reaction to post- Cold War crises, though, exposed a contradiction in the system: values are universal, but their application is selective. In certain conflicts, the international community gets involved, but it is reluctant to do so in many others. Since the international community is perceived to be more free to act in humanitarian crises and the universal humanitarian rights are so emphasised in international politics, one is left to wonder why this is so. Clearly, it is impossible and perhaps not even desirable that the international community get involved in all conflicts. But there are conspicuous cases, such as the genocide in Kurdistan 1988, where the lack of international reaction, despite the sheer number of victims and all the information available at the time, raises serious questions.³⁸¹

The International Humanitarian System was ready to respond to challenges, and was idealistically convinced that it could win the battle against armed violence and for the preservation of humanity, even during wars. International humanitarian law and assistance became even more deeply interrelated with international human rights law, all of them becoming the evident pillars of a supposed 'New World Order.' For the sake of it, collective forcible humanitarian interventions have been carried out in order to preserve the victims of atrocities. Regrettably, clear failures terminated the idealism and created the 'abnegation of responsibility' by those in powers. From that moment on, humanitarian interventions were mostly conceived *in lieu* of political commitments to address root causes, and not as part of a united strategy.

International humanitarian crises have come suddenly and often in this post-Cold War period, and there is every reason to suppose they will continue to do so in the foreseeable future. If the international community is to learn from past mistakes in Somalia, Rwanda and Bosnia, it must gain a better understanding of the varied nature of humanitarian crises, and identify which are most vulnerable to military force. A typology of humanitarian crises based on the degree of human intention helps distinguish between the criminal and the benign, thus identifying those cases for which the use of military force is most appropriate. Choosing the worst case first – genocide – allows for a strategy of military intervention that marries human rights and security concerns and goes a long way towards overcoming the many dilemmas that have plagued post-Cold War humanitarian interventions.

The fact that a military alliance intervened in the domestic affairs of a sovereign state in defence of human rights (although with no UN authorization) established a very demanding normative framework to judge future states' behavior. Whether this precedent represents a passage from pluralist to solidarist norms and behavior in international law requires additional similar cases. The disagreements raised by US/alliance intervention depend on the dialogue among all actors' involved states and non-states. Only an agreement on a set of substantive rules governing humanitarian intervention

³⁸¹ Behind the apology offered to the Kurds was a contradiction between universal humanitarian values and political calculation grounded in the nation-state paradigm. The apology crystallizes the gap between the reality and the ideal. The gap is generally acknowledged and humanitarian interventions seem to reflect it quite clearly.

will counter the fear that intervention might continue to be the tool of the strong to coerce the weak.³⁸²

³⁸² See Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, New York: Oxford University Press, 2001. pp. 351-52.

CHAPTER SEVEN

THE MORAL QUESTION

1. Introduction

The first half of the 1990s left the humanitarian community with several serious moral hangovers. Like the title of the film by Danish film director Lars von Trier, attempts to address humanitarian disasters may metaphorically be described as efforts to break the impact of continuing waves of violence.³⁸³ There is a general consensus that the international system has changed substantially from 1990 onwards. As a result, the character of international relations, civil war dynamics, and the framework for humanitarian intervention has changed.

As international relations are no longer dominated by the overlays of Cold War dynamics, the character of internal conflicts and civil wars have changed accordingly, and the nature of humanitarian action in response to such crises has changed too. Thus, the post-Cold War world provided new room for intervention in intrastate conflicts. This room for manoeuvre by the ‘humanitarian international community’ was primarily exercised within the auspices of the United Nations Security Council.

In legal terms, ‘international peace and security’ has traditionally been defined narrowly as the maintenance of inter-state order. However, the practice of the Security Council can be seen to have modified this concept to include grave humanitarian crises, and it is generally recognised among Western legal scholars that the Security Council now has an exclusive *right* to authorise the use of force for the purpose of preventing or stopping gross and widespread violations of fundamental rights.³⁸⁴ Whether or not there is a *moral* obligation on the part of the Security Council to take such action is another question. According to Simma,³⁸⁵ acts of genocide as defined in the Genocide Convention may trigger an obligation to act to prevent or stop such actions. However, the Secretary-General of the United Nations has suggested that where crimes against humanity are being committed “and peaceful attempts to halt them have been exhausted, the Security Council has a *moral* duty to act on behalf of the international community”.³⁸⁶

This chapter cannot hope to address the many moral questions associated with the issues of human rights, sovereignty, and humanitarian intervention, but what follows will be an overview of the core issues. The first section argues that humanitarian intervention is a right or moral duty of the international

³⁸³ Lars von Trier, “*breaking the waves*” (Copenhagen: Centre for Development Research, August 1999).

³⁸⁴ Penelope C Simons, “Humanitarian intervention: a review of literature” *Ploughshares Monitor*, December 2000.

³⁸⁵ Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects” *EJIL* 10, 1999, p 2.

³⁸⁶ Kofi Annan, “*We the Peoples*”: *The Role of the United Nations in the 21st Century — Millennium Report of the Secretary-General of the United Nations* (2000), para. 219.

community. The second section describes the moral responsibility. The third section analyses morally justified interventions. The fourth section analyses the moral obligation in question. The fifth section tries to awaken dormant moral obligations. The sixth section explores the moral dilemmas, and describes the possibility of abusing the moral tolls for political goals, while the last section concludes the chapter.

2. A Right or Moral Duty of Intervention

There is not the slightest chance in the near future of getting states to sign up to a general legal right of humanitarian intervention. Indeed, it can be argued that to think in terms of the language of a ‘right’ is unhelpful. There may be gains in shifting the emphasis from ‘rights’ to ‘duties’. In reflecting on whether there is a moral duty to act, it may be agreed that there is advantage in limiting the moral duty, to the requirement that actors give consideration to what ought to be done. However, merely stating a ‘duty to consider’ would leave concerned states dissatisfied and give abuser states loopholes to slip through. Having said this, there is, nonetheless, little prospect of securing international agreement to a moral duty to intervene.³⁸⁷

Instead of thinking in terms of a right or moral duty of intervention, it might be helpful to think in terms of a ‘responsibility to protect’. This more holistic concept is meritorious in that it emphasises that international intervention should encompass preventive aspects and that the responsibility includes participation in the mending of war-torn societies. However, even this reformulation will not overcome the fundamental difficulties with the language of rights and duties.³⁸⁸

3. The Moral Responsibility

A moral obligation is a duty owed, which ought to be performed, but which is not legally binding. It may cover natural rights (e.g. to be charitable) or it may rest in precedent (e.g. equity). The starting point here is the modern Western moral point of view, espoused in Immanuel Kant’s moral argument.³⁸⁹ Kant’s moral theory says that actions are morally right by virtue of their motives, which must derive more from duty than from inclination. The clearest examples of morally right action are precisely those in which an individual agent’s determination to act in accordance with duty overcomes his or her evident self-interest and obvious desire to do otherwise. But in such a case, Kant argues, the moral value of the action can only reside in a formal principle or “maxim”, the general commitment to act in this way because it is one’s duty. So, he concludes, “Duty is the necessity to act out of reverence for the law.”³⁹⁰

³⁸⁷ See Rapporteur’s report, “Round Table Consultation”, International Commission on Intervention and State Sovereignty, London, 3 February 2001.

³⁸⁸ The basis for the right and obligation to undertake forceful action on the part of the global community to protect human rights is established. What has not been established is the will of that wider community to act on this responsibility in a coherent and principled manner.

³⁸⁹ Immanuel Kant (1724–1804), German philosopher.

³⁹⁰ Immanuel Kant, *The Critique of Practical Reason* (1788). Kant’s moral philosophy is

According to Kant, then, the ultimate principle of morality must be a moral law conceived so abstractly that it is capable of guiding people to the right action in every possible set of circumstances. So the only relevant feature of the moral law is its generality, the fact that it has the formal property of universality, by virtue of which it can be applied at all times to every moral agent.

Every state is composed of human beings, the vast majority of whom accept and act upon a set of moral principles, aspects of a general code of distinguishing right and wrong. All human action may be judged, with varying accuracy and relevance, in moral terms. The moral issue becomes pertinent when the commands of a state to an individual represent a direct contradiction of what that individual has been taught to regard as right and good. The classic instance is the taking of human life, and we are often reminded that no peace will be just and durable unless it is based on a foundation of universal human rights and international law, that is, it is built on morality and ethical conduct.

No moral code makes a senseless death morally justifiable, and sanity argues that the continued existence of humankind is a desirable goal. The force of international morality is given form by means of an international consensus. Whether expressed formally in the resolutions of the United Nations or informally by a rather amorphous ‘world public opinion.’

Fundamentally, collective moral judgment influenced by global broadcast media is now a factor that policymakers cannot ignore. The question of whether to respond to rights abuses with intervention is answered by identifying whether there is a right or a moral duty on the part of some outside entity, usually the UN, to stop the atrocities. Genocide and other human rights abuses violate the social purpose of the state. When this happens, the government becomes illegitimate because it cannot claim that it is working within the social framework that provides it with its rights and duties in the first place. As Walzer points out: “If rights don’t require us to intervene...then it is difficult to see why they should be called rights.”³⁹¹ It is more than just rights, though, which justify and require humanitarian intervention; it is acts “that shock the moral conscience of the world”.³⁹²

Furthermore, such humanitarian intervention should not be conceived of within the conventional terms of intervention: governments and armies such as those of Iraq, who engage in genocidal acts, are readily identified as criminal governments and armies: they are guilty, under the Genocide Convention and the Nuremberg Code of “crimes against humanity”. Hence, humanitarian intervention comes much closer than any other kind of intervention to what is commonly regarded, in domestic society, as law enforcement and police work.³⁹³ Beyond the rights, duties, and obligations found in positive

developed in the *Grounding for the Metaphysics of Moral* (1785).

³⁹¹ Michael Walzer, “*The Moral Standing of States: A Response to Four Critics*” *Philosophy & Public Affairs* 9, Spring 1980, p 223.

³⁹² Michael Walzer, *Just and Unjust Wars — A moral Argument with Illustrations* (New York: Basic Books, 1977) p 107.

³⁹³ *Ibid*, p 106.

international law, there is also a basis for a right and a duty of humanitarian intervention within the very concept that governments use to shield themselves from intervention sovereignty. What comes next, then, is to delineate the circumstances under which such intervention should be carried out, by whom, and in what manner.

Moral principles of so-called ‘humanitarian intervention’ take into account the legitimate right of states to be free of undue interference in their internal affairs. However, they also recognise the international community’s moral obligation to respond when states are unwilling or incapable of guaranteeing human rights and peace within their own borders. As moral agents, states do have legal obligations,³⁹⁴ even though their citizens can influence them to act in morally responsible and legally admissible ways, or can allow them to act quite differently. Individuals are responsible for the foreseeable consequences of what they do; hence the course of international affairs, influencing events by both action or inaction.³⁹⁵

Particular issues in this chapter are not the only relevant ones, nor are they necessarily the best arguments with respect to finding a moral basis for humanitarian intervention. Although there have been many developments in international human rights and humanitarian law this century, international law is still based upon state action and acceptance. Thus, accepting legal agreements means acknowledging that, for the most part, states do not have limits on their power unless they accept those restrictions — and those who accept such restrictions usually are not the ones who will be targeted for intervention in the first place.

Others would like to rely on natural law,³⁹⁶ to identify restrictions on state power and to provide a basis for intervention. That is, some turn to scriptures or other teachings of religious thought, or to a supposed natural order of things to find a basis for basic human dignity as a natural and absolute good. The

³⁹⁴ States may not be in the purely philosophical sense moral agents, but there is some precedent for viewing them as in some sense moral agents. Take the instance of the anti-racism conference in South Africa in 2001, organized under UN auspices (a conference where states were represented as such). That conference declared that slavery was unlawful *and should always have been unlawful*, thus making some movement in relation to the reparations-for-slavery issues, which are being discussed in certain places. The retrospective part (“should always have been”) perhaps came in partly as a pragmatic political necessity, in order to head people in former slave-owning/slave-trading states off from arguing “We can’t be asked to pay reparations for slavery — what the slave-traders/slave-owners did was lawful (at the time) and in the end *we* were the ones who *made* slavery unlawful”. Politics aside, however, the implication of “should always have been” is that states who had laws legitimating and regulating slavery acted morally wrongly and knew (or should have known) that they were doing so by enacting and applying those laws (and not laws forbidding slavery). Thus the conference adopted the view that “a moral law known to all human beings” has always existed, which authorities in many past societies deliberately or negligently contravened by purporting to make pro-slavery “laws”.

³⁹⁵ James Woolsey and Noam Chomsky debate how far the United States can go in its foreign policy, *Power Politics*, 12 March 1998.

³⁹⁶ The English philosopher John Locke (1632–1704) is one of the philosophers credited with leading the naturalist movement. This movement is at the philosophical roots of the international legal system, in particular Locke’s argument that there is “a law of nature” that all people are created equal: Locke, *Two Treatises of Government* (1690).

difficulty with this, however, is that its basis cannot be pointed to in any concrete way. Saying it derives from God's help is highly problematic because there are so many different religious points of view.³⁹⁷

Basing a law on a supposed natural order of things beyond religion does not get one much further. Once it is realised that 'realities' and ways of interpreting the world are socially constructed, and are thus imbued with social purpose, it becomes clear that any view of law or any social idea, such as sovereignty, is contingent. The firmness or ephemeral nature of this contingency, however, is based on the idea, structure, or institution concerned. This is as true in law as in other realms:

State-societies do not have any inherent legal powers. To claim legal power, as much for a state as for any private citizen, is to acknowledge social purpose.³⁹⁸

One might conclude, therefore, that states may be restricted in their conduct, at least insofar as they violate this social purpose. Investigating this social purpose leads to the conclusion that sovereignty, rather than being focused on the rights of governments should instead be focused on the relationship of individuals to sovereign entities/states and the rights contained therein. It requires the state to be introspective, as well as looking downward towards a lower level of aggregation, and to encompass the views of a wider portion of the international community. Theoretically, states exist for the well being of their inhabitants;³⁹⁹ 'A king is no use without people'. The primary function of states is that of protection. In other words, the state exists to ensure that its citizens are able to live their lives free from the fear that an outside force will interrupt it.⁴⁰⁰

A reasonable extension of this principle would be that the inhabitants of a state should also be as free from internal persecution as from external persecution. What is the point of protecting people from external threats if they are mistreated at home? Thus, the social function of states is to ensure the ability of people to live.⁴⁰¹ If, then, the state exists only for the purpose of enabling

³⁹⁷ Different religious traditions respond in varied ways to situations of large-scale human suffering. Moreover, different cultural contexts lead to different perceptions about the role of the international community in the domestic affairs of other countries. And different historical experiences of intervention lead to very different assessments of whether military or economic intervention can ever be carried out for humanitarian objectives.

³⁹⁸ Philip Allott, *Eunomia: New Order for a New World* (New York: Oxford University Press, 1990) p 256.

³⁹⁹ UN Secretary-General Kofi Annan states that "[I]ntervention should not be understood as referring only to the use of force. A tragic irony of many of the crises that go unnoticed or unchallenged in the world today is that they could be dealt with by far less perilous acts of intervention than the one we saw this year in Yugoslavia.": Kofi Annan, "Two Concepts of Sovereignty" *The Economist*, 19 September 1999.

⁴⁰⁰ Of course with the increased permeability of borders, it is hard for the state to carry out even this function.

⁴⁰¹ There are people living in internal conflict situations who have called on the international community to intervene. For example, as violence escalated in East Timor following the referendum, Jose Ramos-Horta stated that "An armed intervention with or without Jakarta's

the individuals who comprise the state to live their lives relatively peacefully, and for no other purpose, one cannot say that sovereignty ultimately rests with the state. Rather, it rests with individuals within the state.⁴⁰² Individuals may turn over part of their sovereignty to the state as a condition for protection, and to enable the state to engage in activities that will provide the various needs of the individuals. Ultimately, however, this is only a loan, which, theoretically, can be called in whenever the state is not fulfilling the conditions implicit in the loan.⁴⁰³ If sovereignty rests with individuals, what does this actually mean? Are there certain fundamental rights inherent in this sovereignty? Many such rights are recognised within the realm of positive international law.

It is also useful to mention that the opponents of intervention tend to look at the UN Charter only in the context of sovereignty domination. The moral obligation hardly exists. Opponents of intervention state forcefully that Article 2(4)'s prohibition applies not to the purpose of force, but to the act of force itself. Wolf argues: "It was the unabashed intent of the [Charter] framers to assure that there would be no exception to the prohibition on the use of force other than for self-defence."⁴⁰⁴

The reality of current state practice, however, has rendered the Charter's absolute prohibition of force meaningless. Thus, there is a compelling need for a contemporary and realistic interpretation of Article 2(4) based on state practice, an interpretation that recognises an exception to the Charter's prohibition when force is strengthened by a moral duty to prevent mass slaughter. It now seems that, despite the absolutist language of the UN Charter, collective humanitarian intervention undertaken or authorised by the United Nations (usually under Chapter VII powers) is an accepted norm of international law⁴⁰⁵ when there is no economic and commercial self-interest to intervene.⁴⁰⁶ When the self-interest comes first, there will be no real protection of human rights. The moral duty is blurred. This is how James Woolsey

agreement, is the only answer." *International Herald Tribune*, 13 September 1999.

⁴⁰² Aristotle said that the community was (logically) *prior* to the individual, because a community can live without this or that individual, but an individual cannot live without a community. (Even if an individual can live alone in the forest now, he had a mother, father and the rest of it once.) Aristotle conceived of communities as aggregations/extensions of families. He would not have liked the idea of sovereignty residing in the individual: he described a solitary person as "an 'unconnected piece', like in checkers". See Susan Ford Wiltshire, *Greece, Rome, and the Bill of Rights*, University of Oklahoma Press, 1992, p. 247.

⁴⁰³ This is similar to various social contract theories. However, whereas Locke used natural law to provide a base for the intrinsic rights of people over state-centric positive law, it is suggested that these rights can be derived from the social purpose of the state itself rather than a nebulous and unidentifiable natural order of things.

⁴⁰⁴ Wolf, "Humanitarian Intervention" IX Michigan Yearbook of International Legal Studies, 1988, pp 339–340.

⁴⁰⁵ Ved Nanda et al, "Tragedies in Somalia, Yugoslavia, Haiti, Rwanda, and Liberia — Revisiting the Validity of Humanitarian Intervention under International Law — Part II" 26 Denver Journal of International Law & Policy, 1998, pp 827, 862.

⁴⁰⁶ For example, one journalist, talking of French objections to US-led raids against Baghdad in September 1996, explained that they were "acting in their economic and commercial self-interest...they were major customers of Iraqi oil before sanctions were imposed on Iraqi regime and also out of their historic self-image as contrarians": Charles Truehart, "U.S. Raids on Iraq Get Little European Support" *The Washington Post*, 6 September 1996.

responded to Kyle Fisher's question⁴⁰⁷ on whether the United States has a moral obligation, because of its capabilities, to intervene in international affairs: "[I]n some circumstances, I believe we do have an obligation to act, to intervene in international affairs, even if our direct interests are not immediately threatened."

It is significant to note that even those such as Wolf, who find no direct context for humanitarian intervention in the language of the UN Charter itself, see an absolute prohibition on all forms of humanitarian intervention as unrealistic.⁴⁰⁸ For now things are different: most of the wars in the world are *not* between or within very powerful combatant states. The dynamic is different.

However, for the purposes of this discussion, one might contend that recognising the state as a socially constructed institution with the social purpose of providing security for its inhabitants would be incomprehensible without at the same time linking that social purpose to each and every individual within its realm. In other words, since the social purpose of the state is to enable its citizens to live, it makes sense to recognise that social purpose as a right for each person.

While states may hold these rights in trust, they cannot violate them, because the right to live is the most basic right. In addition, individuals are not only protected from abuse and assured of basic protections, but 'the people' are seen as sovereign. This concept of 'popular sovereignty, deems that the state must be beholden to the people. As the Universal Declaration of Human Rights (UDHR) states, the basis of authority is the will of the people. It determines a state's legitimacy: "Political legitimacy arises from the people's will, it does not descend deductively from the Westphalia principles of state sovereignty."⁴⁰⁹

Of course, determining the will of the people is problematic. To a large extent (although possibly not in every circumstance), this leads to various conceptions of democracy to determine this will. Regardless, the state is nothing more than the sum of its parts. Territorial boundaries might (contingently) be put around a group within a state to protect the inhabitants' freely chosen, non-infringing way of life.⁴¹⁰ It is the existence of such a common life that claims to sovereignty and non-intervention is founded upon. Thus, we have three building blocks of sovereignty people, the people, and people (those pursuing a common life).

4. Moral Arguments For and Against Humanitarian Intervention

The core of the debate surrounding the issue of humanitarian intervention may lie in the tension between the two clusters of values reflected in the UN

⁴⁰⁷ Woolsey and Chomsky, *op cit*.

⁴⁰⁸ Wolf, *op cit*, p 368.

⁴⁰⁹ Lawrence T Farley, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Boulder: West View Press, 1986) p 145.

⁴¹⁰ See Michael Walzer, *Just and Unjust Wars*, *op cit*, pp 53-58.

Charter, which intersect with each other and which may sometimes work at cross-purposes. These are state system values and human rights values. The human value and the moral value are, however, the two sides of the same coin.

The two main components of the non-intervention norm can be recognised here: reciprocity and mutual recognition of juridical equality representing the first cluster; popular sovereignty and the self-determination of peoples, the second.⁴¹¹ While most of the legal authors surveyed accept the legality and legitimacy of humanitarian intervention undertaken by the Security Council, there is no such agreement among the international relations scholars surveyed.

Broadly speaking, the moral arguments for and against humanitarian intervention fall into two categories: the realists and pluralists, on the one hand, for whom intervention undermines international order; the solidarity and cosmopolitanisms, on the other, for whom intervention may be a moral obligation stemming from membership to a cosmopolitan community of humankind.⁴¹²

For realists who perceive relations among states as anarchic, and for pluralists who view international society as a community of sovereign and independent entities, humanitarian intervention is not an option. The realists argue that the state is the only sphere of morality. Thus states and their citizens have no overriding obligations to the citizens of other states, and governments should not risk their soldiers' lives except for the security and interests of their own nation.

The pluralists may accept that there exists a universal minimum moral code in which genocide is a breach.⁴¹³ However, they argue that any intervention undermines the foundational norms of the current world order. Moreover, both schools point to a lack of consensus on the universality of human rights and to the principles guiding such interventions as providing no clear legal basis for such action.⁴¹⁴ Thus, Michael Walzer argues:

...even though the fit between government and the political life of its people may be bad, this is no justification for humanitarian intervention. We must act as if governments are internally legitimate, because to do otherwise threatens the

⁴¹¹ Amir Pasic and Thomas Weiss, "The Politics of Rescue: Yugoslavia's Wars and the Humanitarian Impulse", in Joel H Rosenthal (ed), *Ethics and International Affairs* (Washington DC: Georgetown University Press, 2nd ed, 1999) p 301.

⁴¹² Michael J Smith, "Humanitarian Intervention: An Overview of the Ethical Issues", in Rosenthal (ed), *ibid*, pp 280–283. Smith frames the debate as being between realists and liberals, whereas Ramsbotham and Woodhouse identify four ethical schools in international relations theory: Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (London: Polity Press, 1996), pp 57–61. See, also, Jack Donnelly, "Human rights, humanitarian crisis, and humanitarian intervention" *International Journal* XLVIII, Autumn 1993, p 616 ff.

⁴¹³ Walzer, *Just and Unjust Wars*, *op cit*, p 106.

⁴¹⁴ Ramsbotham and Woodhouse, *op cit*, p 59.

autonomy necessary for the natural, if painful, emergence of free, civilised polities.⁴¹⁵

The concern here is that intervention may present an insurmountable challenge to autonomy and self-determination, which would preclude a people's determining their own political destiny.⁴¹⁶ Conversely, the solidarity or internationalists perceive human rights as universal norms and justice as an important component of international order.⁴¹⁷

In addition to strict compliance with the requirements of international humanitarian law, Chinkin argues that human rights law imposes a (moral) obligation on the part of the interveners:

Human rights give rise to responsibilities in states (acting individually and collectively) 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.⁴¹⁸

Thus, the means of enforcement chosen must be effective to protect the vulnerable civilian population and must not endanger them or their way of life further. Hence, human rights values are given as much weight as state system values. Sovereignty is conditional. It is linked to internal legitimacy and requires governments to respect, at least minimally, the well-being and human rights of their citizens. The natural progression according to Smith, is:

A state that is oppressive and violates the autonomy and integrity of its subjects forfeits its moral claim to full sovereignty. A liberal ethics of world order subordinates the principle of state sovereignty to the recognition and respect of human rights.... The principle of an individual's right to moral autonomy, or to put it differently, to the human rights enshrined in the Universal Declaration on Human Rights, should be recognised as the highest principle of world order, ethically speaking, with state sovereignty as a circumscribed and conditional norm.⁴¹⁹

⁴¹⁵ Walzer does argue that "humanitarian intervention is justified when it is a response ... to acts that 'shock the conscience of mankind'": Walzer, *Just and Unjust Wars*, op cit, p 107.

⁴¹⁶ Ibid, pp 86–90.

⁴¹⁷ Ramsbotham and Woodhouse, op cit, p 60.

⁴¹⁸ Christine Chinkin, "Kosovo: A 'Good' or 'Bad' War?" AJIL 93, 1999, p 844.

⁴¹⁹ Smith, op cit, p 289; see, also, Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, 1998) p 61; Nicholas J Wheeler and Justin Morris, "Humanitarian Intervention and State Practice at the

The principles of sovereignty and non-intervention cannot shield governments or other perpetrators of gross violations of human rights. The widespread deprivation of internationally recognised rights puts a moral obligation on the part of the international community to take action, and principles of sovereignty and non-intervention are no moral bars to such action.

There have been situations in which forceful third-party intervention to protect those rights have been called for, absent Chapter VII authorisation by the Security Council or situations of self-defence, because there have been moral and ethical arguments in favour of humanitarian intervention. In some cases, even where the Security Council neither authorised nor condemned an intervention action, the green light of the moral obligation has been visible.⁴²⁰

5. National Interests and Moral Obligations

The case of Rwanda is a good example of the national interest, in which the international community failed to intervene in time to stop atrocities on a massive scale. Kofi Annan emphasises the importance of action to prevent precisely these kinds of large-scale atrocities:

Think about Rwanda...[and] imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defence of the Tutsi population, but the [Security] Council had refused or delayed giving the green light. Would such a coalition then have stood idly by while the horror unfolded.⁴²¹

When the moral obligation overrides the national interests of super powers, it is difficult to define the threshold of human suffering beyond which the international community cannot stand by and watch. The following points constitute a framework of standards that might guide future action by governments and international organizations in cases of humanitarian emergencies:

End of the Cold War”, in Rick Fawn and Jeremy Larkins (eds), *International Society after the Cold War* (New York : St. Martin’s Press, 1996) pp 135–171.

⁴²⁰ In fact, the intervention in Kurdistan reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was actually an “anticipatory humanitarian intervention” based on past actions of the Iraqi regime and future risks of conflict. See JE Stromseth, “Iraq’s Repression of Its Civilian Population: Collective Responses and Continuing Challenges”, in LF Damosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993) pp 87–88; FR Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Irvington-on-Hudson, NY: Transnational, 2nd ed, 1993) p 238; SD Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996) pp 172–174.

⁴²¹ Annan, op cit.

- (1) The principles of sovereignty and non-intervention in the internal affairs of states should be upheld and reaffirmed by the international community.
- (2) Sovereignty is not absolute, but instead must be seen as entailing certain responsibilities and obligations over the territory and the population, the responsible control of which justifies sovereignty in international law.
- (3) Failure to meet such fundamental responsibilities and obligations with the consequential suffering of masses of innocent people creates a right and an obligation on the part of the international community to act toward providing the needed protection and assistance.
- (4) There is a need to re-design rules of intervention to find the balance between sovereignty and human rights.⁴²²

6. Moral Dilemmas

Moral dilemmas are complex because, as Jonathan Moore suggests, they involve competition not only between material, political and ethical considerations, but also between different ethical paradigms. In other words, some are concerned with the moral dilemma *of* intervention (when and why), while others discuss the moral dilemmas arising *from* intervention (what and how). This is not entirely coincidental. It is in itself a reflection of the degree to which political and military intervention has tended to come in the guise of humanitarian assistance.⁴²³

Several authors make a cogent case for the idea that the risk of being enlisted by political players and the military, both operationally and strategically, means that independence is the only viable moral option. This independence is especially useful when the political handling of the matter by the international community tends to become part of the humanitarian problem rather than offering a solution. Larry Minear has strong words to describe how the use of sanctions, notably against Iraq, has made the United Nations “morally schizophrenic” by placing “political and humanitarian imperatives” on a collision course.⁴²⁴

The assumption that human rights are an essential component of peace-building is widely shared. Justice Goldstone insists that peace and justice are not contradictory, and José Zalaquett points to the need for a “moral reconstruction in the wake of human rights violations and war crimes”.⁴²⁵

⁴²² Report by Callagan of Cardiff, on the conclusions and recommendations of a high-level group at “Bringing Africa Back to the Mainstream of the International System”, Cape Town, January 1993. (Inter Action Council, annex 1.)

⁴²³ See Frederic Megret, “Hard choices: Moral dilemmas in humanitarian intervention”, in Jonathan Moore (ed), *International Review of the Red Cross*, No 833, 31 March 1999, pp 182–185.

⁴²⁴ Colin Granderson’s reminder that the joint OAS/UN International Civilian Mission in Haiti (MICIVIH) ended up having to monitor the human rights record of the UN Mission in Haiti (UNMIH) also highlights the need for such independence. See Mégrét, *ibid*, pp 182–185.

⁴²⁵ See Larry Minear, U. B. P. Chelliah, Jeff Crisp, John Mackinlay, and Thomas G. Weiss, *United Nations Coordination of the International Humanitarian Response to the Gulf Crisis, 1990-1992* (Providence, RI: Watson Institute, 1992, p.21.

Although the authors take due note of the fact that in the thick of humanitarian intervention there may be a fundamental tension between assistance and protection, as well as access and advocacy, none of them seem to have any taste for restraint in voicing concerns about human rights violations. Rony Brauman, for example, focuses on circumstances “in which political considerations override all else,”⁴²⁶ because the access benefits of adhering to strict neutrality are outweighed by the cost to the population of failing to denounce atrocities. In such circumstances, warns Brauman, neutrality that lets itself be manipulated – neutrality without independence – is not really neutrality, at all.

This inconsistency in applying the supposedly universal norms of international law amounts to a double standard:

When the bad guys are weak, intervention pops to the top of the agenda; when they are strong, such as Russia in Chechnya, little is said.⁴²⁷

This is something advocates for humanitarian intervention use as moral justification for the action they seek.⁴²⁸

7. Conclusion

In the end, legal and moral legitimation carries significant political weight in the conduct of world affairs. On its most practical level, international legitimation, through articulated principles of international law, can serve to distinguish between aggression and humanitarian intervention. Thus, before Kosovo there were strong legal and policy justifications for some regional humanitarian intervention without UN authorisation. The results of the Kosovo War have removed any doubt.

When it comes to the moral justification of intervention, other dilemmas are encountered such as whether threats to international peace and security exist, massive violations of human rights are occurring, or there is mass starvation. What is needed, then, is a succinct statement of the conditions as stated in previous chapter, under which humanitarian intervention and assistance can take place.

⁴²⁶ See, Frederic Megret, “Hard choices: Moral dilemmas in humanitarian intervention”, in Jonathan Moore (ed), *International Review of the Red Cross*, No 833, 31 March 1999, pp 182–185.

⁴²⁷ Ibid, See Larry Minear, U. B. P. Chelliah, Jeff Crisp, John Mackinlay, and Thomas G. Weiss, *United Nations Coordination of the International Humanitarian Response to the Gulf Crisis, 1990-1992* (Providence, RI: Watson Institute, 1992, p 94.

⁴²⁸ The situation in Rwanda, by contrast, escalated far too rapidly for international public opinion to get too aroused in time; the problems started only later. After the world had stood by and watched as perhaps half a million people were slaughtered, there was suddenly the feeling that “something had to be done” about the refugees pouring into Zaire. That the perpetrators of the genocide heavily manipulated them did not matter in these circumstances.

GENERAL CONCLUSION

Since the late 20th century, humanitarian intervention has emerged as one of the greatest topics in the fields of both international security and international politics. The collapse of the Soviet Union, globalisation, and the emergence of internal disputes where countless citizens suffer from widespread human rights abuses, have all increased awareness of the need for humanitarian intervention.

Nonetheless, the topic of humanitarian intervention is the subject of various controversies, especially in regard to its legality. For starters, there is no international consensus on a definition of humanitarian intervention or on the exact trigger points requiring such intervention. This lack of consensus is critical, given that external intervention in a state's domestic situation is incongruous with the traditional state system, and diametrically opposed to the basic principles of international society, sovereign integrity, and the basis of the international state system.

Some proponents of intervention argue that there is a right to humanitarian intervention, which precedes and overrides currently accepted (post-1945) international law. Such a simple view stands to erode the current international law system, however, and, more importantly, leaves the way open for abuse. Unilateral humanitarian intervention can be reconciled with neither the current international law nor practices and *opinio juris* of most states. Examination of instances of unilateral intervention supports this concern.

Nonetheless, there is a very strong case for intervention for humanitarian purposes where such interventions are based on the measures taken under Chapter VII of the UN Charter; i.e. collective consensus and decision-making. The lack of a clear legal basis for humanitarian intervention makes action under the auspices of a respected body such as the United Nations absolutely crucial.

As mentioned above, humanitarian intervention may be legally justified when it is conducted with United Nations authorisation under Chapter VII of the UN Charter. However, UN humanitarian intervention has no clear legal basis, given the absence of express provisions that tie intervention to the protection of human rights. As matters stand, the United Nations can only intervene or take enforcement measures on an internal dispute when the UN Security Council considers the dispute and the deprivation of human rights to be a threat to peace. Such was the case in Kurdistan.

This still begs the question to a degree. As the UN Charter does not clearly provide that human rights abuse is a threat to peace, any decision to intervene by the Council requires an extended interpretation of a 'threat to peace.' Certainly an inspection of some cases of UN humanitarian interventions shows a growing willingness to broaden the definition of what constitutes a 'threat to peace' to include humanitarian concerns.

The question remains as to whether this definition will stand the test of time. To ensure effective, safe intervention action, the Security Council needs to

establish a clear definition of humanitarian intervention, and develop a systemised structure for such intervention. It is of utmost importance that the Council guards against abuse of the system that permits humanitarian intervention, by any of the world's major powers.

While the Security Council is limited in conducting humanitarian intervention, by such provisions as the power to veto, the Council can contribute in the development of a system of UN humanitarian intervention through its practices. That the Council has historically found the area a difficult one is all the more reason to keep the topic of humanitarian intervention at the forefront of discussions about current international law and the UN Charter.

It is also important to acknowledge a decline in criticism from states, and the implicit UN support of truly humanitarian intervention, albeit after the fact. State practice since 1990 is evidence of a greater acceptance that humanitarian intervention without Security Council authorisation may be morally justifiable in extreme cases. This does not, however, amount to a legal right to humanitarian intervention without Security Council authorisation under current international law. It is still premature to assess whether such a right may be emerging under international law. In the end, legal and moral legitimation carries significant political weight in the conduct of world affairs. On its most practical level, international legitimation through articulated principles of international law can serve to distinguish between aggression and humanitarian intervention, and provide standards of behaviour for states such as Russia, India, and China, thereby enhancing stability. The United Nations must play an active and central role in this.

In the final analysis, this paper has expressed support for the legality of intervention in Kurdistan, and strengthened its arguments by relying on five key principles: The first, is that there are strategic and moral advantages in expressly articulating a right of humanitarian intervention (*jus ad interventionem*) under international law, to stop or prevent genocide or violent mass ethnic expulsions in Kurdistan. Aside from acting as a deterrent to future threats to international peace and security, such a right to intervene may secure greater global support by seizing the moral high ground.

Secondly, intervention in Kurdistan was limited in purpose, scope, and means, in order to prevent its abuse by hegemon and aggressors, and to quell concerns that this is a *carte blanche* for the use of force. An unlimited right of intervention or war is inimical to international peace and security.

Thirdly, the use of force did apply in concert with pacific means of dispute settlement and economic sanctions (Chapter VII) to halt or deter genocide. Collective support for the intervention in Kurdistan was demonstrated by the decisions of the UN Security Council and other major international representative bodies.

The fourth point made is that the US-Alliance action did observe the customary principles of proportionality, humanity, and necessity by avoiding unnecessary harm to the Iraqi people, and directing force against the actual wrongdoers.

Finally, the intervention ended as soon as was practical, and sovereignty restored to the Iraq, though not before reserving the right to re-intervene if necessary. The 1991 interventions in Kurdistan authorised by the post-Cold War Security Council can always be viewed as model examples of successful humanitarian intervention, and what these five main points prove is that intervention in Kurdistan was indeed legal.

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