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**STATE SOVEREIGNTY AND
HUMANITARIAN INTERVENTION :
DOES ONE NEGATE THE OTHER?**

Mohammad Ismail Hossain

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State Sovereignty and Humanitarian Intervention : Does One Negate the Other?

Mohammad Ismail Hossain

Mohammad Ismail Hossain is Deputy Manager of BASIC Bank Ltd, Shantinagar, Branch, Dhaka. This paper is a revised version of a thesis which was submitted in partial fulfillment of the requirements for the degree of Master of Arts in International Relations, International University of Japan, Niigata, Japan in 2004.

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ACRONYMS

ABM	Anti-Ballistic Missile
CSCE	Conference for Security and Cooperation in Europe
DUPI	Danish Institute of International Affairs
ECOWAS	Economic Organization of West African States
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
MTCR	Missile Technology Control Regime
NATO	North Atlantic Treaty Organization
NPT	Nuclear Nonproliferation Treaty
NSS	National Security Strategy of the United States
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization for Security and Cooperation in Europe
PLO	Palestine Liberation Organization
RAD	Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century
U.K.	United Kingdom
U.S.	United States
UCK	Kosovo Liberation Army
UN	United Nations
UNITAF	United Task Force
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNSCR	United Nations Security Council Resolution
WMD	Weapons of Mass Destruction
WTO	World Trade Organization
WWI	First World War
WWII	Second World War

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Chapter I

INTRODUCTION

If you hit on the idea that this or that country is safe, prosperous or fortunate, give it up, my friend, and do not entertain it in any way; for you ought to know that the world everywhere is ablaze with the fires of some faults or others.

- The Buddha (from Ashvaghosha, "Nanda the Fair")

Background

The Treaty of Westphalia of 1648, which ended the Thirty Years' War, has been considered as the basic foundation of the current Europe-centric state system. This system identifies sovereignty as the most fundamental and intangible attribute of the state. Without sovereignty the concept of state becomes meaningless. The notion of sovereignty, as Lyons and Mastanduno note, has basically developed "as an instrument for the assertion of royal authority in the construction of modern territorial states."¹ It was believed that the instabilities and disorders in a society/state "could only be overcome by viable government that could firmly establish 'sovereignty' over territory and populations."² The form of government might be monarchy, aristocracy, or democracy but the important aspect was that whether the government could exercise its sovereign power over its territory. "The concept of sovereignty was then integrated into theories of international relations through a set of ideas that evolved with the end of the moral authority of the

¹ Gene M. Lyons and Michael Mastanduno, "Introduction: International Intervention, State Sovereignty, and the Future of International Society", in Gene M. Lyons and Michael Mastanduno (eds.), *Beyond Westphalia? State Sovereignty and International Intervention*, The Johns Hopkins University Press, London, 1995. p. 5.

² *Ibid.*, p. 5.

church over the secular rulers of Europe.”³ In the UN Charter, the importance of state sovereignty has also been recognized in various clauses.

On the other hand, before World War II, human rights or humanitarian issues were rarely considered legitimate matters for international concern. During World War II, the world community was stunned by the Nazi persecution of the Jewish community in Germany and the widespread human suffering attributed to the policies of other belligerents. After the war, the Nuremberg and Tokyo war crimes tribunals prosecuted a number of German and Japanese leaders. These trials were the first attempt to uphold human rights and values internationally. The inclusion of human rights provisions in the UN charter, although ambiguous in many respects, exemplified the concerns of the international community about the protection and promotion of human rights.⁴

The doctrine of humanitarian intervention is basically a post-Cold War phenomenon. The principle of non-intervention in the domestic jurisdiction or ‘internal affairs’ of a state has been a longstanding and fundamental principle of customary international law. In the past, intervention was viewed as having unpleasant connotations, as something essentially illegitimate. It was not considered whether intervention was undertaken for political interests or humanitarian purposes. There were, of course, some exceptions to this general rule. The Berlin Congress of 1878 can be cited as an example. Article 61 of the Act of the Berlin Congress granted the great powers of that time the right to monitor Turkey’s fulfillment of its obligations to improve the well-being of the Armenians and to defend them

³ *Ibid.*, p. 5.

⁴ Md. Nuruzzaman, “UN Intervention on Humanitarian Grounds: New Humanism or A Chaotic Political Doctrine?”, *Journal of International Relations*, Vol. 3, No. 2, January-June 1996, p. 62.

from the Circassians and Kurds. This provision gave England formal grounds to interfere in the internal affairs of Turkey.⁵

On numerous occasions, the principle of non-intervention has been reaffirmed by the UN General Assembly, particularly in the 1965 Declaration on Inadmissibility and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states. The International Court of Justice has confirmed that the principle is a part of customary international law.⁶ The UN Charter also completely prohibits interventions by member states in each other's domestic affairs. The basic rule of international law concerning the prohibition on the threat or use of force in international relations is laid down in Article 2(4) of the UN Charter: "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 regards intervention by UN organs, a somewhat similar principle is set out in Article 2(7) of the UN Charter as a fundamental principle of the organization: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter". All this notwithstanding, there have been many instances of

⁵ Vladimir Kartashkin, "Human Rights and Humanitarian Intervention", in L.F. Damrosch, & D.J. Scgeffer, (eds.), *Law and Force in the New International Order*, Westview Press, Colorado, 1991, p.204, cited in Nuruzzaman, *ibid*, p. 63.

⁶ In the *Corfu Channel Case*, ICJ Reports 1949, p.35 and in the *Military and Paramilitary Activities Case*, ICJ Reports 1986, para 202, cited in "Humanitarian Intervention: Legal and Political Aspects"- *Report of the Danish Institute of International Affairs* (DUPI), Copenhagen, 25.01.1999 submitted to the Minister of Foreign Affairs on 7.12.1999. p. 46, <http://www.dupi.dk:591/en2000.htm>.

interventions by powerful states in domestic affairs of other states.

During the Cold War, on numerous occasions, the United States and the former Soviet Union intervened in the internal affairs of other states on the pretext of either protecting the lives of their own citizens or restoring stability and order. On 23rd October 1983, the US troops invaded Grenada and justified its attack on the grounds that it was rescuing its citizens from imminent harm. The UN branded the invasion as an act of aggression, as a gross violation of international law, and an encroachment of Grenada's independence and sovereignty. The General Assembly, in a widely supported resolution, condemned the aggression and demanded an immediate withdrawal of US troops from Grenada. Despite this widespread international condemnation, US troops, only six years later, invaded Panama on 20 December 1989. President George Bush justified the invasion on the grounds of protecting US citizens in Panama.⁷ Earlier, the other superpower, the former Soviet Union, attacked Hungary in 1956 and Czechoslovakia in 1968 and justified its intervention on the grounds that it acted to restore order and stability in the region.

Although there were, thus, occasional interventions by powerful states, the principle of non-intervention was more or less a basic norm of international relations during the Cold War. The polarization of the world around the two superpowers, and along ideological and political lines, made intervention 'an unprofitable business' that carried with it the serious risk of nuclear war and global annihilation.⁸ In addition, most countries considered the notion of humanitarian intervention a relic of the colonial era and dissociated themselves vigorously from it. Throughout this period, however, gross violations of human rights posed a strong moral challenge to international public

⁷ Kartashkin, *op. cit.*, p. 63.

⁸ Nuruzzaman, *op. cit.* pp.63-64.

opinion as well as to governments. In most cases, the international community was forced to remain passive witness to the violations.⁹ With the end of the Cold War, the norm of non-intervention suddenly began to collapse. The U.S.-led coalitions' response, under the U.N. banner, to the Iraqi invasion of Kuwait in 1990 and the subsequent actions in northern and southern Iraq marked a major turning point. Interventions in Somalia and former Yugoslavia, too, brought existing international norms into question.

In 1990, Iraq occupied Kuwait in an overnight invasion. The United Nations responded very promptly, condemning the invasion and demanding the withdrawal of Iraqi forces immediately and unconditionally. After Iraqi refusal of the U.N. demand, the U.S.-led coalition forces attacked Iraq under U.N. Resolution 678 and freed Kuwait. In the wake of their defeat the Iraqi forces attacked Kurdish dominated northern Iraq, which had supported the U.S.-led coalition forces during the war, forcing more than two million civilians to flee to neighboring Turkey and Iran. The Security Council condemned the repression of Iraqi civilian population and characterized Baghdad's action as a threat to international peace and security. Under UN resolution 688 'safe havens' were established in Northern Iraq and U.S.-led coalition forces were deployed for the protection of these 'safe havens' from military incursions by the Baghdad government. Iraq condemned the resolution as a blatant interference in its internal affairs and as a direct violation of the principle of sovereignty.

In 1992, the U.S. and its allies, under UN resolution 794, conducted an operation in Somalia which was widely viewed as a classic example of humanitarian intervention. The U.N. Security Council approved the intervention for the purpose of combating man-made disasters like civil war, droughts and

⁹ *Report of the Danish Institute of International Affairs (DUPI), op. cit., pp.12-13.*

famine. In fact, Resolution 794 was the first instance where the U.N. Security Council explicitly authorized military intervention within a country without any invitation from the government. On 9 December 1992, under the provisions of the resolution, the U.S.-led United Task Force (UNITAF), under the code name 'Operation Restore Hope', began operations in Somalia. Although the primary concern of the Security Council was to ensure the delivery of humanitarian aid, the UNITAF forces were subsequently involved in military encounters with the forces of Somali clan leader General Farah Aideed. After the 'Olympic Hotel battle tragedy', where eighteen American soldiers were killed, the White House, faced tremendous domestic pressures, decided to withdraw U.S. forces from Somalia. In the end, the UN mission failed to achieve any significant success.

The post-Cold War era has witnessed a significant number of UN-sponsored or sanctioned military interventions. Security Council Resolution 794 (1992), however, has been considered as the beginning of the use of military force to accomplish a humanitarian intervention under the authorization of the United Nations. Since then, the UN Security Council has authorized a significant number of forceful interventions in the name of either humanitarian purposes or the restoration of peace and security. The establishment of the 'safe havens' and 'no-fly zones' in northern and southern Iraq, the UN operations in Rwanda in 1994, in eastern Zaire in 1996, in Albania in 1997, the use of Australian-led forces in East Timor – all highlighted this new trend in international politics. 'Operation Restore Democracy' in Haiti in 1993-94 demonstrated that interventions could be justified not only for humanitarian purposes but also for restoration of democracy. After the 9/11 terrorist attack, the U.N. adopted a significant number of resolutions that considered acts of terrorism as a threat to international peace and security. U.S.-led coalition forces invaded Afghanistan on the basis of Resolutions 1368 (2001) and 1373 (2001). Thus, U.N. practice

reveals a dynamic change in the perception of potential threats to international peace and security. Recognized threats may now range from human suffering on a large scale to violations of democracy or to acts of terrorism. Some scholars and practitioners assert that the overwhelming U.N. authorization of humanitarian intervention has produced 'a significant change in actual practice and therefore, in customary international law.' Edward Marks, a retired senior U.S. diplomat, holds that "the final conclusion of these ten years of practice is the clear exposition of the right of intervention by the international community, especially when such intervention is so authorized by the Security Council."¹⁰

The Kosovo crisis in 1998-99, however, exhibited the legal and political limitations of the world major powers, especially the permanent members of the UN Security Council. The legal obstacles to humanitarian intervention were very evident when NATO threatened to intervene in the conflict between the Yugoslav government and the secessionist Kosovar Albanians without authorization from the UN Security Council. In 1998, China and Russia threatened to veto any attempt to secure UN authorization for possible NATO intervention. Nonetheless, in March 1999, the U.S. and its NATO allies initiated a military operation to put an end to the atrocities in Kosovo without obtaining authorization from the UN Security Council or consulting the UN General Assembly. Consequently, at the end of the 1990s, the debate revolved not solely around the question of whether humanitarian considerations could be characterized as 'threats to international peace and security' and thus justify intervention in a state's internal affairs, but rather whether such

¹⁰ Edward Marks, "The Changing Definition of Sovereignty", *American Diplomacy*, Vol. VII, No.1, 2002, http://www.unc.edu/depts/diplomat/archives_roll/2001_1012/marks_sovereign/marks_vereign.html, accessed on 12.08.2003; also see <http://www.ciao.net>

intervention needed the authorization of the UN Security Council.

The question of bypassing the authorization of the UN Security Council was also evident in the recent U.S.-Iraq crisis. U.S. President George W. Bush Jr. and his allies declared war and fought against Iraq without a U.N. Security Council resolution, on the grounds that Iraq possessed weapons of mass destruction (WMD), although WMD were neither used by Iraq during the war, nor have been found after the end of the conflict. The U.S.-led forces also insisted that the Iraqi regime had contacts with Al-Qaeda and other similar terrorist organizations. Yet no evidence of Iraq's alleged links to Al-Qaeda has ever appeared. In fact, after the 9/11 incident, 'counterterrorism', the 'war against terror' and 'counter-proliferation' agenda have come to dominate U.S. foreign policy and Washington has been continuously threatening to take action against the so-called Axis of Evil – Iraq, Iran and North Korea. Neither the war in Afghanistan nor the war in Iraq was a humanitarian intervention, although the Bush Administration *ex post facto* cited the 'humanitarian' causes and 'promoting democracy' among the reasons for intervention in both cases. It is widely believed that humanitarian causes were simply used to justify an intervention that aimed at protecting the U.S.-centered regional order in the Middle East as a part of Washington's grand global strategy. Since the end of the Iraq war, the Bush Administration has been threatening to make 'preemptive strikes' against Iran, Syria and North Korea.

Inevitably, the tendency of powerful states to bypass the U.N. raises doubts about the humanitarian nature of their involvement. On numerous instances, the UN seems to have been used as a tool for achieving the national interests of these powerful states. Many scholars raise questions regarding the humanitarian interventions in Somalia, Bosnia, Haiti, Rwanda, Northern Iraq, East Timor and so on. The main challenges to the new concept of intervention are on legal and political grounds.

The proponents of the humanitarian intervention argue that the classical perception of state sovereignty, to a growing degree, has been challenged on the grounds that justification of the right to exercise that sovereignty must rest on the states' ability to preserve and promote human rights. Yet they agree that despite these changing perceptions, 'state sovereignty is still a cornerstone of the international legal and political order.' They hold that "the principle of sovereignty has throughout its 350-400 years history been continuously re-defined and modified. Although the form has been constant, the content has changed: what are the issues that a state can decide on its own and what matters do not fall under the jurisdiction of the national sovereign?"¹¹

Scholars differ sharply on humanitarian intervention. The pro-intervention group holds that governments must protect human rights of their citizens. To stop governments from abusing the rights of their people, they advocate the creation of a new 'humanitarian order', in which promotion of human rights must be accorded prime consideration in the governance of states. They also assert that the international community must take responsibility for protecting ethnic, religious and other minorities from potential brutality and repression by their own governments or from being endangered by conflicts. The U.N. should have guidelines to ensure that it can take appropriate measures to police those states failing to meet the humanitarian needs to their people. In undertaking such humanitarian action state sovereignty should no longer be considered a political bar. These scholars hold that the end of the Cold War makes such a rule possible.¹²

¹¹ *Report of the Danish Institute of International Affairs (DUPI). op. cit., pp. 17-18.*

¹² Stephen John Stedman, "The New Interventionists", *Foreign Affairs*, Vol. 72, No. 1, 1992/93, p. 3.

The fundamental question is whether or not violations of human rights are legitimate international concerns which require a legitimate international response. Although there are some scattered human rights-related provisions in the UN Charter, this document contains no specific chapter exclusively dealing with human rights issues. According to Article 55, the United Nations shall promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Article 56 requires the member states "to pledge themselves to take joint and separate action" for the achievement of the protection of human rights. The main problem arising from these provisions is that there is no specific and acceptable definition of the terms of 'human rights and fundamental freedoms'. As a matter of fact, these provisions are legally binding obligations to the member states of the U.N., yet it is not determined what human rights obligations they are deemed to have assumed under the Charter.

Other than the UN Charter, there are a few other international declarations and conventions on human rights, among which the 1948 Universal Declaration of Human Rights and the 1948 Convention for the Prevention and Punishment of the Crime of Genocide are particularly significant. These international human rights instruments impose an international legal obligation to protect and promote the rights proclaimed in them. The advocates of the humanitarian intervention argue that if any government conducts gross and systematic violations of human rights, these obligations to protect and promote these rights will be deemed to be violated. This interpretation of international human rights instruments makes it difficult to avoid the conclusion that the international community may have a legitimate claim to intervene in states pursuing a consistent pattern of gross violation of human rights.¹³ Yet Article 2(7) and

¹³ Thomas Buergenthal, "Domestic Jurisdiction, Intervention and Human Rights: The International Law Perspective", in G. Brown, & D. Maclean

Article 2(4) in the UN Charter (mentioned earlier) stand in sharp contrast to the claims of the interventionists. In 1965, the UN General Assembly, in the Declaration on the Inadmissibility of Intervention, reaffirmed the principle of non-intervention. Besides, other major international instruments, such as the Charters of the OAS (Organization of American States) and OAU (Organization of African Unity), the Helsinki Final Act and the International Court of Justice (ICJ) in its various verdicts, have recognized the principle of non-intervention and prohibited interventions in the domestic jurisdiction of states.

The advocates of humanitarian intervention are not convinced by the existing interpretations of the provisions of the U.N. Charter and other legal instruments. Rather, they rely on new interpretations of some other provisions of the U.N. Charter to justify their position. They assert that the U.N. Charter not only confirmed the legitimacy of humanitarian intervention but also strengthened it. They cite the preamble and Article 1 of the Charter, which outline the maintenance of international peace and security as the first and foremost responsibility of the U.N., to justify legitimate use of force, such as for self-defence and humanitarian intervention. They hold that Article 2(4) of the Charter proscribes the use of force only for 'illegitimate purposes', such as encroachments upon territorial integrity or political independence of states. They also cite the example of the Security Council's humanitarian actions in Iraq and Somalia based on Chapter VII, which elaborates the mechanisms to maintain international peace and security.¹⁴

Indeed, the UN Security Council authorization to undertake military actions in Iraq and Somalia came after the then UN Secretary-General Boutros Boutros-Ghali had come to consider the situations in these two countries as posing threats to

(eds.), *Human Rights and US Foreign Policy: Principles and Application*, Lexington Books, Toronto, 1979, p.115, cited in Nuruzzaman, *op. cit.*, p. 67.

¹⁴Kartashkin, *op. cit.*, p. 68.

international peace and security. Yet the principal concern has been that the notion of 'threats to peace and security' is intrinsically vague. It is very difficult to determine what sort of violation of human rights constitutes threats to international peace and security. There is no hard and fast rule or any standard international criterion that could identify any aggression or violation of human rights as threatening to international peace and security. Moreover, it is still not settled whether the Security Council can undertake humanitarian intervention to protect human rights in all circumstances. Article 34 of the U.N. Charter authorizes the Security Council to investigate any dispute or situation in order to determine whether it poses threat to the maintenance of international peace and security. Yet under Chapter VII, the Council's enforcement powers are generally defined in terms of threats to the peace, breaches of the peace, and acts of aggression. These conditions may exist in the case of certain serious human rights violations, but not necessarily so.¹⁵

The debate has become more complicated after the recent U.S.-led coalition attack on Iraq. Some scholars argue that inasmuch as the U.S. and its allies launched a joint military attack against Iraq on March 20, 2003, without a U.N. Security Council resolution, their action must be seen as a violation of the principle against war. Hisakazu Fujita, Professor at Kansai University, for example, has raised the question: is it really possible for the U.S. and U.K. to invoke the right of self-defense, as defined in Article 51 of the U.N. Charter, in the absence of an armed attack by Iraq against the U.S. and U.K.? He asserts that President Bush deliberately failed to mention the legal basis for starting the war in his 'ultimatum' speech of March 17 and in his declaration of war on March 19. Instead Bush simply stated that the U.S. had the sovereign right to

¹⁵ Lory Fisler Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights", in Damrosch & Scheffer (eds.), *Law and Force in the New International Order*, Westview Press, Colorado, 1991, p.217, cited in Nuruzzaman, *op. cit.*, p. 68.

undertake preemptive strike to protect its national security in light of the obvious threat posed by Iraq. A general threat, however, posed by the use of WMD (i.e. chemical weapons) by terrorists allegedly under Iraq's influence cannot be used as the basis for the exercise of the right of self-defense.¹⁶

Research Question and Hypothesis

All these recent developments raise serious questions not merely for policymakers but also for academic study of international relations – Are violations of human rights in any particular state a matter of international concern? Are interventions on humanitarian grounds justified under existing international legal norms and practices? Does or does not humanitarian intervention undermine state sovereignty? Whence does the international community derive its authority to intervene in matters that have been traditionally recognized as falling under the domestic jurisdiction of the state? Under what conditions and under what procedures can intervention be recognized as the legitimate expression of the international community? What is the role of the UN in protecting human rights and what can it do in cases of violations of human rights? Is it possible for any state to take unilateral action without a UN resolution on the ground of humanitarian intervention or self-protection?

In an attempt to answer these questions the writer hypothesizes that the concept of state sovereignty and legitimization of humanitarian intervention both rest upon the foundation of accumulated political decisions. They exist side by side, and legal contradictions inherent in this situation are also based on political factors.

The paper begins defining some key concepts including 'state sovereignty' and 'humanitarian intervention', discusses

¹⁶ Hisakazu Fujita, "The Iraq War from the Viewpoint of International Law", *Hiroshima Research News*, Vol.6, No. 1, July 2003.

how these concepts have evolved and how they have been over the past centuries.

The conclusion is based on an overall analysis of the debate concerning the legal and political aspects of state sovereignty and humanitarian intervention.

The papers does not deal with the ethical or moral dimensions of humanitarian intervention largely because such interventions are usually the outcome of political decisions.

The paper is divided into three major parts: the theoretical dimension, the analysis and conclusion. Chapters one and two deal with the theoretical base, while chapter three is devoted to the analysis and the last chapter represents the conclusion based on previous discussions.

Chapter 11

THE LEGAL AND POLITICAL ASPECTS OF STATE SOVEREIGNTY

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 offend every precept of our common humanity?

* UN Secretary General Kofi Annan (Millennium Report to the General Assembly)

The Ambiguity of Sovereignty

In the modern state system 'sovereignty' is considered as the most intangible but essential attribute of the state. This is the attribute which makes a state a state and which distinguishes a state from other forms of political organization. In the first article of the 1933 Montevideo Convention on the Rights and Duties of States, the most prominent legal definition of a "state" was given: "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states." This definition still has diplomatic standing and is often invoked in deliberations on admittance of new applicants to the club of sovereign states.¹⁷ For example, in late 1988 when the Palestinian Council declared Palestine as a sovereign state, a majority of Western governments rejected the claim with reference to the Montevideo criteria on the ground that the West Bank and the Gaza strip were contested territories without effective Palestinian control. There are some exceptions as well. India

¹⁷ James Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 1979, cited in Oyvind Osterud, "Sovereign Statehood and National Self-Determination: A World Order Dilemma," in Marianne Heiberg (eds.), *Subduing Sovereignty: Sovereignty and the Right to Intervene*, Pinter Publishers, London, 1994, p. 21.

was granted membership of the League of Nations and was a signatory of the Versailles Treaty although it was, at that time, a colony of Britain and had no sovereign control over Indian territories. Byelorussia and the Ukraine also obtained membership in the United Nations although they were under Soviet control.

What does the term 'sovereignty' mean? To answer this question certainly we have to focus on different historical junctures and the various uses of the concept. In modern political discourse the multiple uses of the concept "have been marked by ambiguity, contradiction and the lack of consensual perspective."¹⁸ "For some purposes, sovereignty is exclusively a legal concept that can be understood by proving the materials of international law. It is also a political concept that requires focusing on the conduct of states. For other purposes, it can be treated as a psychological concept with which to explore the behavior of ethnic groups, nationalism, and peoples' sense of community and territoriality."¹⁹ E.H. Carr opines that "it [sovereignty] was never more than a convenient label; and when distinctions began to be made between political, legal and economic sovereignty or between internal and external sovereignty, it was clear that the label had ceased to perform its proper function as a distinguishing mark for a single category of phenomena...The concept of sovereignty is likely to become in the future even more blurred and indistinct than it is at present."²⁰

Krasner identified four different uses of sovereignty. "International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that

¹⁸ James N. Rosenau, "Sovereignty in a Turbulent World", in Gene M. Lyons, and Michael Mastanduno. *op. cit.*, p. 192.

¹⁹ *Ibid.*, p.192.

²⁰ E.H. Carr, *The Twenty Years Crisis 1919-1939*, Macmillan, London, 1978, pp.230-1, cited in Jens Bartelson, *A Genealogy of Sovereignty*, Cambridge University Press, Cambridge, UK. 1995, p. 13.

have formal juridical independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state."²¹ He also opines that "these four meanings of sovereignty are not logically coupled, nor have they covaried in practice"²² and "a state can have international legal, Westphalian, and established domestic authority structures and still have very limited ability to regulate cross-border flows and their consequent domestic impacts, a situation that many contemporary observers conceive of as a result of globalization."²³

Krasner shows the extraordinary flexibility of the contemporary international arrangements and reaches to the conclusion that "sovereignty" is not a confining or constraining concept. The leaders tend to interpret or ignore it according to their own needs and interests. Rulers in the anarchic international system, Krasner views, are totally unbound by norms and rules. He mentions that "Rulers, not states – and not the international system – make choices about policies, rules, and institutions."²⁴ He agrees that whether rulers violate or adhere to international principles or rules is based on calculations of material and ideational interest.²⁵ In a different manner he notes "The international system is an environment in

²¹ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, New Jersey, 1999, pp. 3-4.

²² *Ibid.*, p. 9.

²³ *Ibid.*, p. 4.

²⁴ *Ibid.*, p. 7.

²⁵ *Ibid.*, p. 9.

which the logics of consequences dominate the logics of appropriateness.”²⁶

In fact, the meanings of ‘sovereignty’ grow out of Western theories of inter-state relations. They are, as Krasner’s idea acknowledge, embedded in the interstate systems that the Western powers extended to the rest of the world. Although “sovereignty” does not include other closely associated concepts like the concept of the nation-state, national identity and nationalism, the right of nations to self-determination, national independence and the regulation of interstate relations through international law in its broad and explicit definition most of these “notions are either implicit in or follow logically from the concept of sovereignty”.²⁷ In short, to ask whether sovereignty is a constraining concept is almost like asking whether the entire conceptual basis of the current system of interstate relations is constraining.²⁸

It is worth noting that before the nineteenth century many of non-Western interstate systems such as city leagues, protectorates, tributary states, and empires did not enshrine sovereignty in its four meanings, as Krasner elaborates, as an organizing concept. These non-Western interstate systems “interacted untutored or undisciplined by the concept of ‘sovereignty’.”²⁹ ‘Sovereignty’ entered the lexicon of these cultures and polities with the arrival of the West. Western expansion imposed the concept upon the world.³⁰ But in many non-Western interstate systems, in principle, similar indigenous concepts may have existed, for example, in China there was one final source of authority within the state. Before the import of the term ‘sovereignty’ into their political languages Chinese,

²⁶ *Ibid.*, p. 6.

²⁷ Michael Oksenberg, “The Issue of Sovereignty in the Asian Historical Context”, *Asia/Pacific Research Center*, October 20, 1999.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

Japanese and Korean leaders could exercise their right to regulate the movements of people into and out of their domain. But the concept in its full and rich meaning was not present in much of the globe until fairly recently.³¹ In fact, the concept of sovereignty has taken on various meanings at different historical junctures as different elites evolve different stakes in the contents and applications of the concept.³²

A Genealogy of Sovereignty

The evolution of the concept of sovereignty is closely related to the emergence of the state and "in particular to the development of centralized authority in early-modern Europe."³³ Sovereignty, in fact, "cannot be understood without reference to its specificity in time and space."³⁴

"In the medieval period both rulers and ruled were subject to a universal legal order which reflected and derived its authority from the law of the God" and "it was the Church which provided the feudal order with an overarching, organizational and moral framework transcending both legal and political boundaries."³⁵ In the feudal system it was almost impossible to demarcate between the domestic and external spheres of organization and between 'public properties' and 'private estates'. The diverse and fragmented system of feudal rule enjoyed a considerable level of coherence and unity by virtue of 'common legal, religious and social traditions and institutions'.³⁶

³¹ *Ibid.*

³² James N. Rosenau, *op. cit.*, p. 192.

³³ Joseph A. Camilleri & Jim Falk, *The End of Sovereignty? : The Politics of a Shrinking and Fragmenting World*. Edward Elgar Publishing Ltd., Aldershot, UK, 1992, p. 15.

³⁴ *Ibid.*, p. 12.

³⁵ *Ibid.*, p. 12.

³⁶ Perry Anderson, *Lineages of the Absolutist State*, London: New Left Books, 1974, pp. 37-38 cited in Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 12.

By the sixteenth century the European Renaissance in art, literature and philosophy contributed to the 'secularization of life' and led to 'a corresponding decline in the spiritual and temporal authority of the church.'³⁷ The Reformation demolished the illusion of the Christian unity but the secular rulers were concerned about the treatment of different religious sects because religion posed threat to the internal integrity of many states and to the external stability of the whole European state system. In the sixteenth and seventeenth centuries religion was largely responsible for many devastating domestic and international wars.

The Peace of Augsburg of 1555 is considered as the first European effort to settle the issue of religious disputes. The absolute rights of sovereignty and non-intervention were reflected in this resolution. It gave recognition to the division of Germany between Catholic and Lutheran areas and stated that each prince would take decisions about religious matters. In spite of all its efforts, the Augsburg solution could not stabilize the situation and religious disputes continued to lead to devastating military and political conflict in Europe. Germany, the center of the Reformation, faced tremendous strife and disorder. In fact, in Europe, Germany had the most fragmented political order. The Holy Roman Empire of the German people was supposed to be the successor to the Roman Empire. The Emperor, who after 1450 was almost always the Habsburg ruler of Austria, was elected by a small group of religious prelates and major secular rulers. But the problem was that "the relative power of the emperor and the princes, and the authority of the Diet and the courts, was ambiguous and changed over time."³⁸ The Thirty Years' War was precipitated by Habsburg attempts to turn back the Reformation in Bohemia.³⁹ In the war Germany

³⁷ Joseph A. Camilleri & Jim Falk, *ibid*, p. 13.

³⁸ Stephen D. Krasner, "Sovereignty and Intervention," in Gene M. Lyons, and Michael Mastanduno. (eds.), *op. cit.*, p. 234.

³⁹ *Ibid.*, p. 234.

was severely defeated and France and Sweden came out as the military victors. But the atrocities and devastation of the war forced many of the war-parties to find some formula which could limit religious strife.

The Peace of Westphalia brought the Thirty years' war to an end. It consisted of two treaties, the Treaty of Osnabrück and the Treaty of Münster. The main purpose of these treaties was to seek to restore order by establishing rules over religious matters. Although the Peace of Westphalia attempted to limit religious disputes by revising the constitution of the Holy Roman Empire it did not enshrine the norm of non-intervention. Yet with the adoption of the Treaty of Westphalia the decentralized political arrangements characteristic of feudal society were replaced by a new system based on territorially bounded sovereign states, each equipped with its own centralized administration and possessing a virtual monopoly on the legitimate use of violence.⁴⁰ The notion of absolute sovereignty gave the rulers the right to own their domain, that is the possessions and territories over which they exercised legal jurisdiction and thus 'the *state* became the royal *estate*'.⁴¹ The acquisition of new territory, whether by conquest in Europe or colonization of the New World, was a means of extending the royal domain. The emergence of the sovereign state was closely associated with Europe's subsequent colonial expansion.⁴²

In evaluating the Peace of Westphalia Krasner opines that "Power, not consistency of principle, is the best explanation for the religious provisions of the Peace of Westphalia. The strong imposed constraints on the weak because they feared religious

⁴⁰ Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 14.

⁴¹ *Ibid.*, p. 15.

⁴² *Ibid.*, p. 15.

disorder in the center of Europe. The strong did not, however, apply the same principles to themselves."⁴³

The contemporary international system is in large part the consequence of Europe's interaction with the rest of the world over the last five centuries. In the late fifteenth century, when European expansion began, there was no single unique international system. Rather, the international system comprised several different regional international systems, each with its own distinctive rules and institutions, and its dominant regional culture. Before that time, Europeans did not enjoy a dominant position and had no monopoly of knowledge or experience in international relations. The rules and institutions of contemporary international society have been shaped not only by Europeans, but also by North and South Americans of European stock or assimilation and by Asians, Africans, and Oceanians as well as by the European powers in their period of dominance.⁴⁴

In the centuries immediately preceding Europe's expansion the most important regional international systems, alongside medieval Latin Christendom, from which the modern European state system developed, were the Arab-Islamic system, which stretched from Spain to Persia; the international system of the Indian subcontinent and its extensions eastward, founded upon a traditional Hindu culture but with predominant power in the hands of Muslim rulers; the Mongol-Tartar dominion of the Eurasian steppes, which had also become Muslim; and the Chinese system, reemerging under the Ming from a long period of Mongol domination.⁴⁵ Each system had its own enriched civilization and followed specific rules and regulations in dealing with its neighbors. Outside them lay areas of less

⁴³ Stephen D. Krasner, "Sovereignty and Intervention" in Gene M. Lyons and Michael Mastanduno (eds.) *op. cit.*, p. 236.

⁴⁴ Hedley Bull and Adam Watson (eds.), *The Expansion of International Society*, Clarendon Press, Oxford, 1984, p.1.

⁴⁵ *Ibid.*, p. 2.

developed culture, usually pre-literate and sometimes without awareness of the techniques of smelting metal, but organized as a rule into recognizable political entities which had contacts and relations with their neighbors without achieving a general system.⁴⁶ Most of the sub-Saharan African countries fell into these areas and were quite unknown to Christian Europe (but not to the Arabs, Indians and Chinese) before the "Age of Discovery". Two empires in the Americas had also developed in Mexico and Peru. In Australasia there were no such highly organized empires, and political communities were entirely stateless. There was no international system such as had existed in the Middle East, India and China for millennia. Nevertheless, peoples dealt with their neighbors according to established norms and codes of conduct.

Every regional international system had its own distinct nature and was different from other systems. For example, The Mongol-Tartar and Chinese systems were more effectively centralized whereas Arab-Islamic and Indian systems were in practice composed of a number of political entities. Yet they were all, theoretically, hegemonial or imperial. There was a suzerain Supreme Ruler - the Khalifa or Commander of the Faithful, the Emperor in Delhi, the Mongol Great Khan, the Chinese Son of Heaven - at the centre of each, who exercised direct authority over the Heartland. Around this empire extended a periphery of locally autonomous regions that admitted, to one degree or another, the overlordship of the suzerain and paid him tribute. In spite of the nominal claims of the Supreme Ruler, many peripheral states were able to maintain complete *de facto* independence. In fact, until the middle of the eighteenth century, the idea that states, even within the European system, were equal in rights did not emerge. Almost immediately afterwards, in the nineteenth century, the notion received a devastating setback when the Great Powers, in forming the European Concert, put

⁴⁶ *Ibid.*, p. 2.

forward claims to "special responsibilities" for maintaining order, and corresponding rights that small powers did not have.⁴⁷

The post-medieval European concept of the state, which was based on a territorially defined entity apart from rulers or dynasty, in accordance with man-made rules was basically alien to Muslim political theory. Ottoman theories of state and government, for example, derived from the Muslim concept that God is the source of all authority and law, that government exists to enable the community of true believers (Muslims) to fulfill its obligations to God.⁴⁸ And "the community, not the state, constitutes the basic Muslim polity, transcending all boundaries."⁴⁹

Theoretically, any Muslim community or state tends to consider it to be morally superior to all other societies, and because the law came from God through the Prophet Muhammad, that law was considered to be holy, perfect, and unchangeable. Until God's intention of a universal true-believing community under a single law and ruler was achieved, the world would be divided into two spheres: *Dar ul-Islam* – the abode of Islam, where Islamic law prevailed; and *Dar ul-Harb* – the abode of war where infidels lived outside the law of God and against whom holy war, *jihad*, must be waged until the universal idea became reality.⁵⁰

Theoretically, the Ottoman system did not admit of the European principles of equality of sovereignty and diplomatic reciprocity, or the notion of a law of nations as the basis for dealing with other states. This had significant impact on Ottoman relations with their European neighbors. Before the eighteenth century, the Ottoman Empire was confident of its

⁴⁷ *Ibid.*, p. 7.

⁴⁸ Thomas Naff, "The Ottoman Empire and the European State System", cited in Hedley Bull and Adam Watson (eds.) *op. cit.* p. 143.

⁴⁹ *Ibid.*, p. 143.

⁵⁰ *Ibid.*, p. 144.

enormous power but "later driven by need generated of weakness, the *Sublime Porte* participated gradually in Europe's alliance system."⁵¹ Although Ottoman rulers might still harbor feelings of supremacy, they were compelled by circumstances to follow Europe's system of international relations. The stages of this movement were highlighted by the acceptance of such European principles as equality of sovereignty and reciprocity of relations, the adoption of European diplomatic usages, and the recognition of points of western international law such as extra-territoriality and the Law of Nations. All of these 'concessions' paved the way for the ultimate acceptance of alliances with Christian powers of the West. By the nineteenth century the main determinants of that system were shaped by Europe's colonial rivalries across the globe. In the age of colonialism, survival of the *Dar ul-Islam* required fundamental changes in self-perceptions, attitudes, and ideas. A process of cultural synthesis (albeit imperfect) between the Empire and Europe – made inexorable by Europe's dominance in every material sphere of life – became integral to the unification of systems.⁵² These developments occurred sometimes as deliberate initiatives of policy, sometimes as the result of coercion by a European power, and sometimes as the result of the exigencies of the moment without awareness of the precedents being set.⁵³

By the time the Ottoman Empire completed its entry into Europe's state system, most Islamic societies outside the Empire had already been engulfed by Europe's colonial expansion. In this way, almost the entire Islamic world had already been incorporated at some level into the European international system. The Ottoman Empire was the last and most important in the process.⁵⁴

⁵¹ *Ibid.*, p. 144.

⁵² *Ibid.*, p. 144.

⁵³ *Ibid.*, p. 153.

⁵⁴ *Ibid.*, p. 169.

In case of China, the traditional concept of 'civilization' was enshrined in Confucian doctrine. According to the doctrine, the Chinese emperor, as the son of Heaven, received the mandate from Heaven to rule the Middle Kingdom. The Kingdom, in principle, encompassed the entire world, both 'civilized' (Chinese in culture) and not yet 'civilized' ('barbarian' or foreign in nature). In this system, a hierarchy of order was maintained and it was symbolized by the faithful performance of prescribed ritual kowtows. Children kowtowed to parents, parents to grandparents and ancestors, ministers to the emperors; and the emperor to heaven itself.

China's relations with its non-Chinese neighbors were also determined by the same Confucian principles. As the father or elder brother, China rewarded the respect and tribute of its surrounding tributary states by offering due Confucian benevolence. Traditionally China handled its relations with the European countries not in accordance with the developing European theory that states are equally sovereign but rather in accordance with its Confucian doctrine which required "all from near and far acknowledge China's standard of 'civilization'".⁵⁵

The Opium War (1839-1842) and the Treaty of Nanking are considered to be the turning point in Chinese relations with the Western powers and dealt a great blow to the Confucian doctrine. The Opium War and the signing of the Nanking Treaty marked the beginning of the use of Western military force in China, the initiation of sustained if forced Sino-Western contact, the imposition of the European standard of 'civilization' on China, and the start of what is generally referred to as a hundred years of unequal relations due to 'unequal treaties'.⁵⁶

⁵⁵ Gerrit W. Gong, "China's Entry into International Society", cited in Hedley Bull and Adam Watson (eds.) *op. cit.*, p. 174.

⁵⁶ *Ibid.*, p. 175. Also see, Ssu-yu Teng, *Chang Hsi and the Treaty of Nanking* (Chicago, 1944), p.v.

Western pressure and the increasing domestic demands for reform forced China to accept the elements and institutions required by the standard of 'civilization'. By 1880, China had gradually accepted the European principles of diplomacy and international law. By January 1912, when the Republic of China was founded as China's first attempt to conduct its affairs as a sovereign state after the pattern of the European states system, a constitutional government was established, in part, as Jerome Ch'en writes, "to replace the Confucian orthodoxy which had hitherto been the fundamental principle of the state with a new concept, legitimacy".⁵⁷

State formation in Africa has been linked to 'triple heritage'⁵⁸ of Africa's history and culture which encompasses indigenous, Islamic, and Western traditions. Some states in Africa were primarily products of purely indigenous forces, some were products of interactions between indigenous and Islamic elements; and others were outgrowths of a basic interaction between indigenous and Western ideas.⁵⁹ In many occasions the triple heritage has been a fusion of all three. After all, Africa has indeed been a melting pot of political cultures, a laboratory of diverse experiments in political formations.⁶⁰

During the transition from the pre-colonial to the post-colonial era Africa faced serious difficulties. One of the difficulties was precisely the normative and moral gap among the three traditions. The value structures had been fundamentally changed and new perspectives required reformulation. The

⁵⁷ Jerome Ch'en, 'Historical Background', in *Modern China's Search for A Political Form*, ed. Jack Gray (London, Oxford University Press under the auspices of the Royal Institute of International Affairs, 1969), p. 12 cited in Gerrit W. Gong, *op. cit.*, p. 179.

⁵⁸ Ali Mazrui, "Africa Entrapped: Between the Protestant Ethic and the Legacy of Westphalia" cited in Hedley Bull and Adam Watson (eds.) *op. cit.*, p. 290.

⁵⁹ *Ibid.*, p. 290.

⁶⁰ *Ibid.*, p. 291.

evolution of the principle of equality was an important disruptive factor. This principle in Africa was more easily realized among the so-called "stateless societies" than among either city-states or empire-states. Many indigenous societies along the Nile Valley or societies like the Tiv of Nigeria and the Masai of Kenya and Tanzania had relatively loose structures of control and substantial egalitarianism. In contrast, societies like those of Buganda, Northern Nigeria, Ashanti, and other dynastic empires of West Africa were hierarchical and basically unequal.⁶¹

In the pre-colonial period indigenous African political communities maintained their own distinctive institutions for the conduct of relations with one another. Relations among African communities were conducted without benefit of written records except in areas subject to Islamic influence. The dealings of communities with one another were largely those of dominant rulers with tributaries or vassals and they were in most cases geographically confined. There was no "African international system" or "international society" extending over the continent as a whole, and it is doubtful whether such terms can be applied even to particular areas.⁶²

Modern European contacts with African political communities south of the Sahara began with the Portuguese voyages of discovery in 1444. This was more than two centuries before the Peace of Westphalia, at a time when there was no generally accepted European notion of what constitutes normal behavior in international relations. In pre-partition Africa there was no general system of warfare and alliance, involving European and indigenous powers alongside one another. However, such alliance systems existed on a local scale in many areas. For example, the Portuguese in 1570 sent a military

⁶¹ *Ibid.*, p. 295.

⁶² Hedley Bull, "European States and African Political Communities", cited in Hedley Bull and Adam Watson (eds.), *op. cit.*, pp.105-6.

expedition to assist Kongo against the Jagas; in the seventeenth and eighteenth centuries forts built on the Slave Coast by Portuguese, Dutch, English, French, Spaniards, Swedes, Brandenburgians, Danes, and others fought with one another in alliance with local powers; and in the nineteenth century Britain formed alliance with the Fante against the Ashanti and the Somalis against Ethiopia.⁶³ African rulers often opted for such alliance systems to solidify their position and extend their spheres of influence against their rivals.

The European states did not maintain these elements of coexistence with African political communities during the partition. Nor did they consult with the relevant African parties when they reached agreements among themselves setting out their spheres of influence. In many cases, indeed, African political communities were overthrown by conquest after their independence had been recognized by European rulers. The French conquest of Madagascar is such an example. The European powers invoked the doctrine of 'constitutive recognition' to show that African rulers did not have the rights of sovereign states, while these same European powers argued that it was the sovereign rights of African rulers, voluntarily transferred to them, that provided the titles to their colonial territories. For Europe the solidarity of the imperial powers, symbolized by the conferences of Berlin and Brussels, meant that the partition was orderly and that the peace of Europe was preserved. For Africa, in contrast, it meant that the imperial powers could not be played off one against another but were united in imposing their domination.⁶⁴

Theoretical Development of the Concept of Sovereignty

Historically, the evolution of the concept of sovereignty is deeply indebted to the philosophical and theoretical

⁶³ *Ibid.*, p. 113.

⁶⁴ *Ibid.*, p. 114.

advancement in early modern Europe, when the modern state system was evolving and a central authority system was developing. This does not mean that European philosophers, who developed the theory from the sixteenth to the eighteenth centuries, were holding the monopoly of understanding of the concept. Moreover, they based their thinking on different premises and often adopted different and contradictory views of social order. Sovereignty is an integral part of the state, itself a highly a problematic concept, likely to give rise to a variety of interpretations.

From the historical point of view the origins of western concepts of sovereignty lie in the Roman Empire. The king's will was considered to be the rule of order and in this way he "personified law". "This was a departure from [the notion of] the divinity of the ruler in the Near East and in ancient India, where the king may have governed by the grace of gods but was, like his subjects, subordinate to the external laws of the universe, or dharma."⁶⁵ Roman sovereignty was final and absolute and by definition it meant that 'no final and absolute authority exists elsewhere'. It was argued in the Roman Empire that if there is a source of law then it must be above the law. Consequently, the Emperor was regarded as "above the law; and by the law was now meant codes, customs and constitution of the society itself. These are the essential elements in a theory of sovereignty and it was now, from about the end of the first century AD, that they were first enunciated."⁶⁶ According to the Roman system, if there was a final point of authority, it was reasonable for it to be absolute. In this sense "intervention" had no meaning in this universalized system.

⁶⁵ Jarat Chopra, "The Obsolescence of Intervention under International Law" in Marianne Heiberg (eds.), *op. cit.*, p. 40.

⁶⁶ F.H. Hinsley, *Sovereignty*, 2nd ed., Cambridge University Press, Cambridge, 1986, p.41 cited in Jarat Chopra, *op. cit.*, p. 40.

Roman law is considered to be one of the most important intellectual influences on the emerging theory of the state in the Western world. Whereas in medieval Europe priority was accorded to divine or customary law, the Roman mind tended to ground law in the community or its rulers (or some combination of the two).⁶⁷ Only the existence of a political community or state could give rise to a comprehensive legal system. "The state was understood as *summa potestas*, a Latin phrase denoting a quality of mystique and majesty, which the sixteenth-century French philosopher, Jean Bodin, would subsequently use interchangeably with 'sovereignty'."⁶⁸ The intricate system of Roman law was based on the simple but fundamental principle that a political community had the inherent power (or imperium) to exact unlimited obedience from its citizens.⁶⁹

Machiavelli was heavily influenced by the European revival of Roman law in his treatment of the State⁷⁰. In his writing in 1513-14 he focused on the Italian city-states of his time and at the same time predicted the emergence of absolutist states. According to Machiavelli, the state is an organization based on force, which ensures the security of persons and property. Machiavelli had made a great stride towards the notion of the 'omnipotent legislator', yet fell short of a general theory of political absolutism.⁷¹ Subsequent theorists, like Bodin and Hobbes, equated "the state with the exercise of supreme

⁶⁷ Kenneth Dyson, *The State Tradition in Western Europe: A Study of an Idea and an Institution*, Oxford: Martin Robertson, 1980, p.113 cited in Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 16.

⁶⁸ Joseph A. Camilleri & Jim Falk, *ibid*, p. 16.

⁶⁹ Joseph A. Camilleri & Jim Falk, *op. cit.*, p.16. Also see Phyllis Doyle, *A History of Political Thought*, London: Jonathon Cape, 1963 (first published 1933), pp. 43-4.

⁷⁰ Niccolò Machiavelli, *The Prince and The Discourses* (introduction by Max Lerner), New York: Random House, 1950; see especially *The Discourses*, 1:2, 3, 4.

⁷¹ George A. Sabine. *A History of Political Theory* (3rd edn). London: Harrap, 1963, p.346 cited in Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 16.

authority within a given territory or society.”⁷² These different and contrasting views of the state have deeply influenced the theory and practice of sovereignty.

In 1576 Jean Bodin in his *De la République* first articulated the predominant modern Western theory of sovereignty. He developed his theory in an unprecedented context, during a conflict between the universal empire and local kings claiming supremacy on the basis of Roman law. The king was proclaimed to be Emperor within his own kingdom and “had of right all the attributes – including the power to interpret the law and to make new law – which, on the basis of the same Roman law but in relation to all Christendom, the Roman lawyers were claiming for the Emperor and the canon lawyers were claiming for the Pope.”⁷³ Bodin’s thesis that “a central authority should exercise unlimited power was in part an attempt to restore order and security to the deeply divided political society” of Europe.⁷⁴ He maintained that such power must have legal recognition and “it had to be endowed with sovereignty.”⁷⁵ Bodin used the words *souveraineté*, *majestas* and *summa potestas* more or less interchangeably. Sovereignty was, for Bodin, ‘supreme power over citizens and subjects unrestrained by law’,⁷⁶ and hence ‘it is unlimited in extension and duration.’⁷⁷

The next major contribution in the development of the theory of sovereignty comes from *The Leviathan* in 1651. “Like Bodin and others before him, Hobbes sought to eliminate the dualism inherent in the notion of a body politic comprised of monarch and people, but unlike Bodin he swept aside all limitations on

⁷² Joseph A. Camilleri & Jim Falk, *ibid*, p. 16.

⁷³ Jarat Chopra, *op. cit.*, p. 41.

⁷⁴ Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 18.

⁷⁵ *Ibid.*, p. 18.

⁷⁶ Jean Bodin, *The Six Bookes of a Commonweale*, trans. Richard Knolles, London: Impencis G Bishop. 1606. p.84 cited in Joseph A. Camilleri & Jim Falk, *ibid* p. 18.

⁷⁷ Joseph A. Camilleri & Jim Falk, *ibid* p. 18.

sovereignty by doing away with every right of the people.”⁷⁸ He did not uphold the idea of a social contract between ruler and ruled. Instead he substituted for it a contract in which all individuals agreed to submit to the state. Hobbes describes the outcome of this universal surrender of the right to self-government as a ‘Multitude united in one Person’, a ‘Commonwealth’, a ‘Leviathan’.⁷⁹ In this sense, there is no difference between society and state and between state and government. In a community there may exist different groups but they have no independent or autonomous existence; they are subordinate to the sovereign.

A reaction to the political absolutism, as advocated by Hobbes, developed very soon on the part of those committed to constitutional theory and other comparatively more flexible forms of government. “Locke held that society and the state existed to preserve individual rights, including the right to property. Locke had thus resorted to natural law, the importance of which Hobbes had deprived it by reaffirming the medieval tradition that moral laws are intrinsic and superior to positive law, and that governments are obliged to give effect by their laws to what is naturally and morally right.”⁸⁰ He did not agree with Hobbes’ idea of state sovereignty as supreme coercive power. Rather he maintained a moderate view that government derived its legitimacy from the trust and consent of the people. Yet this attempt to base sovereignty on constitutional theory by reviving the idea of a partnership between ruler and ruled posed several problems. The most significant was the effective division of sovereignty between ruler and ruled that undermined the supremacy of power and authority, which was regarded as the essential element of sovereignty by Bodin, Hobbes and others.

⁷⁸ *Ibid.*, p. 19.

⁷⁹ *Ibid.*, p. 19, also see Thomas Hobbes, *Leviathan*, ed. By C.B. Macpherson, Harmondsworth, Middlesex: Penguin, 1968, pp. 382-83.

⁸⁰ *Ibid.*, p. 20.

Like Hobbes, Rousseau in his *Social Contract* published in 1762 argued that state sovereignty was unlimited and indivisible and the state was the result of a contract in which all individuals had agreed to submit to its will. Yet unlike Hobbes he equated the state with the body politic that had been formed by the social contract, 'reducing government, the rulership, to a mere commission'.⁸¹

Kant, like Locke, also reasserted the principle of constitutional government. Although he accepted Rousseau's notion of popular sovereignty he was at pains to stress the practical necessity of political organization.⁸² Howard Williams argues that 'he sought to combine the freedom and consent of Rousseau's Social contract with the domination and absolute authority of Hobbes' *Leviathan*'.⁸³ People will choose their representatives in the legislature and by this way all members of society will contribute to the development of the law of the sovereign. Yet the law is binding on all citizens after it is made and administered by the executive.

Although the theory of sovereignty has undergone tremendous modifications and refinements in its long history it still remains 'contested territory'.⁸⁴ Sovereignty is still regarded as one of the most important attributes of the state but the state is itself 'subject to numerous and sharply conflicting interpretations'.⁸⁵

⁸¹ F. Hinsley, *Sovereignty*, London: C.A. Watts, 1966, p. 153 cited in Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 21.

⁸² Joseph A. Camilleri & Jim Falk, *ibid.*, p. 22.

⁸³ Howard Williams, *Kant's Political Philosophy*, Oxford: Basil Blackwell, 1983, pp. 170-72 cited in Joseph A. Camilleri & Jim Falk, *op. cit.*, p. 22.

⁸⁴ *Ibid.*, p. 23.

⁸⁵ *Ibid.*, p. 23.

State Sovereignty under International Law

The state is the primordial legal personality in international law.⁸⁶ States express this by their right to absolute sovereignty over their territories and their governments merely have to ensure that they are independent of any other authority and that they enjoy legislative and administrative competence to be recognized as the legitimate controlling authority of the state.⁸⁷ In this sense, the nature of the government is less significant than the fact of its existence for it to be recognized as a legitimate authority. It may take any form, either democratic or autocratic. In the absolute sense of sovereignty, states enjoy equal status in their relations with one another and in terms of international law no state can dictate the behavior of others until and unless states agree to sacrifice their sovereign decision making power to some other body through an agreement.

At the international level the state is treated as equal to the individual in the national level. The equality of states comes from the notion that individuals are equal. In fact, Vattel in his *Le droit de gens*, published 1758, first introduced the concept of the equality of states into international law. He took the idea from the logic of the state of nature. In the state of nature, if men were treated equal, states would also be treated as free and equal, he reassured. For Vattel a small republic was no less a sovereign state than was a powerful kingdom.⁸⁸

In the modern political system, the basic rule for state sovereignty under international law is that states must be recognized and this has been a common practice, although there

⁸⁶ See, Østerud, p. 21-22 for discussion of the Montevideo Convention cited in George Joffe, 'Sovereignty and Intervention: The Perspective for the Developing World', in Marianne Heiberg (eds.), *op. cit.*, p.68.

⁸⁷ Marianne Heiberg (eds.). *op. cit.*, p. 68.

⁸⁸ J.L. Briely. *The Law of Nations: An Introduction to the International Law of Peace*, edited by Humphery Waldock, 6th ed. New York: Oxford University Press, 1963, pp. 37-40 cited in Stephen D. Krasner, 1999, *op.cit.*, p. 14.

are many exceptions. In many cases, recognition of specific government is more important than recognition of states. Whether other political entities will recognize or withhold recognition depends on political relations with that particular government. Recognition is frequently used to support or weaken a specific political force. Weaker states often claim that recognition of governments should be automatic, but comparatively stronger states have denied such claims because they tend to use recognition as a political instrument. In many instances states have extended their recognition to other governments although the governments may not have exerted effective control over their claimed territories. German and Italian recognition of the Franco regime in 1936, and the American recognition of the Lon Nol government in Cambodia in 1970, can be cited as examples. In other cases states have continued to recognize governments which have lost power, for example, Mexican recognition of the Spanish republican régime until 1977, and recognition of the Chinese Nationalist regime by several Western powers until the 1970s. In other cases, although new governments may have established effective control over their territories other states have refused to recognize them, such as the British refusal in the nineteenth century to recognize the newly independent Latin American states until a decade after they had been established. The frequency and effectiveness of the use of recognition or non-recognition as a political instrument have depended both upon the distribution of power (conflicting policies by major powers reduce the impact of recognition policies) and the degree of ideological conflict.⁸⁹

Sometimes, even entities that do not conform with the basic norm of appropriateness associated with international legal sovereignty have been recognized. In many cases entities have obtained such recognition although they have lacked either formal juridical autonomy or territory. As previously noted,

⁸⁹ *Ibid.*, p. 15.

although India was a British colony it became a member of the League of Nations and a signatory of the Versailles Treaty. India and the Philippines were founding members of the United Nations even though they did not become formally independent until 1947 and 1946 respectively. In 1974 the Palestinian Liberal Organization (PLO) was given observer status in the United Nations and this status was changed to that of a mission in 1988, coincident with the declaration of Palestinian independence, even though the PLO could not independently control its territory. Hong Kong, a British colony and then part of China, became a founding member of the World Trade Organization (WTO) even though China was not a member at that time.⁹⁰

It is worthwhile to observe that rulers have sought the recognition of other states to enjoy their international legal sovereignty, which offers them both material and normative resources. Sovereignty can be conceived of as "a ticket of general admission to the international arena."⁹¹ Recognition brings juridical equality for the states and only recognized states can enter into treaties with one another. These treaties cannot be denied even if the government changes. Although there are some exceptions, as with everything else in the international system, dependent or subordinate territories do not generally have the right to conclude international agreements, giving the central or recognized authority a monopoly over formal arrangements with other states.⁹² Recognized states and their rulers have more secure status in the courts of other states. The act of state doctrine holds, in the words of one U.S. Supreme Court

⁹⁰ *Ibid.*, p. 16.

⁹¹ Michael Ross Fowler, and Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, University Park: Pennsylvania State University Press, 1995, p.142, cited in Stephen D. Krasner, 1999, *op. cit.*, p. 16.

⁹² Oppenheim, L., *Oppenheim's International Law*, edited by Robert Jennings and Arthur watts. 9th ed. Harlow, Essex: Longman, 1992, p. 158, 245, 339-40 cited in Stephen D. Krasner, 1999, *ibid.*, p. 16.

decision, that "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory".⁹³

International legal sovereignty does not ensure that the state authority can regulate every development within its territory or flows across its borders. This indicates that it does not guarantee either domestic sovereignty or interdependence sovereignty and that it is also different from Westphalian notion of sovereignty. As international law is based on the consent of states, rulers have to compromise voluntarily some aspects of their Westphalian sovereignty. In this case the most prominent example is the European Union. Jacques Chirac, the President of France, in an interview shortly before the opening of the April 1996 European Union conference on governance in Turin, stated that "In order for Europe to be widened it must in the first instance be deepened, but the sovereignty of each state must be respected."⁹⁴

It should be noted that international legal sovereignty cannot ensure the territorial integrity of any state. There are many instances where recognized states have been dismembered and even absorbed. It is obvious that the conquest of any particular state extinguishes the sovereignty of that state, but conquest is not a challenge to the Westphalian system and international legal sovereignty as institutional forms. It reconfigures borders but does not create new principles and norms.⁹⁵

State Sovereignty and Non-intervention

From the Westphalian perspective state sovereignty is considered as an institutional arrangement that is based on two

⁹³ The case is *Underhill vs. Hernandez*, quoted in Oppenheim 1992, *op. cit.*, p. 365-67 cited in Stephen D. Krasner, 1999, *ibid.*, p.17.

⁹⁴ *Frankfurter Allgemeine Zeitung*, March 26, 1996 cited in Stephen D. Krasner, 1999, *ibid* p. 19.

⁹⁵ *Ibid.*, pp. 19-20.

major principles. One is territoriality of the state and the other is the exclusion of external actors from the internal decision-making process. Of course, the state decision-making process is influenced by the external behavior and interaction of other states, but as long as state leaders can make their decisions freely there is no violation of state sovereignty. Westphalian sovereignty faces problems when external actors force or determine the internal decision-making process of a state.

The territoriality of a state and its internal decision-making process can be infiltrated through coercive means such as intervention. Sometime rulers invite outside interference, at the sacrifice of their Westphalian sovereignty, to uphold their superior position domestically. Coercive means like outside intervention constitute a clear violation of international legal and Westphalian sovereignty. Voluntary invitations do not violate international legal sovereignty although they are inconsistent with Westphalian sovereignty. The norm of non-intervention in internal affairs is often associated with the Treaty of Westphalia although it was not clearly articulated until the end of the eighteenth century and it is not historically correct to claim that the norm of non-intervention was embodied in the Treaty of Westphalia, (this has already been discussed).

Wolff and Vattel were among the first who explicitly articulated the principle of non-intervention. In the 1760s Wolff wrote that "to interfere in the government of another, in whatever way indeed that may be done is opposed to the natural liberty of nations, by virtue of which one is altogether independent of the will of other nations in its action."⁹⁶ Vattel also opined that no state had the right to intervene in the internal affairs of other states.

From historical experience it is evident that weaker states have always been the strongest advocates and supporters of the

⁹⁶ Quoted in Stephen D. Krasner, 1999, *op. cit.*, p. 21.

norm of non-intervention. Krasner notes that the Latin American states endorsed this rule at international meetings in 1826 and 1848 and that in 1868 the Argentine jurist Carlos Calvo published a treatise in which he condemned intervention by foreign powers to enforce contractual obligations of private parties. Luis Drago, the Foreign Minister of Argentina, in a note to the American government in 1902, argued that intervention to enforce the collection of public debts was illegitimate. The Calvo and Drago doctrines have been recognized in international law. In 1928 the Commission of Jurists at the sixth International Conference of American States held in Havana recommended adoption of the principle that "No state has a right to interfere in the internal affairs of another."⁹⁷ It was not adopted mainly because of the opposition of the United States. There were several reasons for American opposition. At that time the United States was involved in many interventions in Central America and the Caribbean. Charles Evan Hughes, the American Secretary of State, reasoned that the United States had a right to intervene to protect the lives of its nationals should order break down in another country.⁹⁸ Although the United States opposed the principle of non-intervention in 1928 it finally accepted it at the seventh International Conference of American States in 1933. The Convention on Rights and Duties of States declared that "no state has the right to intervene in the internal or external affairs of another" and this principle was accepted by the Washington.⁹⁹ The Charter of the Organization of American States (OAS) also stipulates that "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the

⁹⁷ Stephen D. Krasner, 1999, *op. cit.*, p.21.

⁹⁸ *Ibid*, p. 21.

⁹⁹ Ann Thomas and A.J. Thomas, *Non Intervention: The Law and its Import in the Americas*, Dallas: Southern Methodist University Press, 1956, pp. 56-62 cited in Stephen D. Krasner, 1999, *op. cit.*, pp. 21-22.

personality of the State or against its political, economic, and cultural elements.”¹⁰⁰ Later on the principle of non-intervention has been adopted in many international agreements such as the United Nations Charter and the 1975 Helsinki agreement.

From the beginning the principles associated with both Westphalian and international legal sovereignty have frequently been violated. Neither Westphalian nor international legal sovereignty, Krasner opines, have ever constituted a stable equilibrium from which rulers had no incentives to deviate.¹⁰¹ He has termed the concepts as ‘organized hypocrisy’. The adoption or violation of the principles has depended simply on the vested interest of rulers.

State Sovereignty and International Protection of the Individual

From the legal point of view, recent trends have somewhat limited the scope of state sovereignty with regard to the way a state may treat individuals within its territorial boundaries. Since the adoption of the United Nations Charter and the Universal Declaration of Human Rights, the principle of human rights has progressively gained weight at the cost of the classical perception of sovereignty.

According to the Westphalian perspective, rulers can adopt any principle to structure relations with their subjects,

¹⁰⁰ Quoted in Lori Damrosch, “Changing Conceptions of Intervention in International Law” in Laura W. Reed and Carl Kaysen (eds.), *Emerging Norms of Justified Intervention: A Collection of Essays from a Project of the American Academy of Arts and Sciences*, 91-110. Cambridge, Mass.: American Academy of Arts and Sciences, 1993, cited in Stephen D. Krasner, 1999, *op. cit.*, p.22.

¹⁰¹ Krasner, 1999, *ibid.*, p. 24.

independent of outside forces. They may adopt or ignore human rights as governing principles; they can offer or deny any special rights to ethnic or religious minorities; they may designate or reject indigenous peoples as distinct categories; and they may treat men and women equally or differently. In fact, there is no empirical evidence that the Westphalian model has provided any particular guidelines for the relationship between rulers and their subjects.

Historically minorities (religious, ethnic or whatever) are the most vulnerable in any society or state. During the Middle Ages in Europe there had been few norms or treaties to protect minorities. The Peace of Westphalia and some other treaties of sixteenth and seventeenth centuries contained explicit provisions for religious toleration. These provisions were adopted mainly because the rulers of the time wanted to contain the religious strife that was threatening the stability of Europe. After the First World War the Allied Powers imposed provisions for the protection of minorities in the states of Central and Eastern Europe. Such protection was considered essential for the establishment of stable democracies as a precondition for collective security and international peace. In the 1990s provisions for the protection of minorities were also imposed on the successor states of Yugoslavia by the United States and the major European powers, on the grounds that this would promote peace and stability in the Balkans and in Europe. Indeed, there has been a clear trend towards international efforts to influence the relationship between rulers and minority groups. Most of the major peace treaties from Westphalia to Versailles contained provisions for the protection of minorities either in terms of religious toleration or of ethnic or linguistic identity.

After World War II efforts to promote the protection of minority rights were evident in only a small number of UN accords, such as the Covenant on Civil and Political Rights and the Genocide Convention. There was no such effort in the United Nations Universal Declaration of Human Rights. Rather

emphasis was placed on the protection of human rights. Both minority rights regimes (in which the protection of an individual is based on membership of a group that provides affective self-identity) and human rights regimes (in which protection is accorded because an individual is a human being or because the individual is classified as a member of a group, such as stateless persons, which does not provide affective self-identity) can violate the Westphalian model because the rules governing relations between rulers and ruled within a territory can be subject to external monitoring and even enforcement.¹⁰²

The adherence to human rights rather than minority rights reflected the post World War II preferences and power of the United States. The United States emerged from the World War II as one of the most powerful states and began to exert a strong influence in the international system. In the American political heritage there was at that time no place for minority rights. The American identity was grounded on the mutual acceptance of Lockean political values, which ennobled the individual and emphasized democracy and capitalism.¹⁰³ Although there has been an ongoing American discussion about how much melting actually takes place in the melting pot, and whether ethnic affiliation should be recognized, American identity has always been based on political beliefs, not ascriptive characteristics.¹⁰⁴ During the UN debate on the drafting of the Universal Declaration of Human Rights, Eleanor Roosevelt, its chief author, argued that the declaration should not mention minorities.¹⁰⁵

¹⁰² *Ibid.*, p. 96.

¹⁰³ Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*, New York: Harcourt Brace, 1955 cited in Krasner, 1999, *ibid.*, p. 96.

¹⁰⁴ *Ibid.*, p. 96.

¹⁰⁵ Jay A. Sigler, *Minority Rights: A Comparative Perspective*, Westport, Conn.: Greenwood Press, 1983, p., 67, 77 cited in *ibid.*, p.96.

In fact, the concept of minority rights almost faded away in the post-World War II world, although it was raised briefly in some specific circumstances— the South Tyrol in 1946 and 1969, Trieste in 1954 and 1974, Austria in 1955 and Cyprus in 1960. The Westphalian model was compromised in all of these cases.

Regionally, the Conference and later Organization for Security and Cooperation in Europe (CSCE and then OSCE) took various steps to protect minority rights. The CSCE, created at Helsinki in 1975 during the Cold War period, was initially an agreement between the former Soviet and the Western blocks in which the East obtained recognition from the West of the borders of Eastern Europe in return for a commitment to protect human rights in the Eastern block. It was stipulated in Principle VII of the Final Act of the Helsinki accord that persons belonging to minorities would be granted equal status before the law and would enjoy equal human rights. Yet there were no provisions for enforcement, as in many other international accords.

In the 1990s, the disintegration of the Soviet Union and the end of the Cold War brought new dimensions to international politics. Ethnic strife reemerged in many parts of the world and “ethnic cleansing” appeared to be a convenient tool to several rulers. Most alarming were the developments in the former Yugoslavia, in the very heart of Europe. At the height of ethnic cleansing in 1992 the General Assembly passed the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities. This was the first post-World War II convention for which minorities were the primary concern.

In fact, the rediscovery of minorities after the end of the Cold War highlighted the changes in the nature of power struggles and in the vested interests of the major powers. During the Cold War, no superpower was in a position to acknowledge minority rights within its own sphere of influence. The

disintegration of the Soviet Union was accompanied by the reemergence of old rivalries which had been controlled by the superpowers during the Cold War. Ethnic hostilities broke out not only in the former Yugoslavia but also in Rwanda, Nagorno Karabakh and other parts of the world. In the post-Cold War era, most of the major powers, including the sole superpower, the United States, now disoriented by Soviet threat, lost their political interest in intervening to restore stability in these areas. To mitigate ethnic strife, for both humanitarian and security reasons, they invoked international guarantees of minority rights as an alternative to the principle of autonomy, the vital principle of Westphalian philosophy. Krasner shows that the minority provisions associated with the recognition of Croatia and Slovenia, and Annex 6 of the Dayton accords, were examples of coercion. The would-be rulers of these new states would have preferred autonomy in the treatment of groups within their own territories but the major European powers insisted on minority protection as a condition of recognition.¹⁰⁶

As already suggested, before World War II the protection of human rights was predominantly a matter of domestic jurisdiction. Customary international law contained no limitations upon the freedom of the state to treat its own citizens in its own way at its own discretion. There existed very few treaty obligations in the field of human rights (slavery, minorities etc.) all of which were scattered and limited in scope.

In the post-World War II world rulers signed human rights accords under different circumstances. In most cases they did not endorse human rights conventions deliberately. Rather, they were driven by the idea that such arrangements were part of a 'cognitive script' that was considered as the normal behavior of a state at that time. In some other cases, they were driven by domestic politics. They wanted to make it certain that their commitments to the human rights of their subjects would not be

¹⁰⁶ *Ibid.*, p. 103.

abandoned by their successors. In some instances rulers might have seen participation as a strategy to uphold their prestige and expand their support bases in other countries. However, in actual practice, most of the states failed to protect human rights in their absolute sense.

However, the UN Charter, in its various clauses, emphasizes the promotion and protection of human rights. Articles 1(3), 2(7), 55 and 56 can be cited as examples. There are several other agreements that dignify human rights. The Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948 after three years of debate. In fact, most of the agreements lack enforcement and monitoring mechanisms. For example, the Universal Declaration of Human Rights, the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1981 Declaration on All Forms of Intolerance and Discrimination based on Religion or Belief, have no monitoring and enforcement provisions. In other cases, like those on slavery, the status of refugees, political rights of women, the prevention and punishment of the crime of genocide, disputes can be referred to the International Court of Justice (ICJ). It should be noted that only signatories of the ICJ can raise such disputes. Such referrals are contrary to the Westphalian philosophy since they pose challenges to governments by constituting the ICJ as an external source of authority. Certainly they will not violate international legal sovereignty, as the hearings of the ICJ can be conducted only after the contending states have agreed to its jurisdiction. However, to date, no human rights cases have been referred to the ICJ.¹⁰⁷

United Nations human rights accords, however, are consistent with international legal sovereignty since they are all conventions in which states/parties enter into voluntarily and in which the behavior of one party is not contingent on that of

¹⁰⁷ *Ibid.*, p.113.

others. Yet if the accord is associated with enforcement procedure, it may violate Westphalian sovereignty. The European human rights regime can be cited as an example in this regard. Although enforcement of the European Court of Human Rights depends on law enforcement agencies and courts of national states its decisions are binding on signatories. Here individuals and entities can also raise complaints against their own governments, which may influence policy changes within the respective states. By joining the regime, more than twenty European states have not only invited external authority structures into their domestic politics but have also sacrificed their Westphalian sovereignty in a crucial sense.

In many instances the world body and some states impose economic sanctions to protect human rights and to alter the relationships between rulers and ruled. Yet such measures violate both international legal sovereignty and Westphalian sovereignty because 'the target state is being coerced with regard to issues associated with its domestic political structures'.¹⁰⁸ The most prominent example perhaps, was collective sanctions against South Africa to force that country to end apartheid, endorsed by the United Nations for the first time in 1962. Between 1970 and 1990 the United States imposed sanctions against more than a dozen countries for what is considered to be human rights violations.¹⁰⁹ Most of the target states suffered because of the economic sanctions imposed on them, at least for some period of time, whether they eventually complied with the sanctions or not. Some avoided sanctions by adopting new policies.

¹⁰⁸ *Ibid.*, pp. 123-124.

¹⁰⁹ Gary C. Hufbauer, Jeffrey J. Schott, and Kimberly A. Elliot, *Economic Sanctions Reconsidered: History and Current Policy*, 2nd ed. Washington, D.C.: Institute for International Economics, 1990, cited in Krasner, 1999, *op. cit.*, p. 124.

Recent practice regarding human rights enforcement has been considered as one of the most controversial issues in which the traditional norms of sovereignty have been compromised. There are many conventions on human rights which are considered as inconsistent with the Westphalian sovereignty. Coercive measures, like economic sanctions to promote human rights, violate international legal sovereignty as well. Some observers, like Krasner, opine that Westphalian sovereignty has never been a foregone conclusion. Even most rulers in Western Europe, where the notion of Westphalian sovereignty originated, have never enjoyed full autonomy to exercise their power over their own subjects. The recent development of concepts of human rights has exacerbated the tension between domestic autonomy and international efforts to regulate relations between rulers and ruled.

Chapter III

LEGAL AND POLITICAL ASPECTS OF HUMANITARIAN INTERVENTION

There are few questions in the whole range of International Law more difficult than those connected with the legality of intervention....We can generally deduce the rules of International Law from the practice of states; but in this case it is impossible to do anything of the kind. Not only have different states acted on different principles, but the action of the same state at one time has been irreconcilable with its action at another. On this subject history speaks with a medley of discordant voices, and the facts of international intercourse give no clue to the rules of International Law.

- T J Lawrence, 1895

What Do We Mean by Humanitarian Intervention?

Like 'state sovereignty' the term 'humanitarian intervention' also "suffers from a lack of precision as to what the term embraces".¹¹⁰ The terms 'humanitarian' and 'intervention' are typically imbued with such a variety of nuances and differing interpretations that to join them together into a single concept almost inevitably produces ambiguity and perhaps even tension, especially since both words inherently carry a lot of emotional baggage.¹¹¹

The term 'humanitarianism', in international politics, is elusive and controversial. It may cover a broad range of activities, for example, from individual and government contributions to the welfare of flood-affected peoples or the assistance of international organizations to the war-torn societies. The most significant aspect is how authorities of

¹¹⁰ Simon Chesterman, *Just War or Just Peace? Humanitarian intervention and international law*, Oxford University Press, Oxford, 2001, p. 7.

¹¹¹ Stephen A. Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention*, Praeger Publishers, USA, 1999, p. 1.

different institutions explain their various policies on the basis of humanitarianism and how they appeal to their subjects/members to legitimize their actions within the framework of humanitarian motives. The recent uses of the term embrace not only moral causes but also on political purposes. Indeed, the mantra of 'humanitarianism' now seems to have assumed an almost equal standing with more traditional terms in foreign policy, such as 'the national interest' and 'legitimate self-defense' as standard coins of the realm.¹¹²

The term 'intervention', on the other hand, has come into use over the long course of international relations and also has been subject to a far reaching transformations in its meaning and actual practice. From the traditional theoretical perspectives of international relations, "intervention basically referred to the injection by one state of its military forces into the sovereign territory of another, either for determining the latter's political character or even, in the most extreme examples, for outright subjugation."¹¹³ From this perspective the idea of intervention is contrary to international law and has been "universally condemned as a practice by both customary and conventional norms".¹¹⁴ Yet in some instances, certain non-military practices of states and international institutions to involve themselves in the internal affairs of other states or institutions can be termed as interventions in the context of the current usage of the term. Very often the World Bank, the International Monetary Fund (IMF) and other donor agencies place conditions on loan applicant states, which require the fulfillment of donors' demands, such as the adjustment of their fiscal and monetary policies. The recipient countries frequently complain that the donors intervene in their internal economic affairs by imposing their conditions. The similar allegations have also been evident in the cultural arena. American cultural products, for example,

¹¹² *Ibid.*, p. 2.

¹¹³ *Ibid.*, p. 2.

¹¹⁴ *Ibid.*, p. 2.

particularly in the area of music and films, have penetrated virtually every society around the world and in some instances have raised alarms about 'cultural imperialism.'¹¹⁵

According to the customary principle of non-intervention, however, 'intervention' means forcible, dictatorial or otherwise coercive interference, in effect depriving the state intervened against of control over its affairs.¹¹⁶ From the legal point of view, other forms of interference in the affairs of another state do not constitute intervention. Even diplomatic and economic sanctions are generally not considered as intervention in the proper sense because they may be directed simply to pressure the target state, but as long as they do not have any coercive effect such sanctions do not constitute intervention. In the case of Nicaragua, for example, the International Court of Justice refused the assertion by Nicaragua that the United States boycott on trade and its freeze of economic aid to Nicaragua constituted 'intervention'.¹¹⁷ The European Union's embargos on the sale of weapons to Myanmar, Nigeria and Sudan; and African states' sanctions against Burundi and Liberia in 1996 can be cited as other examples of non-intervention. Indeed, "the threat or use of force is the classical form of intervention – whether in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities in another state."¹¹⁸ Yet even economic sanctions or political measures may in some cases amount to intervention, provided they have 'coercive

¹¹⁵ *Ibid.*, p. 2.

¹¹⁶ Jennings and Watts, *Oppenheim's International Law*, 9th ed., Vol.1, 1992, pp.430ff cited in DUPI Report, *op. cit.*, p. 46.

¹¹⁷ *Military and Paramilitary Activities Case*, ICJ Reports 1986, para 245 cited in the DUPI Report, *op. cit.*, p. 47.

¹¹⁸ See, the International Court of Justice in the *Military and Paramilitary Activities Case*, ICJ Reports 1986, para 191, cited in the DUPI Report, *op. cit.*, p. 46.

effect'.¹¹⁹ In the case of Nicaragua, "the International Court of Justice held that the supply of funds by the United States to violent opposition forces in Nicaragua, while not a threat or use of force, constituted intervention in the internal affairs of Nicaragua."¹²⁰

From the United Nations (UN) perspective 'intervention' must be understood in a broader sense as regards Article 2(7) of the UN Charter:

The practice of the organs of the UN is not clear as regards the scope of the notion of intervention. When the UN rejects an invocation of Article 2(7) by a state, it is most often left open, whether this is based on the opinion that the interference is not intervention or that the intervention is bearing on matters which are not considered "essentially within the jurisdiction of the state". But in cases where Article 2(7) has been invoked, states concerned argued that "intervention" includes all actions of interference, including discussions and resolutions on the situation in a state.¹²¹

Emergency assistance for humanitarian purposes conducted by the organs of the United Nations is, presumably, not intervention, provided it meets the same standards as are applicable to humanitarian assistance offered by states; that is, the assistance must serve the purposes hallowed by the International Red Cross and be offered to all in need without discrimination.¹²²

The notions of 'humanitarianism' and 'intervention' are exclusive in nature and they are broad and protean in world

¹¹⁹ See, Jennings and Watts, *op. cit.*, p.434; Beyerlin, "Prohibition of Intervention" in Wolfrum (ed.), *United Nations: Law, Policies and Practices*, Vol.2, 1995, p.806 cited in the DUPI Report, *ibid.*, p. 46.

¹²⁰ *Military and Paramilitary Activities Case*, ICJ Reports 1986, paras, 228 and 241 respectively cited in the DUPI Report, *ibid.*, p. 47.

¹²¹ See, Ermacora on Article 2(7) in Simma (ed.), *The Charter of the United Nations*, 1995, p. 148; Brownlie, *Principles of Public International Law*, 1998, p.296 cited in the DUPI Report, *ibid.*, p. 48.

¹²² DUPI Report, *ibid.*, p.48.

affairs. Yet for our analytical purpose we have to operationalize the notion of 'humanitarian intervention' in such a way so that we can compose a distinct phenomenon in the field of international relations and which will help us to assess our focused area. For this purpose humanitarian intervention is defined here as coercive action by one or more outside states, involving the use of armed forces, into the affairs of another state, without the consent of its government, and with or without authorization from the United Nations Security Council (post-World War II cases) with the principal objective alleviating grave human suffering or preventing gross violation of international humanitarian law.

It should be noted that humanitarian intervention is inherently political in nature. It is not the outcome of any natural catastrophe. It may be the consequence of the systemic abuse of basic human rights by a 'cruel and repressive regime' or of a general breakdown of central government authority in a country, leading to anarchical conditions that in themselves threatens basic human rights.

It should be noted that humanitarian intervention does not equate with the traditional peacekeeping conducted under the auspices of the United Nations, as it is associated with a lack of consent by at least one of the parties to the dispute and use of force by the outside power, authorized under Chapter VII of the Charter in the case of the United Nations. "Peacekeeping inherently involves an effort to maintain the status quo or at least the status quo as it has now come to be after a previous period of instability. Humanitarian intervention, by contrast, is an attempt to shape and define a new order within the affected country that will end the abuses occasioned by the old order."¹²³

¹²³ Stephen A. Garrett, *op. cit.*, p. 4.

Theoretical Perspectives of Humanitarian Intervention

For many centuries, particularly after the adoption of the Treaty of Westphalia and the consequent emergence of the modern European state system, the principle of non-intervention was generally considered to be sacrosanct. Even in the recent past, most states tended to emphasize the inviolability of sovereignty and the principle that states should not intervene in the internal affairs of other states. However, after the disintegration of the Soviet Union and the end of the Cold War, the situation has changed rapidly and the world has been witnessing a significant number of 'interventions' in many areas. While advocates of both 'intervention' and 'non-intervention' have frequently equivocated, what they have been debating about is the legitimacy of humanitarian intervention.

In the study of international relations there are two dominating theoretical perspectives on humanitarian intervention, liberal interdependence and realism.

Liberal Interdependence

Advocates of this perspective hold that the world has become more interdependent because of rapid technological development, which increases communication flows, reduces the costs of transportation and makes the world smaller. Global transactions and trade ratios have increased significantly and investors are not confined within their own state boundaries. At the present time, states have become so interdependent that economic development in one country has spill-over effects in other countries and *vice versa*. Even environmental degradation in one region can easily cross borders and affect other regions. The effects of global warming or ozone layer depletion can not be restrained to any specific region. Technological changes have also influenced the behavioral pattern of state authorities by enhancing their power and legitimacy compared to the old national states. In the same way they have affected individuals'

understanding and pursuit of their interests and transformed their basic preferences.

Technological development has altered the whole international security dimension in many ways. Even the latest technologies, including nuclear weapons, cannot ensure the security of the states, although they may be effective in deterring attacks. Because of technological diffusion, it is now very easy for relatively weak states and even for terrorists to acquire weapons of mass destruction. The 9/11 incident can be cited as an example in this regard.

Advocates of liberal interdependence also suggest that technological changes have transformed the interests and basic preferences of individuals. The notion of universal human rights is becoming accepted and 'democracy is viewed as the only legitimate form of government.'¹²⁴ Media are playing very significant role in structuring public opinion and setting political agendas. During the recent Iraq war it was very evident how media were used to divert attention and change public perception.

Liberal analysts maintain that the implication of interdependency is that in the new world order intervention will become more common and more legitimate. Recent developments in the nature of the international system show that the fundamental distinction between domestic and international politics has been eroded. In sum, an analysis based on a liberal interdependence perspective concludes that the nature of the international system has been transformed in ways that make interventions more frequent and more legitimate.¹²⁵

¹²⁴ Francis Fukuyama, *The End of History and the Last Man*, New York: Free Press, 1992 cited in Stephen D. Krasner, *op. cit.*, p. 230.

¹²⁵ *Ibid.*, p. 231.

Realism

Advocates of realism contend that the international system is anarchical and that the stability of the system depends on the distribution of power among states. They also maintain that change in the system occurs only when there is an alteration in the distribution of power among the units of the system. From the realist perspective states are the units of the system and every state has its own capacity to formulate its own domestic and foreign policies without outside interference.

The basic assumption of realism is that all states can be treated as equal sovereign states. When there is an intervention the basic tenet of realism faces trouble because the rulers of the target state cannot make their decisions independently; intervention prevents or forces to compromises in the independent decision-making ability of the target state.

Realism asserts that as the international system is anarchical and no universal political authority exists states certainly have the right of self-help. Yet self-help is logically contradictory to the norm of non-intervention. Self-help implies that each state can do anything it chooses, noninterference implies that there are some things that a state should not do.¹²⁶ Krasner opines that realist analysis has been able to slide past this contradiction between self-help and the assumption of autonomy because it has usually focused on major powers and issues of security but it is impossible to avoid confronting this inconsistency when dealing with questions of intervention and when there is a contradiction between self-help and non-interference, self-help prevails.¹²⁷

¹²⁶ Stanley Hoffmann, "The Problem of Intervention," in Hedley Bull, ed., *Intervention in World Politics*, Oxford: Clarendon, 1984.

¹²⁷ Krasner, 'Sovereignty and Intervention: in Gene M. Lyons and Michael Mastanduno (eds.), op ct., p. 232. 232.

Realism also holds that when there is a high asymmetry of power among states the probability of intervention increases. In a bipolar system there is equilibrium in the distribution of power and intervention is less likely but in a multipolar system, intervention is less likely unless all of the major powers are in agreement. In fact, the bipolar or multipolar system cannot prevent intervention if powerful states are driven by other considerations, for example, if they have commitments to any specific political agenda. Asymmetrical capabilities are a necessary condition for intervention, but not a sufficient one.¹²⁸

Krasner shows that "neither of which [liberal interdependence and realism] offers a fully satisfactory explanation for the phenomenon of intervention."¹²⁹ Liberalism emphasizes changes in technology, actors and values and their consequent transformation of the international system but it fails to explain the absence of change in the frequency of intervention. Over time, there has been no consistent relationship between technological change and intervention.¹³⁰ Realism, on the other hand, emphasizes the distribution of power among states and holds that power asymmetry increases the chances of intervention. Yet it fails to provide an adequate explanation for intervention, because intervention in the internal affairs of another state violates one of the basic analytic assumptions of realism: namely, the assumption that all states are capable of autonomously determining their own policies.¹³¹ In spite of some inherent shortcomings, both liberal interdependence and realism provide us with insightful explanations for the pattern of intervention.

¹²⁸ *Ibid.*, p. 233.

¹²⁹ *Ibid.*, p. 228.

¹³⁰ *Ibid.*, p. 229.

¹³¹ *Ibid.*, p. 229.

Humanitarian Intervention as a Practice in the International Arena

From the historical perspective, it is difficult to find instances in which a state or group of states has intervened in the affairs of another entirely on the grounds of humanitarian concern. When states or organizations decide to intervene in the internal affairs of other states, the authorities may be driven by mixed motives, but it does not mean that they always have no more than their own self-interest in mind. Sometimes their self-interest is supplemented, at least to some extent, by genuinely altruistic goals. Although it is difficult to find 'pure' examples of humanitarian intervention, it is not impossible to identify various historical episodes in which some sort of humanitarian concern has been evident in interventions conducted by outside powers into a sovereign state or entity.

It should be noted that many writers, on various occasions, seem confused about humanitarian intervention. Sometimes the most blatant, naked aggression has been painted as 'humanitarian intervention'. In the nineteenth century efforts by the European powers to protect Christians or to curb supposed abuses within the Ottoman Empire provide some examples of this process. The joint intervention of Great Britain, France and Russia on the side of the Greek insurgents in their struggle for independence against Turkish rule in 1827 is frequently cited as an example of 'pure' humanitarian intervention. In the words of one authority, the object of this action was "to prevent the complete subjugation of the Greek people ... and to protect [their] rights of self-determination."¹³² The fact that "Greece was considered an integral part of the Western cultural tradition presumably played an important role as well."¹³³ Ian Brownlie dismisses characterization of the action as an instance of

¹³² Ellery Stowell, *Intervention in International Law*, Washington, DC: John Byrne and Co., 1921, pp. 126-27..

¹³³ Stephen A. Garrett, *op. cit.*, p. 10.

humanitarian intervention as 'ex post factoism', stating that the governments of the day did not refer to a legal justification for intervention and that jurists and historians have ascribed numerous motives to the action.¹³⁴

In the early 1850s Russia intervened to protect the rights of oppressed Orthodox Christians from Turkish outrages within the Ottoman Empire. In this case, however, the unilateral character of the Russian action led eventually to the Crimean War, in which France and Britain actually allied themselves with the Sultan to maintain the balance of power in southern Europe.¹³⁵

In another instance in June and July 1860, thousands of Maronite Christians were killed by Druzes and Muslims on Mount Lebanon and in Damascus, then part of Greater Syria but within the Ottoman Empire.¹³⁶ To protect them, a French contingent was deployed in Lebanon by agreement of all the major powers including Austria, Great Britain, Prussia, Russia and Turkey. A convention was signed on 5 September and it was decided that French troops would leave after a period of six months. This was later extended until 5 June 1861. The French also received the reluctant endorsement of the Sublime Porte, thus placing this episode in a special category as far as humanitarian intervention is concerned.¹³⁷

The American intervention in Cuba in 1898 is considered one of the better-known instances of unilateral humanitarian intervention in pre-Charter state practice. It was reported that the Spanish military authorities had been engaged in a ruthless suppression of the Cuban independence movement that commenced in 1895. In order to identify revolutionaries the Spanish authority followed the policy of forcing the disaffected

¹³⁴ Quoted from Simon Chesterman, *op. cit.*, p. 30.

¹³⁵ Stephen A. Garrett, *op. cit.*, p. 10.

¹³⁶ Simon Chesterman, *op. cit.*, p. 32.

¹³⁷ Ellery Stowell, *op. cit.*, pp. 63-65 cited in Stephen A. Garrett, *op. cit.*, p. 10.

population into concentration camps which caused genuine anger in America. It was estimated that some 200,000 Cubans died in these camps.¹³⁸ In his special message to Congress of 11 April 1898, President McKinley outlined four justifications for US intervention in the conflict: 'the cause of humanity', protection of US citizens and their property in Cuba, protection of US commercial interests, and self-defence.¹³⁹ Although the stated goals of US intervention were to guarantee Cuban independence and compel Spain to relinquish its authority over the island,¹⁴⁰ subsequent writers, like Jean-Pierre Fonteyne, who cites six instances of humanitarian intervention in the period, excludes the intervention in Cuba as lacking a clearly humanitarian motive.¹⁴¹ Theodore Salisbury Woolsey, writing at the time of the Spanish American War, noted that 'it is not on the score of humanity alone ... that the President justifies intervention', but that American interests were 'deeply involved' to the point where the action might be properly regarded as self-defence.¹⁴²

In the nineteenth century there were many instances of intervention in the strict sense but most of the instances in which humanitarian motives were asserted can be dismissed as opportunistic or optimistic interpretations of the doctrine.¹⁴³ The five-power naval blockade of Antwerp in 1830 in support of the Belgian drive for independence from the Kingdom of the Netherlands can be cited as an example. This had the effect of

¹³⁸ Robert H. Ferrell, *American Diplomacy: A History*, 3rd ed.; New York: Norton, 1975, pp. 135, 350.

¹³⁹ President McKinley, Special Message to Congress, 11 April 1898..

¹⁴⁰ Simon Chesterman, *op. cit.*, p. 35.

¹⁴¹ Jean-Pierre L. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter' (1974)4 *California Western International Law Journal*, Vol. 203, pp. 132, 206.

¹⁴² Theodore Salisbury Woolsey, *America's Foreign Policy*, New York: Century, 1898 pp. 147, 76

¹⁴³ Simon Chesterman, *op. cit.*, p. 26.

securing the claim of the Belgians to self-determination.¹⁴⁴ In 1877-78 Russia intervened in the Balkans to protect the Christian populations of Bosnia, Herzegovina, and Bulgaria from atrocities committed by Turkish troops (popularly known as the 'Bulgarian horrors') and to give support to the revolutionary movements in that region. This ultimately led to independence for the Bulgarians and autonomy for Bosnia-Herzegovina. Sanctioned by Austria, Prussia, France, and Italy, the Russian move was described as being motivated by religious sentiment and elementary considerations of humanity.¹⁴⁵ Yet Russia was also motivated by its desire to acquire new territory in the region and had signed a secret agreement with Austria to this effect.¹⁴⁶ Most authorities agree that the action, though "based in theory upon religious sympathy and upon humanity ... was a move, in fact, upon the Straits and Constantinople in pursuance of Russia's century-long program".¹⁴⁷

In the pre-Charter era there are various others cases of humanitarian intervention that are often discussed, including the 1913 invasion of Macedonia by Bulgaria, Greece and Serbia. The intervention was a consequence of traditional power politics rather than a desire to protect the Macedonian Christians. In 1900, during the "Boxer Rebellion" in China, the intervention of the United States and Great Britain was justified at the time as an instance of the protection of nationals and property, but it also had the aim of ensuring that China remained 'open' to Western trade.¹⁴⁸ The Japanese invasion of Manchuria in 1931 and Hitler's demand in 1938 that the Sudetan area of Czechoslovakia be given over to Germany are other notable examples of efforts

¹⁴⁴ Stephen A. Garrett, *op. cit.*, p. 11.

¹⁴⁵ Thomas Frank and Nigel Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Force," *American Journal of International Law* 67, 1973, pp.281-83 cited in Stephen A. Garrett, *op. cit.*, p. 10.

¹⁴⁶ Simon Chesterman, *op. cit.*, p. 27.

¹⁴⁷ *Ibid.*, p. 27.

¹⁴⁸ *Ibid.* p. 27.

to paint an exercise in naked aggression as a humanitarian enterprise. Japan characterized its action to the League of Nations as an acceptance of its duty to 'stabilize' the disorder then existing in Manchuria. The Japanese action was, in fact, the initial step in a project to bring the whole of China under its control. In the same way, the German action was intended to effectively destroy Czechoslovakia as an independent entity and to gradually open the whole Danube valley to Nazi domination.

Tesón concludes his brief survey of pre-Charter practice by stating that the most important precedent for a right of humanitarian intervention is the World War II itself. The Allies, he argues, fought Fascism not *just* because Hitler and Mussolini engaged in military aggression, but to defend "dignity, reason, human rights, and decency ... against degradation, authoritarianism, irrationality, and obscurantism".¹⁴⁹ Although it may be argued that humanitarian concerns played a part in the Allied involvement in the war, they were nevertheless subsidiary to more traditional motives such as self-defence.¹⁵⁰

There is another important case of intervention that deserves attention mainly because it was indeed based, at least partly, on the advancement of certain principles or norms. In the nineteenth century Great Britain, the dominant maritime power, played a significant role in the abolition of the international slave trade. At that time, the British government was facing a powerful domestic anti-slavery movement. Britain used its naval supremacy to halt the transportation of slaves from African countries. Britain put pressure on Portugal and Brazil to bring to an end of slave trafficking. Yet Britain failed to obtain Portugal's consent to sign a treaty outlawing all slave traffic. In 1839 Britain authorized its navy to unilaterally board and seize

¹⁴⁹ Tesón, Fernando R, *Humanitarian Intervention: An Inquiry into Law and Morality*, Dobbs ferry, NY: Transnational, 1988, pp. 178-79, cited in Simon Chesterman, *op. cit.*, p. 28.

¹⁵⁰ *Ibid.*, p. 28.

suspected slavers that were flying the Portuguese flag. Following its independence in 1822, although Brazil had agreed to end importing slaves from Africa, the human traffic to this South American nation increased significantly in subsequent years. In 1850 British ships entered Brazilian ports in order to seize and burn the suspected slave trafficking vessels. After facing serious pressure Brazil passed and enforced laws designed to end the slave trade. It is germane to observe that there seemed little pragmatic benefit accruing to Britain out of her actions, especially in the economic sense, since many British plantations in the Caribbean had been heavily dependent on slave labor.¹⁵¹

Humanitarian Intervention During the Cold War

With the end of the World War II and the consequent establishment of the United Nations, the responsibility for the maintenance of international peace and security was placed, according to UN Charter, on the Security Council. Yet the ideological differences and global confrontation between the two superpowers very soon paralyzed the world body and eroded the possibility of new world security system as envisioned in the UN Charter. The right of veto of the permanent members and the Cold War rivalry paralyzed the UN security system and left little room for collective humanitarian intervention. No country wanted to risk a third world war by embarking on humanitarian intervention. Even the superpowers were rarely willing to disturb the existing global political order by intervening militarily for the sake of human rights protection without UN authorization. Most Third World countries considered the notion of outside intervention in internal affairs, without the consent of the target state, as a relic of neo-colonial thinking. This strong rhetoric of anti-colonialism in the General Assembly helps explain why it was not politically possible to designate human rights violations and genocide in black sub-Saharan Africa as

¹⁵¹ See, Stephen A. Garrett, *op. cit.*, p. 13.

threats 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.¹⁵²

During the Cold War although there has not been notable instances of large scale humanitarian interventions, some interventions were claimed to be based on humanitarian motives. One of the most-cited is the Indian intervention in the then East Pakistan (now Bangladesh) in 1971, apparently to end the atrocities being inflicted on the Bengali (East Pakistani) people by Pakistani rulers and to give support to the right of self-determination of the Bengalis. During the UN debate over the Indian intervention into East Pakistan, the Indian Ambassador at the UN defended the *bona fides* behind his country's action: "We have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering."¹⁵³ It is indeed true that because of Pakistani atrocities, hundreds of thousand Bengalis crossed the border and took refuge in Indian territory and Indians also extended their cooperation to the Bengalis. Yet there is reason to doubt whether Indian intervention was based on "purest of motives and purest of intentions". Before the independence of Bangladesh, India had been suffering from security problem vis-à-vis Pakistan, which it bordered in the east and in the west. It was India's long term security strategy to divide Pakistan. New Delhi cleverly utilized the independence movement of Bangladesh to reach its goal.

The Soviet suppression of the Hungarian 'rebellion' in 1956 is another example of so-called humanitarian intervention. The efforts of the Hungarian people to throw off the yoke of Soviet domination and to remove the oppressive rule of the Hungarian

¹⁵² DUPI Report, *op. cit.*, p. 35.

¹⁵³ Thomas Frank and Nigel Rodley, *op. cit.*, p. 276 cited in Stephen A. Garrett, *op. cit.*, p. 15.

Communist regime resulted in a Soviet intervention that eventually led to some 30,000 Hungarian casualties and to the exodus of another 60,000 Hungarians to seek refuge in the United States alone.¹⁵⁴ Yet Soviet representatives at the United Nations justified their action as an exalted attempt at "helping to put an end to the counter-revolutionary intervention and riots" which had occurred as a result of a foreign plot "to stab the Hungarian people in the back."¹⁵⁵ In 1968 the Soviet Union again intervened into Czechoslovakia to crush the reformist government of Alexander Dubcek. Its objective was to preserve Soviet domination of Eastern Europe. Yet again it explained its intervention in the same way: "enemies were ... shaking the foundations of law and order and ... trampling laws underfoot ... preparing to seize power" and under the circumstances, there was a need for fraternal forces "to clean up the atmosphere ... and to create the necessary calm and serenity to allow the Czechoslovak people to put order in their home."¹⁵⁶ Both these Soviet actions were designed to maintain the cohesion of Moscow's East European security system and to prevent any spillover of 'unhealthy' liberal bourgeois thinking into the Soviet Union itself.¹⁵⁷

American interventions in the Dominican Republic in 1965, Vietnam throughout the 1960s and Grenada in 1982 also exemplify the gap between the stated purpose and actual motives. In the first two interventions the stated goals were "to secure the safety and freedom of a country under assault by totalitarian forces" and in third instance to "rescue American nationals from imminent harm more than securing a better life for the Grenadian people."¹⁵⁸ The Johnson administration's decision to intervene into the Dominican Republic was guided

¹⁵⁴ Stephen A. Garrett, *ibid.*, p. 16.

¹⁵⁵ United Nations SCOR, 746th Meeting 27 (1956) cited in *ibid.*, p. 16.

¹⁵⁶ Thomas Frank and Nigel Rodley, *op. cit.*, p.276 cited in *ibid.*, p. 16.

¹⁵⁷ *Ibid.*, p. 16.

¹⁵⁸ *Ibid.*, p. 17.

by 'a fear of a domino effect in the Caribbean'.¹⁵⁹ The Soviet Union did not want to take any risk by allowing the establishment of a leftist regime in Santo Domingo, the consequence of which might be considered as potentially disastrous in the whole region. As Vincent notes, "The American nations can not, must not, and will not permit the establishment of another Communist government in the Western Hemisphere."¹⁶⁰ The American role in Vietnam suggests that even though there may have been some genuine concern for the future of the South Vietnamese people, Washington's overwhelming emphasis was to counter the perceived threat of Chinese expansion, to minimize the encouragement that a Communist victory in Vietnam could give to others contemplating wars of national liberation, and, finally, the overall military-strategic calculations about defending the Western presence in Southeast Asia and the Western Pacific more generally.¹⁶¹ In December 1989, the United States undertook Operation Just Cause against Panamanian dictator Manuel Noriega, "the supposed rationale once again being Noriega's subversion of Panamanian democracy as well as his use of a private army of thugs against his political opponents".¹⁶²

There are other cases that deserve at least some attention. In 1987 India decided to airdrop relief supplies to the Tamil population in northern Sri Lanka, where the Tamils were suffering from the effects of a civil war. The Indian government justified the intervention on the grounds that the government in Colombo had remained indifferent to the sufferings of the Tamil population. The Tanzanian intervention in Uganda in 1979 and the Vietnamese invasion of Cambodia in the same year are two other examples. Tanzania intervened in order to topple the

¹⁵⁹ *Ibid.*, p. 17.

¹⁶⁰ R. J. Vincent, *Nonintervention and International Order*, Princeton, NJ: Princeton University Press, 1974, pp. 202-3.

¹⁶¹ Stephen A. Garrett, *op.cit.*, p. 18.

¹⁶² *Ibid.*, p. 15.

regime of Idi Amin and Vietnamese invasion had the effect of ending the brutal rule of the Khmer Rouge. The French decision to send troops to the so-called Central African Empire to topple the bloody regime of Emperor Jean Bedel Bokassa in 1979 is also referred to as a humanitarian intervention.¹⁶³

During the Cold War the almost complete absence of 'pure' humanitarian interventions was, therefore, due to the ideological, political and to some extent moral polarization among the major powers of the world. There are numerous instances of 'bogus' intervention and in almost all cases states have tended to legitimize their intervention by stressing its humanitarian features.

Humanitarian Intervention after the Cold War

The ending of the Cold War has made humanitarian intervention politically more feasible as the ideological rivalry and the polarization of the world transformed itself into non-competition and to some extent cooperation between the United States and Russia. In the post-Cold War era, proxy wars and competition to get support from the Third World countries became almost non-existent. Yet in many cases, Third World regimes without their patron support, have become vulnerable and the consequent civil wars have propelled many weak states along the slippery road to failed states. At the same time, many old and historic disputes reemerged and regained their importance. There are some positive aspects as well. Most governments have accepted, rhetorically at least, the norms and principles related to universal human rights in order to become eligible for international assistance. Medias are also playing very significant role and it is now quite impossible to hide flagrant violations of human rights from the sight of people throughout the world.

¹⁶³ *Ibid.*, p. 14.

The ending of the Cold War also witnessed a tendency of the UN Security Council towards further widening of the notion of a 'threat to the peace'. Recent practices of the Security Council reveal that civil wars or internal conflicts, violations of human rights and international humanitarian law and even lack of democratic practice that may lead to serious human catastrophes can be regarded as threats to international peace. It is of utmost importance that authorization for humanitarian intervention is an innovative idea of the Security Council in the 1990s.

Since the beginning of the 1990s there has been an increasing number of instances of internal conflicts that threaten international peace and security. This has given rise to massive UN involvement on humanitarian grounds, mostly under the name of peacekeeping operations. Between its inception and 1 September, 2002, the UN conducted altogether 55 peacekeeping operations. At that time it was carrying out 15 peacekeeping operations throughout the world.¹⁶⁴ The principal cases where the UN Security Council has dealt with civil wars and humanitarian emergencies have been Iraq, the former Federal Republic of Yugoslavia, Liberia, Somalia, Haiti, Angola, Rwanda, Zaire, Albania, the Central African Republic, Kosovo and East Timor. It is not possible to elaborate all these cases within the limits of this paper. We will, however, highlight some cases that deserve attention and contribute to our understanding of the nature of post-Cold War humanitarian intervention.

The Iraqi invasion of Kuwait in 1990 and the subsequent UN actions in Northern Iraq to protect the Kurds from Saddam Hussein's repression represents the turning point of post-Cold War humanitarian intervention. In 1990 Iraq invaded and occupied Kuwait. The international community responded to the invasion on the basis of Security Council Resolution 678. After its crushing defeat, Iraq agreed upon conditions for a ceasefire under Security Council resolution 687, 1991. President George

¹⁶⁴ www.un.org accessed on 01.01.2003.

Bush, during the 1991 military campaign against Iraq, publicly expressed his hope that Iraqi citizens would 'take matters into their own hands' and remove Saddam Hussein from power.¹⁶⁵ The defeat of the Iraqi army and the support of foreign powers reignited the Kurds' dream of having their own land. In the wake of their humiliation in the war against the U.S. and its allies, Iraqi troops turned on the rebellious Kurds, who had supported the U.S.-led coalition forces, and forced more than two million civilians to flee to Turkey and Iran. The Security Council condemned the repression of civilians by adopting Resolution 688 and considering the repression and its international consequences a threat to international peace and security. The US issued a warning to Iraq on the basis of this resolution that any military activity north of the 36th parallel would be met with force. Allied troops remained in Iraq until 15 July as part of Operation Provide Comfort and the military exclusion zone later became the northern no-fly zone, extended in August 1992 to apply to Iraqi territory south of the 32nd parallel.¹⁶⁶ Under the provisions of the Resolution 688 'safe havens' were established in Northern Iraq. The protection of these 'safe havens' was entrusted to U.S., U.K. and French forces. The Iraqi regime condemned the resolution as a blatant intervention in its internal affairs and as a direct violation of the principle of sovereignty. The intervention in Northern Iraq was also discussed in the UN General Assembly and many states protested against it as a violation of sovereignty of Iraq.

The case of the former Yugoslavia (1991-93) provides an even more striking example of internal armed conflict constituting a threat to international peace and security. The problem arose between June and October 1991, when four of the six republics comprising Yugoslavia declared their

¹⁶⁵ 'Remarks to the American Association for the Advancement of Science', 15 Feb 1991, in [1991] *Bush Papers* 145, cited in Simon Chesterman, *op. cit.*, p. 196.

¹⁶⁶ *Ibid.*, p. 131.

independence. War broke out almost immediately after Croatia and Slovenia first made unilateral declarations on 25 June 1991, in the wake of internal referenda. Bosnia and Herzegovina proclaimed their sovereignty by assembly vote on 15 October 1991. Bosnia and Herzegovina conducted a referendum and proclaimed their formal independence on 3 March 1992. On 22 May 1992 Croatia, Slovenia, and Bosnia and Herzegovina obtained admission as member states of the United Nations. In the meantime the UN Security Council adopted Resolution 743 on 21 February 1992 which helped to set up the United Nations Protection Force (UNPROFOR). According to the resolution the force was necessary 'to create the conditions of peace and security required for the negotiation of an overall settlement' of the Yugoslav war. In Resolution 757 (1992) the Security Council determined that the situation, notably in Bosnia, constituted a threat to international peace and security. It imposed comprehensive economic sanctions against Serbia and Montenegro under Chapter VII of the UN Charter. In Resolution 770 (1992), the Security Council called upon "states to take nationally or through regional agencies all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina.¹⁶⁷ The resolution was a clear authorization for NATO to take all necessary measures, although NATO did not intervene in a significant way until more than two years later, when it attacked the Bosnian Serbs and forced them to surrender. By Resolution 827 (1993) the Security Council, under Chapter VII, established an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia.¹⁶⁸ This is the first case ever where the UN Security Council considered serious violations of international humanitarian law a threat to international peace and security and authorized a humanitarian intervention.

¹⁶⁷ DUPI Report, *op. cit.*, p. 65.

¹⁶⁸ *Ibid.*

The UN operation in Somalia is widely considered another classic example of humanitarian intervention. The ousting of President Siad Barre, who ruled Somalia for 21 years, in 1991 and the subsequent power vacuum, led Somalia into clan-based civil war. The UN Security Council expressed its concern at the deteriorating internal conflicts in Somalia in its Resolution 733 (1992). In its landmark Resolution 794 (1992), the Security Council took its boldest stand so far when determining, without reference to cross-frontier implications, that the humanitarian disaster in Somalia brought about by civil war, disorder and widespread violations of international humanitarian law in itself constituted a threat to international peace.¹⁶⁹ Under the provisions of the resolution the U.S.-led United Task force (UNITAF) under the code name 'Operation Restore Hope' conducted operations in Somalia on 9 December 1992. The UNITAF forces, which characterized the operation as 'humanitarian war', were subsequently engaged in several military encounters with the forces of Somali clan leader General Farah Aideed. On 4 May 1993, the United States formally turned over the operation to an expanded UNOSOM (UN Operation in Somalia) (UNOSOM II), but this was unable to fulfill the expanded mandate, which included 'nation-building' projects such as disarming the factions and arresting faction leaders such as General Aideed.¹⁷⁰ On 5 June twenty four Pakistani soldiers were killed while they were inspecting weapons dumps, under the authorization of Resolution 814 (1993). On 3 October three US Black Hawk helicopters were downed and eighteen American died when US Rangers and Delta commandos made an unsuccessful attempt to capture Aideed in the 'Olympic Hotel battle'. Due to mounting domestic pressure the U.S. withdrew its forces in March 1994. The Security Council voted gradually to withdraw UNOSOM and the UN, in the end failed to register any progress in Somalia.

¹⁶⁹ *Ibid.*, p.66.

¹⁷⁰ Simon Chesterman, *op. cit.*, p. 143.

Operation Restore Democracy in Haiti (1993-94) represents one of the most controversial actions of the UN Security Council under Chapter VII. This was the first occasion in which the Security Council considered the violation of democratic principles a threat to international peace and security and authorized the use of force in support of democracy. In 1990 Aristide was elected President in Haiti's first democratic election. Subsequently, in September 1991 he was forced into exile by a military coup. In 1993 the UN imposed an economic embargo under Chapter VII. This, however, proved unsuccessful in forcing the military regime to step down. In 1994 the Security Council, acting under Chapter VII, passed Resolution 940 (1994), which authorized a multinational force to use "all necessary means to facilitate the departure from Haiti of the leadership ... the prompt return of the legitimately elected President."¹⁷¹ Finally, former US President Jimmy Carter negotiated an agreement with the military regime of Haiti and a violent invasion was avoided. Over 17,000 U.S. troops were deployed in Haiti by the end of September and on 15 October 1994, Aristide returned to Port-au-Prince.

The Kosovo case in 1998 demonstrates how UN Security Council decision-making has been influenced by the use of veto of permanent members. In 1998 a violent internal conflict occurred between Serbian government military and police forces and the Kosovo Liberation Army (the UCK) in the province of Kosovo in the Federal Republic of Yugoslavia (FRY). In Resolution 1160 and 1199 (1998), the Security Council determined that the humanitarian catastrophe in Kosovo constituted a threat to international peace and security, and, acting under Chapter VII, imposed an arms embargo on Yugoslavia. In Resolution 1199 the Security Council stated that it was, "deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the

¹⁷¹ *Ibid.*, p. 155.

impending humanitarian catastrophe (...) and emphasizing the need to prevent this from happening.”¹⁷² Yet a Security Council authorization for military intervention was not given due to the stated intentions of Russia and China to block such a decision by veto.¹⁷³ Then NATO, without the authorization of the UN Security Council, initiated a military operation in March 1999 to put an end to the atrocities in Kosovo. In June 1999, after the NATO military operation, Belgrade agreed to sign the agreement with the G8 regarding the autonomy of Kosovo and an international military presence in the province. In Resolution 1244 (1999) the Security Council welcomed the agreement and, in accordance with its terms, it authorized, under Chapter VII, an international security presence in Kosovo.

The 9/11 terrorist attacks on the World Trade Center and the Pentagon triggered a lively debate on the role of the United Nations and legal consequences of these events. The Security Council passed Resolutions 1368 (2001) and 1373 (2001), which considered acts of terrorism as threats to international peace and security. It is worth noting that this is not the first time that acts of terrorism have been defined as threats to international peace and security as set out in paragraph 3 of the preamble to Security Council Resolution 1373 (2001). Security Council Resolution 731 (1992) demonstrates a similar reference, addressing the consequences of the attacks carried out against Pan American flight 103 and Union des Transports Aériens flight 772.¹⁷⁴ Yet the subsequent US war against Afghanistan remains controversial from the legal point of view, as a significant number of arguments lend support to the claim that Resolution 1368 (2001) and Resolution 1373 (2001) cannot be interpreted

¹⁷² DUPI Report, *op. cit.*, p. 67.

¹⁷³ *Ibid.*, p. 92.

¹⁷⁴ See, Carsten Stahn, ‘Security Council Resolutions 1368(2001) and 1373(2001); “What They Say and What They Do Not Say,” *European Journal of International Law*, www.ejil.org/forum_WTC/ny-stahn.html, and sources there cited, accessed on 10.04.2004.

as UN Security Council authorization of the military action against Kabul.¹⁷⁵

State practice after the end of the Cold War concerning humanitarian intervention reflects a dynamic change, particularly in the notion of 'international peace', from a traditional negative notion of peace, meaning the absence of war between states, to a wider notion of 'positive peace', meaning stability and order in the world. Now there is a tendency to widen considerably the traditional notion of a 'threat to peace' under Chapter VII as well. In several cases, the Security Council has considered civil war and violations of international humanitarian law by the state authority threats to international peace and security. In the case of Haiti, it even considered an irregular overthrow of a democratically elected government a threat to international peace and security. The Kosovo case illustrates that states or regional organizations even tend to undertake humanitarian intervention without the authorization from the Security Council if they consider the situation a threat to regional stability and international peace. In the cases of former Yugoslavia and Rwanda, the Security Council set a precedent by establishing international criminal tribunals to prosecute persons responsible for committing crimes against humanity.

The Legal Framework of Humanitarian Intervention in General

For a better understanding of the legal framework of humanitarian intervention it may be pertinent to survey the generally accepted sources of international law. Article 38 of the Statute of the International Court of Justice is often cited as a summary of the agreed-upon sources of international law. These include:

¹⁷⁵ The debate will be discussed in the next chapter.

- a. international conventions [treaties], whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations.¹⁷⁶

The historical roots of the doctrine of humanitarian intervention date back to the 16th and 17th century classical writers on international law.¹⁷⁷ The classical perception of humanitarian intervention was developed in the Middle Ages by several scholars but it achieved its most comprehensive and widely publicized form in the work of the Protestant Hollander Hugo Grotius (1583-1645).¹⁷⁸ Based on the laws of nature Grotius in his seminal text, *De jure belli ac pacis*, presented for the first time a systematization of practice and authorities on the *jus belli*. He raised issues relevant to the emergence of a doctrine of humanitarian intervention in two sections of Book II of *De jure belli ac pacis*: the quasi-judicial police measure of war against the immoral and the waging of war on behalf of others.¹⁷⁹ The proponents of humanitarian intervention "held the view, founded in natural law philosophy, that a war to punish injustice and those guilty of crimes was a just war (*bellum justum*)."¹⁸⁰

¹⁷⁶ Herbert W. Briggs, ed., *The Law of Nations*, 2nd ed., New York: Appleton-Century Crofts, 1952, p. 24.

¹⁷⁷ DUPI Report, *op. cit.*, p. 78.

¹⁷⁸ Simon Chesterman, *op. cit.*, p. 9.

¹⁷⁹ *Ibid.*, pp. 9-10.

¹⁸⁰ Quoted from DUPI Report, *op. cit.*, p. 78. Also see Brownlie, *international Law and the Use of Force by States*, 1963, p.338 (with references to Grotius and Vattel); Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, 1993, p.7 et seq. (with references to Grotius, Suarez and Gentili). The development of this theory coincides with

In the 19th century state practices evidence the evolution of the modern doctrine of humanitarian intervention in international legal theory. Although war and other forms of use of force were not generally prohibited at that time there were moral and political appeals to justify the use of force with the notion of just war. In 1836 Henry Wheaton argued for a customary legal right of humanitarian intervention "where the general interests of humanity are infringed by the excess of a barbarous and despotic government."¹⁸¹

The doctrine of humanitarian intervention which developed in the 19th century is basically a reflection of the philosophy of political liberalism and the concept of human rights, which during the late 18th century and 19th centuries, led to the establishment of constitutional democracy in the United States and European States.¹⁸² The 19th century state practices show the overwhelming invocation of humanitarian reasons to justify intervention. Sometimes, of course, the invocation was 'a pretext for intervention for strategic, political or economic purposes.'¹⁸³

During the first half of the 20th century the frequency of alleged humanitarian interventions declined dramatically. This decline coincides with, and might in part relate to, the first initiatives by the international community to outlaw the use of force in international relations by restricting and ultimately prohibiting (the Kellogg-Briand pact from 1928) war as an instrument in international relations.¹⁸⁴ In spite of that some prominent authorities on international law argued in favor of humanitarian intervention. Lassa Oppenheim observed as

the development of the modern concept of state sovereignty by Hobbes and Bodin.

¹⁸¹ H Wheaton, *Elements of International Law*, London: B. Fellowes, 1836 cited in Stephen A. Garrett, *op. cit.*, p. 42.

¹⁸² DUPI Report, *op. cit.*, p. 78.

¹⁸³ See, DUPI Report, *op. cit.*, p. 79 and sources there cited.

¹⁸⁴ DUPI Report, *ibid.*, p. 79.

follows, "There is a 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."¹⁸⁵ The phrase "to shock the conscience of mankind" is a mantra among those who argue for the legal right of humanitarian intervention, although the definition of which practices are likely to create such a shock and, for that matter, how we can determine whether the conscience of mankind is actually aroused over a particular situation is left unstated and ambiguous.¹⁸⁶

There is a vigorous debate among authorities on international law about how firmly the doctrine of humanitarian intervention had established itself in customary international law in the pre-charter era. Some scholars opine that humanitarian intervention has no foundation in the law of nations and such action is specifically proscribed by international legal norms. Simon Chesterman, for example, holds that, "Of the various examples raised by modern writers seeking to prove the existence of such a right, most either do not involve the threat or use of force, or retrospectively attribute motives alien to those expressed by the acting states at the time."¹⁸⁷

From the legal point of view, the UN Charter in 1945 drew a clear distinction concerning the use of force in its various clauses. The basic rule of international law concerning the prohibition on the threat or use of force is laid down in Article 2(4) and Article 2(7) of the UN Charter (see Introduction, p. 4). In a resolution passed on December 21, 1965, the UN General Assembly reaffirmed the centrality of state sovereignty: "No

¹⁸⁵ L. Oppenheim, *International Law*, 7th ed., ed. H. Lauterpacht, London: Longmans, Green, 1948, pp. 279-80 cited in Stephen A. Garrett, *op. cit.*, p. 43.

¹⁸⁶ Stephen A. Garrett, *ibid.*, p. 43.

¹⁸⁷ Simon Chesterman, *op. cit.*, p. 25.

State 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, or cultural elements are condemned.”¹⁸⁸

The UN Charter provides for two explicit exceptions to the prohibition on the use of force as stipulated in Article 2(4). According to Article 51 of the UN Charter an exception is granted for the use of force in exercising the right of individual or collective self-defence in response to an armed attack against a state. ‘Individual self-defence’ means the state subject to armed attack defending itself and ‘collective self-defence’ means other states helping that state in its defence, either based on an ad hoc request from this state or on the basis of a prior agreement on collective self-defence. The second exception is based on Article 39 and 42 under Chapter VII of the UN Charter, which mentions that the use of force can be mandated by the UN Security Council in case of a threat to or a breach of international peace or an act of aggression.¹⁸⁹

On many occasions military action has been taken by one state into the territory of another state in order to protect or rescue its own citizens, whose lives are in immediate danger, and such action is sometimes considered justified, provided it is not abused for political purposes. However, such action has not formally been accepted as an exception to Article 2(4) of the Charter. Some states and legal authorities consider the action valid on the basis of Article 51 (the right of self-defence) of the Charter but this position has not been accepted since the right of self-defence presupposes an armed attack against the state itself.

The debate among the legal authorities and states regarding the legitimacy of humanitarian intervention is still going on in different quarters. The next chapter will analyze this debate more fully.

¹⁸⁸ See, Stephen A. Garrett, *op. cit.*, p. 46 and sources cited therein.

¹⁸⁹ DUPI Report, *op. cit.*, p. 12.

Chapter IV

THE DEBATE OVER HUMANITARIAN INTERVENTION

Intervention is a question rather of policy than of law. It is above and beyond the domain of law, and when wisely and equitably handled by those who have the power to give effect to it, may be the highest policy of justice and humanity.

*-Sir William Harcourt

The Principle of Non-Intervention

The arguments in favor of the principle of non-intervention developed in three phases, under three distinct influences; the rise of positivism in international law; a general commitment to state sovereignty in the centuries since the adoption of Treaty of Westphalia; and the adoption of the United Nations Charter. The first two phases have been discussed in the previous chapters. The principle of non-intervention, however, has been reaffirmed strongly in its post-World War II phase.

The proponents of the principle of non-intervention hold that 'non-intervention in the internal affairs of a state' is a 'longstanding principle'¹⁹⁰ of customary international law. "It is corollary of the right of every state to sovereignty, territorial integrity and political independence, which itself a fundamental principle of international law."¹⁹¹ After the World War II various norms in the United Nations Charter and contemporary international law appear to disfavor intervention in the domestic jurisdiction. Article 2(1) of the Charter of the United Nations, for example, affirms that the United Nations "is based on the principle of the sovereign equality of all its Members." Article

¹⁹⁰ DUPI Report, *ibid.*, p. 46.

¹⁹¹ *Ibid.*, p. 46.

2(4) and Article 2(7) of the Charter support the principle of non-intervention as well.

In the Declaration on the Inadmissibility of Intervention in 1965, the United Nations General Assembly reiterated the centrality of state sovereignty and the principle of non-intervention. In 1970 the General Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, where the principle of non-intervention has been reflected to a large extent, although, formally, the Declaration has merely the status of a recommendation. Both the 1965 Declaration and 1970 Declaration are couched in more or less the same language. The 1970 Declaration states: "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.

No state may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorists or armed activities directed towards the violent overthrow of the regime of another State, or interference in civil strife in another State."¹⁹²

The Charter also mentions that the purpose of the United Nations is to develop "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Intervention by outside forces may be seen as interfering with the exercise of such a right of self-determination

¹⁹² *Ibid.*, p. 47.

and finally, humanitarian intervention may be perceived as violating a principle of U.N. impartiality, which is reflected in many Charter provisions.¹⁹³

The UN Charter is undeniably the primary source of contemporary international law. It is a formal treaty and almost all states in the present international system are signatories of the Charter. One of the most prominent legal scholars, Louis Henkin, has summarized the position of those who claim the Charter effectively rules out a legal right of humanitarian intervention: "It was the original intent of the Charter to forbid the use of force even to promote human rights or to install authentic democracy. Nothing has happened to justify deviations from that commitment ... Surely the law cannot warrant any state's intervening by force against the political independence and territorial integrity of another on the ground that human rights are being violated, as indeed they are everywhere."¹⁹⁴

Refuting the moral arguments in favor of a right of humanitarian intervention, some legal scholars are alert to the danger of its abuse in the practical field. Smith holds that, "the occasional benefits of such intervention would be outweighed by its liability to abuse. In theory no doubt it is regrettable that international law should prohibit, even by implication, the suppression of outrage, but in practice the number of national Don Quixotes is not found to be considerable, and thinkers of very different schools are content to distinguish between the moral standards applicable respectively to individuals and communities."¹⁹⁵

¹⁹³ See, Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*, The Pennsylvania State University Press, University Park, USA, 2002, p. 5.

¹⁹⁴ Louis Henkin, "The Use of Force: Law and U.S. Policy," in *Right v. Might*, eds. Louis Henkin *et al.*, New York: Council on Foreign Relations Press, 1989, p. 61.

¹⁹⁵ See, Simon Chesterman, *op. cit.*, p.38.

The International Court of Justice has also confirmed through its various verdicts that the principle of non-intervention is part of customary international law.¹⁹⁶ In the Helsinki Final Act from the Conference on Security and Co-operation in Europe (CSCE) in 1975 the participating states vowed to "refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind."¹⁹⁷

Debate over Order and Justice

The relationship between order and justice is one of the most controversial issues in conducting humanitarian intervention. The debate mainly rests on whether order is a precondition for justice or justice is precondition for order and what is more significant, to maintain international peace and stability or to take initiative to protect the sufferer in a violent conflict. In fact, the relationship between the two is very complex and it is 'one of the recurrent conundrums in political theory and international affairs.'¹⁹⁸

Adherents of the realist perspective hold that order is a prerequisite for justice. Internal instability and chaos, according to this school, might result without some degree of political order and authority within states, which will make it difficult to protect the rights of individuals. The Realist school rests on the assumption that 'maintenance of order is considered a moral and political imperative because domestic and international stability is a precondition for the pursuit and enforcement of other values such as human rights, minority rights, and democracy – and thereby justice for the greatest number.'¹⁹⁹ So statesmen should

¹⁹⁶ See, *Corfu Channel Case*, ICJ Reports 1949, p. 35 and *Military and Paramilitary Activities Case*, ICJ Reports 1986, para, 202.

¹⁹⁷ DUPI Report, *op. cit.*, p. 47.

¹⁹⁸ *Ibid.*, p. 14.

¹⁹⁹ *Ibid.*, p. 15.

endeavor, as a priority, to establish and preserve both domestic and international order.

From a realist perspective, disorder is in itself the principal threat to human rights and humanitarian intervention must be regarded as a potentially threatening trend in international relations if such intervention contributes to instability in the world system. Thomas Hobbes is considered as the pioneer of this perspective. Hobbesian "political morality consists in ranking peace and stability over all other values, especially those associated with rights and justice."²⁰⁰ Given Hobbes's gloomy vision of the essence of human nature – naturally anarchical and predisposed toward aggression and violence – it is only through a fixed and predictable political order that a minimally tolerable human existence can be achieved.²⁰¹

The alternative argument, put forward by liberals, is that justice is a precondition for order. They emphasize the protection of individual rights and treat this as a precondition for long-term domestic and international order. If traditional norms of sovereignty and non-intervention are not overruled by the international community when governments violate these principles on a massive scale, neither justice for the greatest number nor long-term domestic and international order will be secured, because oppressed groups and individuals will inevitably revolt against their rulers and internal conflicts will spill over into international conflict.²⁰² Mark Wicclair argues, "it cannot be denied that world peace and stability are desirable ends. But from a moral perspective, considerations of justice must be taken into account as well. Thus, depending upon the extent to which injustice prevails in the world, it is conceivable

²⁰⁰ Fernando R. Tesón, *Humanitarian Intervention*, Irvington-on -Hudson, NY: Transnational Publishers, 1985, pp.80-81 cited in Stephen A. Garrett, *op. cit.*, p. ix.

²⁰¹ *Ibid.*, p. ix.

²⁰² DUPI Report, *op. cit.*, p. 15.

that a period of conflict and instability would be justified, all things considered."²⁰³

Although the realist and liberalist approaches differ about the relationship between order and justice, both acknowledge that the main challenge is to protect individuals from the extremes of power; either from too little (anarchy) or too much (tyranny), and are thus 'moral' in the sense that they attempt to address the question of how to secure 'justice' for the greatest number.²⁰⁴

Thus, in principle, both the approaches are about reconciling these two aims. Yet in a concrete situation one often has to balance the two against each other and decide how much of one to trade off in order to obtain some of the other. A specific difficulty of such trade-offs is associated with the current state-based international order. If humanitarian intervention is conducted, motivated by justice, for example, blatantly violating the principle of state sovereignty to protect human rights, there are two strong arguments against this action. The first argument could be that this is merely an extension of an ongoing trend towards increased protection of individuals on the part of the present system and hence a development of the existing state-based order, not a derogation from it. Another, more radical argument could be that this act may represent a weakening of this order, but that it points towards another, less state-based, more individual-based humanitarian order.²⁰⁵ According to this radical perspective, human rights and international humanitarian law are not seen as emerging out of the state-based system, but are rather perceived as the building-blocks of an alternative, emerging, world order based on individuals and their rights.²⁰⁶ Yet the problem is that the existing international political order

²⁰³ Mark R. Wicclair, "Human Rights and Intervention," in *Human Rights and U.S. Foreign Policy*, eds. Peter G. Brown and Douglas MacLean, Lexington, MA: Lexington Books, 1979, p.150..

²⁰⁴ DUPI Report, *op. cit.*, p. 16.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

remains state-based, although significant progress has been evident in the direction of extending direct rights and thereby international status to individuals; and in this latter perspective, states and their mutual co-operation remain as the basic pillars of international order and therefore it is a detraction from order as such, if the existing inter-state order is weakened. Therefore, concrete situations often imply a *de facto* trade-off between order and justice.²⁰⁷

Is Protection of Human Rights a Legitimate International Concern?

The post-World War II international order is replete with declarations and conventions on human rights although protection of human rights was basically a matter of domestic jurisdiction in the pre-War period. The UN Charter also contains significant number of provisions on human rights, although most of the provisions are vague in nature and broad in meaning. Article 1(3) of the Charter, for example, sets out as a purpose of the United Nations to achieve international co-operation "in promoting and encouraging respect for human rights and fundamental freedoms..." Articles 55 and 56 also provide significant importance on human rights (see Introduction, p.10).

On numerous instances different organs of the United Nations have condemned gross and systematic violations of human rights within a state. For example, the General Assembly in 1946 and the Security Council in 1960 condemned the apartheid policy followed in South Africa and Southern Rhodesia; in 1959 the General Assembly condemned the suppression of the Tibetan people by China; in 1976 the General Assembly condemned the serious human rights violations in Chile under Pinochet; in 1991 the Security Council condemned the suppression of the Kurds by Baghdad; and in 1992 the Security Council condemned the policy of ethnic cleansing and

²⁰⁷ *Ibid.*, pp. 16-17.

forcible displacement of minorities within the former Yugoslavia. This illustrates the view that the protection of human rights has become a matter of international concern. Some legal scholars hold the view that UN provisions on human rights "establish a legal obligation for states to observe human rights and, consequently, human rights issues are a matter of international concern outside the scope of Article 2(7)."²⁰⁸ Yet some legal authorities oppose the view 'as too far-reaching in light of the broad wording of the Charter provisions on human rights and the fundamental character of Article 2(7).'²⁰⁹ In spite of different views, it is probably generally recognized that states have, in any case, legal responsibility under the Charter for gross and systematic violations of human rights.²¹⁰ The International Court of Justice in 1971, for example, held that the South African policies of apartheid in the territory of Namibia constituted "a denial of fundamental human rights [and] a flagrant violation of the purposes and principles of the Charter."²¹¹

States have also undertaken numerous declarations and conventions on human rights and international humanitarian law. Some notable milestones have been the Universal Declaration of Human Rights 1948, the Convention for the Prevention and Punishment of the Crime of Genocide 1948, the Convention on the Elimination of all Forms of Racial Discrimination 1965, the two 1966 Covenants relating to civil, political, social, economic and cultural rights; and the adoption in 1998 of the Statute for the Establishment of an International Criminal Court. The four Geneva Conventions from 1949, with Additional protocols I and II from 1977 are also significant documents on international

²⁰⁸ *Ibid.*, pp. 50-1.

²⁰⁹ *Ibid.*, p. 51.

²¹⁰ *Ibid.*, p. 51.

²¹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, South West Africa, Advisory Opinion, ICJ Reports 1971, para 131, cited in DUPI Report, *op. cit.*, p. 51.

humanitarian law. Most of these declarations and conventions have been ratified by a vast majority of states in the world and, therefore, issues of human rights and international humanitarian law governed by an international treaty to which the state is a party no longer belong to its exclusive jurisdiction. Some legal scholars also hold that even if the state is not a party to the relevant conventions on human rights or international humanitarian law the principle of non-intervention may still be inapplicable because the treaty provisions codify or have subsequently developed into norms of customary international law, which are binding upon all states.²¹²

In 1970 the International Court of Justice held that the obligation of states toward the international community as a whole include the protection of the individual against the crime of "genocide" as well as the protection of "the principles and rules concerning the basic rights of the human person" some of which have entered into the body of general international law, others are conferred by international instruments of a universal or quasi-universal character.²¹³ In 1986, the Court confirmed that the basic provisions of the Geneva Conventions on international humanitarian law on the protection of people *hors de combat* are norms of customary international law, binding upon all states; and these basic principles of international humanitarian law belong to the "elementary considerations of humanity."²¹⁴

Another landmark development in the field of human rights took place in the World Conference on Human Rights held in Vienna on 25 June 1993. In the concluding document – the Vienna Declaration and Programme of Action – which was unanimously adopted by all the members of the UN, it is unequivocally stated in paragraph four that, "the promotion and

²¹² DUPI Report, *ibid.*, p. 52.

²¹³ *Ibid.*, p.52.

²¹⁴ *Ibid.*, p. 52.

protection of all human rights is a legitimate concern of the international community.”²¹⁵

China and several other states oppose the view that ‘protection of human rights is a matter of legitimate international concern.’ They stick to the principle of state sovereignty and argue that protection of the individual is a matter that falls essentially within the domestic jurisdiction of the state. At the Security Council summit on 31 January 1992 China stated that “(...) In essence, the issue of human rights falls within the sovereignty of each country (...) China values human rights (...) However, it is opposed to interference in the internal affairs of other countries using the human rights issue as an excuse.”²¹⁶ In spite of opposition from different quarters there is a growing trend to support the view that protection of human rights is a matter of international concern. The opposition mainly rests on the meaning and nature of human rights. Yet the legitimacy of intervention in the domestic jurisdiction of other countries on humanitarian grounds is still a matter of debate.

Is Humanitarian Intervention a Right or a Responsibility?

In the aftermath of the 1991 Gulf War, French Foreign Minister Ronald Dumas asserted that the international community had a ‘right to intervene’ to alleviate human suffering caused by repression, civil disorder, inter-state conflict or natural disasters.²¹⁷ Citing the failures of the UN Security Council to act promptly in Rwanda and Kosovo, UN Secretary General Kofi Annan, in his address to the 54th session of the UN General Assembly in 1999, invoked the member states of the UN to “find common ground in upholding the principles of the

²¹⁵ *Ibid.*, pp. 53-54.

²¹⁶ *Ibid.*, p. 54.

²¹⁷ Thomas G. Weiss and Kurt Campbell, “Military Humanitarianism”, *Survival*, vol. 33, no. 5, September-October, 1991, p. 452 cited in Amitav Acharya, ‘Redefining the Dilemmas of Humanitarian intervention’, *Australian Journal of International Affairs*, Vol. 56, No. 3, 2002, p. 374.

Charter, and acting in defence of our common humanity.” He warned that “if the collective conscience of humanity cannot find in the United Nations its greatest tribunal, there is a grave danger that it will look elsewhere for peace and for justice.”²¹⁸ A year later, he reiterated the dilemma in his Millennium Report to the General Assembly: 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 offend every precept of our common humanity?²¹⁹

In 2000 the ICISS (International Commission on Intervention and State Sovereignty) in *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* responded to the Secretary General’s challenge to the international community to act upon future violations of human rights and humanitarian law. *The Responsibility to Protect* redefines humanitarian intervention as a responsibility (first, of the state concerned, and failing that, of the international community), and not a right (of outsiders, however, may they represent the international community at large).²²⁰ The report considers the phrase ‘right to intervene’ unhelpful, because it stresses ‘the claims, rights and prerogatives of the potentially intervening states’ over ‘the urgent needs of the potential beneficiaries of action’, and because it fails to capture the broader tasks of prevention and follow-up peacebuilding that must accompany intervention.²²¹

One of the most notable features of the report is its assertion that humanitarian intervention is to be ‘an exceptional and

²¹⁸ *The Responsibility to Protect: Report of the International Commission on Intervention and State sovereignty*, (ICISS Report), Ottawa: International Development Research Centre, December 2001, <http://icissciise.gc.ca>, Accessed on 30.03.2004.

²¹⁹ *Ibid.*

²²⁰ Amitav Acharya, *op. cit.*, pp. 373-74.

²²¹ *Ibid.*, p. 374.

extraordinary' measure. As stated in the basic principles of the ICISS, "Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."²²² The report considers two kinds of event for conducting intervention: where there is a large-scale loss of life – with or without genocide intent – that results from deliberate state action or the massive failure of state structures; and where there is a large-scale "ethnic cleansing" carried out by means of killing, rape, torture, or mass expulsion. In both instances, it argues that these actions can be "actual or apprehended."²²³ Yet the report does not to define or set any figures as to what constitutes 'large-scale' loss of life or ethnic cleansing.

The most significant feature of the report is that it does not rule out 'state sovereignty' as the basic norm of international order but it considers sovereignty as a 'responsibility', not a 'right'. The main responsibility to protect its own people rests on the state itself and when states are unable or unwilling to do so, the responsibility to protect shifts to international community. According to the ICISS, "sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship."²²⁴ There is no doubt that a significant number of states in the international

²²² ICISS Report, *op. cit.*

²²³ ICISS Report, *ibid.*, cited in Jennifer M. Welsh, 'Review Essay: From Right to Responsibility: Humanitarian Intervention and International Society', *Global Governanc*, 8(2002), p. 512.

²²⁴ ICISS Report, *ibid.*

community have accepted, through their ratification of different human rights conventions and humanitarian law, an obligation "to prevent and punish" acts of genocide and violation of human rights. However, many legal authorities deny that this sanctions humanitarian intervention in other countries.

Unilateral Intervention to Promote Democracy

There is growing tendency to argue in favor of intervention to promote democracy in different quarters of the world, especially among the Western scholars and statesmen. James Crawford argues that the manner in which classical international law conceptualized sovereignty and the state was deeply undemocratic, or at least capable of operating in deeply undemocratic ways.²²⁵ Michael Reisman, in an editorial comment published in 1990, argued that the term 'sovereignty' constituted an anachronism when applied to undemocratic governments or leaders, and that traditional concepts of sovereignty were being replaced by a 'popular sovereignty' vested in the individual citizens of a state.²²⁶ In this way they wish to stress that unilateral intervention to promote democracy does not violate state sovereignty and international law.

Before analyzing existing international law and the current state practice regarding unilateral intervention to promote democracy, it may be pertinent to make a preliminary distinction between a unilateral right of pro-democratic intervention, and situations where the Security Council makes a determination that disruption to democracy constitutes a threat to international peace and security within the meaning of the Chapter VII of the UN Charter. The fact of Security Council authorized action in such circumstances provides support for the view that the right

²²⁵ James Crawford, 'Democracy and International Law' 44 *British YBIL*, 1993, pp. 113-116 cited in Simon Chesterman, *op. cit.*, p. 88.

²²⁶ W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law*, p. 866 cited in Simon Chesterman. *ibid.*, p. 91.

of democratic governance may be acquiring some substance, but a finding that its absence may constitute a threat to the peace does not establish a unilateral right of intervention.²²⁷

The right of pro-democratic intervention was also asserted by the former U.S. President Ronald Reagan (the 'Reagan Doctrine'). The 'Reagan Doctrine' was developed primarily as a response to the "Brezhnev Doctrine", which was perceived as embodying a Soviet objective of global empire.²²⁸ Under this doctrine support for insurgencies, moral, political and military, was justified legally on the ground of self-defence. Yet the doctrine was criticized in its day and its applications in Grenada and Nicaragua were condemned by the General Assembly and the ICJ respectively.²²⁹ In the Nicaraguan case the Court held that, regardless of what the United States thought of Nicaragua's Sandinista regime, "adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of."²³⁰

On several other instances states, principally the U.S., have conducted allegedly pro-democratic intervention in other countries. The U.S. intervention in Panama in 1989-90 is one of

²²⁷ Simon Chesterman, *ibid.*, p. 89.

²²⁸ Jeane J Kirkpatrick and Allan Gerson, 'The Reagan Doctrine, Human Rights, and International Law', in Louis Henkin (ed), *Right v Might: International Law and the Use of Force*, New York: Council on Foreign Relations, 1989, p. 23 cited in Simon Chesterman, *ibid.*, p. 93.

²²⁹ Simon Chesterman, *ibid.*, p. 94.

²³⁰ *Nicaragua (Merits)* [1986] ICJ Rep 14, 133 para 263 cited in Simon Chesterman, *op. cit.*, pp. 92-93.

the most notable examples. The U.S. interventions in the Dominican Republic in 1965 and in Nicaragua in the early 1980s are also often cited examples of pro-democratic intervention. The ECOWAS intervention in Sierra Leone in 1997-98 and Operation Restore Democracy in Haiti in 1993-94 are typical examples which were at least partially justified by Security Council authorization. Yet such practices have been contradictory in many instances. Upholding or restoring democracy has not previously been asserted by the United States, or the United Kingdom, as an independent basis for intervention. It was not raised by Tanzania when it deposed Idi Amin in Uganda in 1979, by Vietnam when it overthrew the genocidal regime of Pol Pot in 1978-79, or by France when it helped overthrow 'Emperor' Bokassa in the Central African Republic in 1979.²³¹ Yet it was invoked by the U.S. to justify its actions in Grenada, Nicaragua and Panama. The U.S. actions in these cases have been condemned by the international community and international institutions.

In 1970 the General Assembly adopted the Declaration on Friendly Relations which affirms that '[e]very State has an *inalienable* right to choose its political, economic, social and cultural systems, without interference in any form by another State'. General Assembly resolution 45/150 (1990), adopted by a large majority, recognizes that "the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States."²³²

²³¹ See, Simon Chesterman, *ibid.*, pp. 106-7.

²³² Quoted from Simon Chesterman, *ibid.*, p. 107.

Intervention on 'War against Terrorism'

After the terrorist attacks carried out against Pan American flight 103 and Union des Transports Aériens flight 772, the United Nations Security Council adopted Resolution 731 (1992), affirming the 'right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from "acts of international terrorism that constitute threats to international peace and security".' After the 9/11 terrorist attacks on the World Trade Center and the Pentagon the UN Security Council reiterated that acts of terrorism should be considered as threats to international peace and security and adopted several significant resolutions regarding terrorism, including Resolutions 1368 (2001) and 1373 (2001), on the basis of which the U.S.-led coalition forces invaded Afghanistan. Paragraph 9 of the UN Security Council Resolution 1373 (2001), quoting the text of Principle 1 of the Friendly Relations Declaration (1970), displays strong parallels with paragraph 6 of Security Council Resolution 748 (1992), in which the Council reaffirmed, with respect to the Libyan Government, that 'every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force'.²³³ Earlier, in Security Council Resolution 1267 (1999), the Council noted that the failure of the Taliban authorities to respond to the demands in paragraph 113 of Resolution 1214 (1998), namely, to stop providing sanctuary and training for international terrorists and their organizations, and to 'cooperate ...to bring indicted terrorists to justice', constitutes a threat to international peace

²³³ Carsten Stahn, 'Security Council Resolutions 1368 (2001) and 1373 (2001) : What They Say and What They Do Not Say: European Journal of International Law, www.ejil.org/formWTC/ny-stahn.html accessed on 10.04.2004.

and security.²³⁴ In Resolution 1333 (2000) the same determination was reiterated. The importance of Security Council Resolutions 1368 (2001) and 1373 (2001) lies on the fact that they reaffirmed the 'inherent right of individual and collective self-defence as recognized by the UN Charter'. Yet after the 1998 attacks on the U.S. embassies this reference to Article 51 of the UN Charter was not made although the U.S. officially invoked Article 51 as the legal basis for its missile strikes against Afghanistan and Sudan in 1998.

Some scholars have raised question about the legality of the war against terrorism in Afghanistan and have supported the view that paragraph 3 of the preamble to Resolution 1368 (2001) and paragraph 4 of the preamble to Resolution 1373 (2001) cannot be interpreted per se as an authorization of the use of force. The first argument is that immediately after the 11 September attack the Security Council called it a 'terrorist attack' instead of using 'armed attack', which is necessary by Article 51 of the UN Charter to qualify for self-defence or collective action. Secondly, in its two resolutions, the Security Council 'mentions neither a specific state as the holder of the right of self-defence, nor a concrete author of the attacks'.²³⁵ Thirdly, the UN Security Council refrains from expressly attributing the 11 September attacks to the Taliban regime.²³⁶ Yet in Security Council Resolutions 1267 (1999) and 1333 (2000) explicit statements were made with regard to the Taliban support to terrorism in Afghanistan. It is also argued that the terrorist acts themselves did not emanate directly from the Afghan territory that makes it difficult to prove the direct involvement of Taliban in the attack. These activities have obviously not been considered grave enough by the Security Council to establish a sufficient link to a state-sponsored armed attack. Another significant aspect is that the Taliban regime was

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

not officially recognized by the Security Council as the governing authority of Afghanistan.²³⁷ Instead the Security Council addresses them as 'the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan'. "Taking into account Article 9 of the Draft Articles of the ILC on the Responsibility of States for internationally wrongful acts, the case would therefore have to be made that the Taliban and Usama bin Laden (together with the groups he controls) are so closely linked that Bin Laden's terrorist activities can be attributed to the *de facto* government of the state."²³⁸ Given all these legal and factual uncertainties there is hardly any ground to argue that Security Council Resolution 1373 (2001) authorizes the exercise of self-defence by the United States and its allies under Chapter VII of the UN Charter.²³⁹

Although the UN authorized intervention against Afghanistan faced serious attack about its legality under Chapter VII from different quarters, there is no doubt that war against terrorism remains the burning question of the day. The debate has regained its importance after the war against Iraq. Now the question is whether states are entitled to undertake unilateral intervention or intervention without UN Security Council authorization on the basis of self-defence. The existing legal norms, according to majority of legal scholars, are contrary to such a right.

²³⁷ The Taliban government was recognized by only three governments and two of these quickly broke diplomatic relations immediately after the 9/11 attack, leaving only Pakistan, which joined the war against Afghanistan on the US side.

²³⁸ See Carsten Stahn, *op. cit.*

²³⁹ *Ibid.*

Weapons of Mass Destruction (WMD) and Collective Intervention

Military capability has been a central element of state power from the very inception of the state system. An ancient city state or a modern state is not different in this respect. Military power is a symbol of the sovereignty of a state. The ability to produce and deploy advanced weapons is viewed as a sacrosanct objective in both industrial and industrializing countries, the *sine qua non* of independence and modernity.²⁴⁰ Therefore any attempt from outside powers to control national military capability is viewed as an assault on state sovereignty. Technologically advanced and militarily powerful states have for decades attempted to control so-called WMD, namely, nuclear, chemical and biological weapons, along with certain advanced conventional technologies. States have also agreed to sign and comply with many international agreements on control of WMD. In 1925, for example, forty-one nations signed the Geneva Protocol prohibiting the use of chemical and biological weapons in any future conflict. The 1970 Nuclear Nonproliferation Treaty (NPT) can be cited as an attempt to regulate the proliferation of nuclear weapons. Another attempt is the use of multilateral or bilateral supplier cartels to regulate the export of key technologies for development of weapons of mass destruction. The Australia Group, for example, was established to restrict Third World access to chemical weapons materials, and the Missile Technology Control Regime (MTCR) was established to control the trade in ballistic and cruise missiles. The United Nations has at times also imposed arms embargo on particular countries, notably on South Africa. On many instances coercive efforts were also followed to disrupt or destroy states' military capabilities. In 1982 Israel conducted air strikes on an Iraqi nuclear reactor and the UN Security Council,

²⁴⁰ Janne E. Nolan, "Sovereignty and Collective Intervention: Controlling Weapons of Mass Destruction", in Gene M. Lyons, and Michael Mastanduno (eds.), *op. cit.*, p. 170.

under Resolution 687, authorized the dismantling and destruction Iraq's unconventional weapons arsenal after Operation Desert Storm.

The international agreements designed to regulate WMD contain both cooperative and coercive elements. The most coercive approach to regulating WMD is the use of unilateral or collective action to destroy military facilities of the target states. On numerous instances states have also followed other punitive measures including imposing sanction or restrictions. Yet the enforcement of restrictions, in practice, has varied according to the political status and orientation of the violating state. The U.S. has a tendency to overlook the obvious violations on the part of its allies or trading partners. For example, the U.S. has never raised any questions about the nuclear weapons development program of Israel. The Reagan and Bush administrations refused, for years, to adopt a confrontational policy toward Pakistan in response to that country's nuclear program, until forced to do so by U.S. legislation.²⁴¹ In contrast, unpopular states, such as Iran and North Korea have been subject to punitive sanctions.

Although different nonproliferation regimes have serious shortcomings regarding the implementation of their policies the NPT regime has achieved success in at least some cases. In 1992 the Security Council joint communiqué expressed strong support for nonproliferation efforts, including specific reference to Chapter VII of the UN Charter, which allows for economic sanctions and the use of force in order to inhibit proliferation.²⁴²

In the early 1990s there was a growing tendency on the part of powerful states to impose restrictions on some specific proliferating countries more forcefully, yet there is still no consensus internationally about the means by which to do so.

²⁴¹ See, Janne E. Nolan, *ibid.*, p. 176.

²⁴² *Ibid.*, p. 181.

The UN Security Council Resolution 687 sets a significant precedent in this regard. Yet the debate only arose when the US-led coalition forces attacked Iraq on the WMD issue, without authorization from the UN Security Council.

Humanitarian Intervention With/Without Authorization from the UN Security Council

In the existing legal procedures the Security Council has the right under Chapter VII of the UN Charter to take necessary measures to maintain international peace, including the use of force, if the Security Council considers the situation in a state poses a threat to international peace. Before going to analyze the UN operational procedures for conducting humanitarian intervention it may be pertinent to define the concept of a "threat to the peace".

The notion of a "threat to the peace" is intrinsically vague. Security Council practice illustrates that the notion of a "threat to the peace" is related with the notion of international peace. According to the original conception of UN Charter, international peace is interpreted in the negative sense, that is, the absence of armed conflict between states. The traditional notion of a "threat to international peace" thus presupposes the objective existence of a threat of aggression by one state against another or a real risk of international armed conflict in some other form.²⁴³ After World War II the framers of the UN Charter might not have considered that internal conflicts and violation of human rights should be regarded as threats to international peace, since their main purpose was to maintain the status quo by outlawing the use of force between states. The UN Charter has basically left the determination of a 'threat to the peace' to the discretion of the Security Council.

²⁴³ Cf. Kelsen, *The Law of the United Nations*, 1951, p. 19; Blumenwitz, "Maintenance of Peace and Security" in Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, 1995, p. 865 cited in DUPI Report, *op. cit.*, p. 62.

Under Chapter VII of the United Nations the primary responsibility for the maintenance of international peace and security rests with the Security Council. Subsidiary responsibility rests with the other UN organs, specially the General Assembly. According to Article 25, decisions taken by the Security Council in discharging its responsibilities are binding upon the Member States. Article 27(3) mentions that a decision by the Security Council requires an affirmative vote of nine of its fifteen Members, including the 'concurring votes' of the five Permanent Members – the United States, the United Kingdom, Russia, France and China. The Security Council, under Article 39, shall determine the existence of a 'threat to the peace', a 'breach of the peace' or 'act of aggression' and make recommendations or decide upon the measures necessary to maintain or restore international peace and security. According to article 41, measures decided upon by the Security Council may include non-military measures like economic sanctions or the severance of diplomatic relations. Article 42 holds that only if such measures "would be inadequate or have proved to be inadequate" may the Security Council take action involving the use of military force.

It is of utmost importance to distinguish action under Chapter VII from proposals and recommendations under Chapter VI on Pacific Settlement of Disputes. Under Chapter VI, the Security Council, on numerous occasions, has established peace-keeping forces and observer groups for the maintenance of international peace. Although there is no provision for peacekeeping in the UN Charter it is sometimes referred to as 'Chapter VI ½' action. The fundamental difference between peace-keeping operations and enforcement action under Chapter VII is that peace-keeping is based on the consensus and co-operation of the state(s) or parties concerned.²⁴⁴

²⁴⁴ DUPI Report. *ibid.*, p. 57.

Under Chapter VIII on Regional Arrangements regional organizations or agencies can play a pivotal role in maintaining international peace and security. Yet Article 53 holds that the Security Council, where appropriate, shall utilize such regional organizations or agencies for enforcement action "under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council..."²⁴⁵

In 1950, the Uniting for Peace Resolution was adopted by the General Assembly. Under this Resolution the General Assembly claimed subsidiary responsibility for international peace and security and competence to make recommendations regarding measures necessary to maintain or restore the peace. In the central passage of the resolution the General Assembly resolved that: "if the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Member States for collective measures, including in the case of a breach to the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."²⁴⁶ Except for the 1950 instance, however, there have never been any recommendations by the General Assembly on the basis of the Resolution to take collective military measures. There is no legal basis for the authorization of humanitarian intervention on the basis of the Resolution. The General Assembly, in case of a threat to the peace, may recommend non-military measures only. It may also recommend military measures in case of a breach of the peace or an act of aggression.

²⁴⁵ Cited from DUPI Report, *ibid.*, p. 59.

²⁴⁶ Cited from DUPI Report, *ibid.*, pp. 60-61.

Today, however, the Resolution has lost much of its importance.²⁴⁷

During the Cold War period there were only few instances where the Security Council considered that any particular situation constituted a threat to international peace and security. In 1966 the Security Council, for the first time, considered violations of basic human rights in Southern Rhodesia a threat to international peace. In 1977 the Council regarded the policy of apartheid in South Africa a threat to international peace and imposed an arms embargo.

Since the end of the Cold War, the practice of the Security Council shows an overwhelming tendency towards further broadening the notion of a 'threat to the peace' and considering internal conflicts and violation of human rights threats to international peace and security. On several occasions, the Security Council has authorized, under Chapter VII, the use of force in response to threats to international peace and security. The cases of Iraq, the former Yugoslavia, Liberia, Somalia, Haiti, Angola, Rwanda, Burundi, Zaire, Albania, the Central African Republic and East Timor are notable in this regard.

From the current practice of the Security Council, it is evident that the Council "has treated the notion of a 'threat to the peace' as a political concept rather than a legal one."²⁴⁸ It is also worthwhile to note that the Security Council is not only a law-making but also a political organ. Different members have different interests and they try to maximize their interests through the world body. Moreover, the Security Council takes its decisions according to Article 27(3) which reflects the interests of the world powers, allowing the Permanent Members to veto any decision. At the same time, the Security Council is not omnipotent, it can exercise the powers and capacities that the

²⁴⁷ *Ibid.*, p.61.

²⁴⁸ *Ibid.*, p. 74.

member states choose to provide it with. As a result, in many instances the most powerful organ of the world body may not be able to take action when, according to the UN Charter, it could and should. There are numerous examples of such inaction. In Rwanda, for example, the Security Council authorization for humanitarian intervention came too late. A full-blown genocide has already occurred.

Humanitarian intervention without Security Council authorization is a controversial issue of international law. The dilemma arises when the Security Council, due to the exercise of a veto by one or more Permanent Members to uphold their political interests, fails to authorize necessary action for protecting human lives from imminent suffering in a state. The legal scholars have a lack of consensus, in these circumstances, regarding whether states have a right to conduct humanitarian intervention on their own initiative under existing international law.

A significant number of legal scholars, especially from the US, have tried to justify the legality of humanitarian intervention without authorization from the UN Security Council. They begin their argument with Article 2(4) of the UN Charter, which lays down the general prohibition on the use of force in international relations. The argument is that humanitarian intervention is not incompatible with Article 2(4), since humanitarian intervention is not directed against the 'territorial integrity' or 'political independence' of the state and, above all, is not "inconsistent with the Purposes and Principles of the Charter", but rather in conformity with one of the fundamental purposes of the UN, the promotion of respect for human rights, Article 1(3).²⁴⁹ Yet the

²⁴⁹ Cf. Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos", in Lillich (ed.), *Humanitarian Intervention and the United Nations*, 1973, p.171. See also the conclusion of the ILA Sub-Committee that "it does not seem impossible to reconcile a limited right to intervene for humanitarian purposes with the strictures of Article 2(4)", *International Law Association Yearbook*, 1970, p. 637 cited in DUPI Report, *ibid.*, p. 82.

problem is Article 1(3) defines the solution of international economic, social and cultural problems as purposes of the UN. In fact, 'such balancing between general purposes of the Charter and the prohibition of the use of force is not compatible with the fundamental character of the latter.'²⁵⁰

Another argument is that when the Security Council fails to fulfill its responsibilities under Article 24 of Chapter VII member states have a subsidiary responsibility for the maintenance of international peace and security. This line of reasoning is generally referred to as the "link theory".²⁵¹ Yet according to Article 24 "primary" responsibility for the maintenance of international peace and security rests on the Security Council and subsidiary responsibility on other organs of the UN, especially the General Assembly. The Charter mentions nowhere any responsibility of the Member States.

The International Court of Justice in its practice also supports the general prohibition of the use of force laid down in Article 2(4). In the Corfu Channel Case of 1949 and the Nicaraguan case of 1986, for example, the ICJ reaffirmed the general character of the prohibition on the use of force and considered the rule a part of customary international law. In the Nicaraguan Case, more significantly, the Court held that international law does not permit the use of armed force to redress violations of human rights in another state.

Some governments and legal scholars have also argued that force can be legally used to protect and rescue a state's nationals abroad whose lives are under threat, or who are in hostage situations. Yet this idea has not been formally recognized as an exception to Article 2(4) of the Charter. In extreme cases, some

²⁵⁰ DUPI Report, *ibid*, p. 82.

²⁵¹ First developed Jessup, *A Modern Law of Nations*, 1948, pp. 170-71, this theory was restated by Lillich, "Forcible Self-help by States to Protect Human Right", *Iowa Law Review*, Vol. 53, 1967, pp. 344-51 and has since gathered several proponents cited in DUPI Report, *ibid*, p. 82.

legal scholars hold, the doctrine of 'a state of necessity' can be justified for undertaking humanitarian intervention without Security Council authorization. The doctrine has been recognized by the International Court of Justice as valid only 'on an exceptional basis'. According to the International Law Commission (ILC) draft, Article 33, section 1, the reference to a "state of necessity" may only be applied as a legal defence if the act not in conformity with international law was the "only means of safeguarding an essential interest of the State against a grave and imminent peril" and at the same time "did not seriously impair an essential interest of the State towards which the obligation existed."²⁵² There are two fundamental loopholes in humanitarian intervention to meet up these conditions: the first one is that the essential interests of the intervening states, specially the question of the survival of the state or of the security of its territory, are not really at stake in case of humanitarian intervention; and the second one is that such intervention may impair the essential interests of the target state, concerning respect for its territorial integrity.²⁵³ The state of necessity, therefore, cannot provide a legal justification for humanitarian intervention under existing international law.

During the Cold War state practice - for example, Indian intervention in East Pakistan (currently Bangladesh) in 1971, Vietnam's intervention in Cambodia in 1978-79, the intervention by France in Central Africa in 1979 and Tanzania's intervention in Uganda in 1979 - does not support the view that humanitarian intervention without authorization from the Security Council has been established under customary international law.

In post-Cold war state practice, there are some notable cases of intervention on humanitarian grounds without prior authorization from the Security Council. In 1990, for example, the Economic Organization of West African States (ECOWAS)

²⁵² *Ibid.*, p. 85.

²⁵³ *Ibid.*, pp. 85-6.

intervened in Liberia to put an end of the existing civil war and restore order in the country. Subsequently, the Security Council, in Resolution 788 (1992), endorsed the action of ECOWAS. After the Gulf War of 1991 the formation of 'no-fly zones' and consequent military interventions in Northern and Southern Iraq raised serious debates about whether such interventions were based on the authority of the Security Council. The intervening states – the U.S., the U.K., and France – tried to justify their actions on the basis of UN Resolution 688. However, this resolution makes no explicit reference to Chapter VII and does not contain any language authorizing the use of force. NATO's intervention in the Federal Republic of Yugoslavia (FRY) in 1999 is another notable instance of humanitarian intervention without authorization from the UN Security Council. The FRY brought the case before the International Court of Justice alleging a violation of the prohibition on the use of force. The court, in its preliminary order of 2 June 1999, rejected the request by Yugoslavia for provisional measures but at the same time indicated concern for the legality of the use of force by NATO. The Court's judgment on the matter is pending.²⁵⁴

In sum, under existing international law, there is no right for states to undertake humanitarian intervention in other states without prior authorization from the UN Security Council. Neither state practice during the Cold War nor practice in the post-Cold War period has been sufficiently substantial to impose the view that a right of humanitarian intervention without prior authorization from the Security Council has become part of customary international law.

²⁵⁴ *Ibid*, p. 93.

CONCLUSION

We have been told that one of the pillars of the new world order is respect for law and the rule of law. That statement has given us cause for hope. What we are witnessing, however, is in point of fact a gradual retreat from law and the rule of law and, in some cases, an attempt to circumvent the international rule of law for political ends. We find this new world order ominous.... It is indeed a strange world, and we may be in for many surprises.

-Representative of Yemen, while discussing on UNSCR
688(1991)

Ever since the beginning of the modern state system, governments have repeatedly confronted the dilemmas posed by respect for the principle of state sovereignty and calls for humanitarian intervention. During its long history, the notion of sovereignty has come under serious attack from different quarters and has been modified in various ways, but the fundamental idea has not changed. Sovereignty is still considered as the basic pillar of a state, irrespective of whether the state is weak or whether it is strong. On the other hand, humanitarian intervention, in its true sense, evolves as a response to state failure to protect human beings from grave suffering. Theoretically, both 'state sovereignty' and 'humanitarian intervention' have emerged as a consequence of disorder and instability and proponents of both doctrines have claimed that 'state sovereignty' and 'humanitarian intervention' are necessary to maintain or restore regional and international order and stability. In practice, however, there have been numerous instances of the misuse and misinterpretation of both doctrines. In numerous cases, powerful states have justified their intervention in the domestic jurisdiction of weaker states on 'humanitarian grounds' although there have been no particular violations of human rights. Weaker states, on the other hand, have used 'state sovereignty' as a shield to oppose any outside intervention in their domestic jurisdiction, although their

governments may have committed serious violation of human rights. The whole debate, therefore, is not conceptual. It has become entangled in the traditional world of realpolitik.

At the level of principle, the debate revolves around two questions; first, whether states have the right to intervene in the affairs of other states; and second, if they have that right, then what would be the criteria to justify intervention? Different scholars have different views about the issue and it is important to make a close scrutiny of the practical uses of the doctrines.

In previous chapters, it has been noted that the notion of state sovereignty has been considered sacrosanct from the inception of the modern state system. As a matter of fact, the principle of non-intervention in domestic jurisdiction has been endorsed in many international treaties and has become customary international law. In spite of that, there have been numerous instances of so-called 'humanitarian intervention'. The propensity to resort to 'humanitarian intervention' has dramatically increased in the post-Cold War era. In the Cold War era, the existence of a balance of power and the possibility of a Third World War limited the scope for 'humanitarian intervention', although there were occasional exceptions. The post-Cold War era has been presented as a period of 'globalization', and it is claimed that there has been a growing trend to transfer the functions of governance to transnational institutions, thus weakening of the notion of sovereignty and moving the world into a 'post-Westphalian' society. However, this is just one side of the coin. It should be kept in mind that the U.N. is a forum created and sustained by sovereign states and that the very existence of the U.N. is dependent on the upholding of their interests. Are we really moving into a post-Westphalian world or entering one in which at least some sovereign states are reasserting their powers? The sole remaining superpower, the U.S., for example, has signed off from a number of international treaties and it is adamantly opposed to its citizens becoming subject to the jurisdiction of the ICC. In the name of 'war

against terrorism' it has imposed unprecedented rules and restrictions, which do not conform at all to the notion of a post-Westphalian society. In fact, this trend represents the beginning of a new era of state sovereignty. The contrasts and contradictions thus remain.

Under existing international law, states have no right to intervene in the domestic jurisdiction of another state. Only the U.N. Security Council can authorize the undertaking of such a responsibility. The question remains, what would be the responsibility of the international community when civilian populations are victimized in civil wars or state-sponsored atrocities? Obviously, there is no easy answer to the problems posed by humanitarian intervention conducted without Security Council authorization. If states are allowed to take unilateral action on 'humanitarian' ground there is a very real possibility of chaos and instability in the international system. To maintain order and stability states have relied, in principle at least, on international law, which is essentially a body of norms. These norms, which states in their mutual relations have agreed upon either by treaty or by custom, are generally regarded as a viable and necessary framework for international cooperation and coexistence. The problem is that the existing international legal order has been suffering from the lack of effective enforcement measures. In 1945, when the United Nations was formed the then U.S. Secretary of State Cordell Hull hailed it as the key to "the fulfillment of humanity's highest aspirations."²⁵⁵ Yet gradually it became clear that the attempt to subject the use of force to the rule of law had faced serious challenges. The reality is that "the UN's rules governing the use of force, laid out in the Charter and managed by the Security Council, had fallen victim to geopolitical forces too strong for a legalist institution to withstand."²⁵⁶ Glennon remarks that "in framing the Charter, the

²⁵⁵ Quoted in Michael J. Glennon, "Why the Security Council Failed?" *Foreign Affairs*, May/June 2003.

²⁵⁶ *Ibid.*

international community failed to anticipate accurately when force would be deemed unacceptable. Nor did it apply sufficient disincentives to instances when it would be so deemed. Given that the United Nations is a voluntary system that depends for compliance on state consent, this short-sightedness proved fatal.”²⁵⁷ In the post-Cold War era, state practice as well as U.N. Security Council action, however, suggests a growing tendency to humanitarian intervention. This is just because of the shift in world power toward a configuration that was simply incompatible with the way the United Nations was intended to function. After the disintegration of the Soviet Union and the end of the Cold War the United States emerged as an unrivalled sole superpower. The rise in American unipolarity and subsequent development in the international system brought a new dimension to the use of force. The trauma of September 11, 2001 had an extremely significant impact on U.S. foreign policy, acting as a catalyst for the development of a long-term post-Cold War security strategy. Immediately after the attack the Bush administration declared that the country was at war for the foreseeable future. Vice President Dick Cheney asserted that the war on terrorism was “different than the Gulf War was, in the sense that it may never end, at least, not in our lifetime.”²⁵⁸ Bush developed his own doctrine, saying that “either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”²⁵⁹

In fact, the 9/11 attack made it “easier for the ‘neo-conservatives’ to press the rapid translation of their agenda into government policy, although policy had already been set in a unilateralist direction pre-9/11, as was demonstrated by the Bush

²⁵⁷ *Ibid.*

²⁵⁸ See Rahul Mahajan, *Full spectrum Dominance : U.S. power in Iraq and Beyond*, seven stories press New York, 2003, p. 42.

²⁵⁹ See, www.whitehouse.gov/news/release/2001/09/20010920-8.html., also see Rahul Mahajan, *ibid.* pp. 42-43.

Administration's rejection of the Kyoto Treaty on environmental protection, its intention to withdraw from the 1972 Anti-Ballistic Missile Treaty (ABM Treaty), and its emphatic rejection of the new International Criminal Court."²⁶⁰ The policy shift can be understood if we examine two closely linked documents – *National Security Strategy of the United States* and *Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century*. It is assumed that both documents derived from 'Defense Planning Guidance', written in 1992 by Deputy Defense Secretary Paul Wolfowitz, then Number 3 in the Defense Department, and I. Lewis Libby, currently Vice President Cheney's Chief of Staff.²⁶¹

National Security Strategy of the United States (NSS), published in September 2002, of which Condoleezza Rice was supposedly the principal author, embodied several policies favored by the American neo-conservatives. It stressed first, a 'right' of anticipatory self-defence or pre-emptive attack against terrorist groups and 'rogue states' (it was argued that this was 'a necessity in an era of suicidal, and therefore, undeterrable, Islamic terrorism'). Second, it displayed a preference for taking military action in cooperation with others (the so-called coalitions of the willing) but a readiness to act alone if necessary where 'American security' – now an increasingly elastic concept – was deemed to be at risk. Finally, it insisted America's current military predominance would be considered irreversible and therefore any challenge to it could simply not be countenanced.²⁶²

The report *Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century* (RAD), published by the Project for the New American Century, a neoconservative think

²⁶⁰ James Hamill, "The United States, Iraq, and International Relations," *Contemporary Review*, July, 2003, p. 326.

²⁶¹ Rahul Mahajan, *op. cit.*, p. 45.

²⁶² James Hamill, *op. cit.*, p. 327.

tank, argued that the U.S. must maintain a capacity to fight and decisively win multiple, simultaneous, major theatre wars, that U.S. forces are "the cavalry on the new American frontier", that China should be targeted for regime change, that U.S. space forces must be enhanced to dominate space, and that a worldwide command-and-control system must be developed to contain the dangerous regimes of North Korea, Libya, Syria and Iran.²⁶³

Thus, the 9/11 attack transformed the fundamental security perceptions of the United States and the new sense of vulnerability has led the U.S. to adopt a more militaristic approach to foreign policy. The notions of 'preventive' or 'pre-emptive' action previously considered dangerous and destabilizing, particularly during the Cold War, are now viewed more sympathetically. Moreover, the American version of 'peace' can only be understood as a recipe for Pax Americana in the imperial sense. RAD holds that "If an American peace is to be maintained, and expanded, it must have a secure foundation on unquestioned U.S. military preeminence." The new policy has also subverted the International Criminal Court (ICC), renouncing 'any concept of international accountability for the United States'. According to the NSS report, "We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept."²⁶⁴ In short, 9/11 has changed the U.S. security perceptions and transformed security strategies as well. Whereas Article 51 of the UN Charter permits the use of force only in self-defense, and only "if an armed attack occurs against a Member of the United Nations," the

²⁶³ Sung-han Kim, "The end of Humanitarian Intervention?" *Orbis*, vol. 47, No. 4, Fall 2003, p. 732.

²⁶⁴ See Rahul Mahajan, *op. cit.*, pp. 55-57.

American policy is based on the premise that Americans "cannot let our enemies strike first."

It has been evident that states are not in agreement on when and whether force can be justified. Glennon marks it as a 'cultural split.' According to him, "It [cultural split] divides nations of the North and West from those of the South and East on the most fundamental of issues: namely, when armed intervention is appropriate."²⁶⁵ He also remarks that cultural divisions concerning the use of force not merely separate the West from the rest, they also separate the United States from the rest of the West. This disagreement rests on fundamental question: who should make the rules? Namely, should it be the states themselves, or supranational institutions? Americans oppose supranationalism. Francis Fukuyama has written, "Americans tend not to see any source of democratic legitimacy higher than the nation-state."²⁶⁶ Europeans, on the other hand, see democratic legitimacy as flowing from the will of the international community. What Europeans comfortably submit to impingements on their sovereignty Americans would find anathema.²⁶⁷ Thus, humanitarian intervention, on numerous occasions, has come to represent 'high politics'. There is no easy way to bring together the requirements of existing international law and the moral and political considerations employed to justify humanitarian intervention without authorization from the U.N. Security Council. This dilemma underscores the necessity of forming a 'code of conduct' for the states to intervene on humanitarian grounds.

Although the purpose of this paper is not to propose any 'code of conduct' that would regulate the behavior of states for conducting humanitarian intervention without the authorization of the U.N. Security Council and legalizing their action under

²⁶⁵ Michael J. Glennon, *op. cit.*

²⁶⁶ Quoted in Michael J. Glennon, *ibid.*

²⁶⁷ *Ibid.*

specific sets of circumstances, it may not be impertinent to analyze proposals put forward by several scholars. There are two schools of thought. The first one offers its proposals within the framework of the United Nations but certainly rests on new interpretations of the U.N. Charter. The second highlights the law outside the realm of the U.N. Charter.

One possible alternative, put forward by analysts who advocate 'a new look at the U.N. Charter', is "to seek support for military action from the General Assembly meeting in an Emergency Special Session under the established 'Uniting for Peace' procedures."²⁶⁸ In 1950 'Uniting for Peace' was developed specifically to address situations where the Security Council, because of lack of unanimity among the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security. Some even go further and recommend that to take a prompt decision "an Emergency Special Session must not only be convened within 24 hours of the request being made, but also, under Rule of Procedure 65 of the General Assembly, 'convene in plenary session only and proceed directly to consider the item proposed for consideration in the request for the holding of the session, without previous reference to the General Committee or to any other Committee.'"²⁶⁹ It is argued that "although the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favor of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position."²⁷⁰

Another proposal is to broaden the mandate of regional organizations under Chapter VIII and to give them the right to

²⁶⁸ ICISS Report, *op. cit.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

authorize the use of force under certain conditions. Winrich Kühne, a German analyst, has proposed entrusting regional organizations with the authority to use force under three conditions: i) when the UN Security Council is unwilling or unable to act; ii) when the UN Security Council has not explicitly denied the existence of a humanitarian crisis; and iii) when the regional institution in question can act within the confines of a predetermined institutional structure that could authorize such action.²⁷¹ Yet regional arrangements are usually confronted with practical problems. Most lack the logistical capability to undertake humanitarian intervention. Members of regional organizations are neighbors and may have bilateral or multilateral disputes among themselves, or they may be driven by ulterior political or economic motives, which may disperse the problem throughout the whole region.

Advocates of the second school of thought have opined that 'states have an inherent right to use force' and they offer strong moral and legal-political arguments for the legitimacy of humanitarian intervention even without authorization from the U.N. Security Council. Most of their arguments have been drawn on the old natural law doctrine of a 'just war' (*bellum justum*). These arguments include,

- 'Just warfare' – moral necessity;
- Intervention is necessary in extreme cases to preserve the practical and moral legitimacy of international law;
- Doing wrong to correct greater wrongs – emergency rules;
- True humanitarian intervention does not violate the core of state sovereignty;

²⁷¹ Chantal de Jonge Oudraat, "Intervention: Trends and Challenges", in Ramesh Thakur & Edward Newman (eds.), *New Millennium, New Perspectives: The United Nations, Security and Governance*, United Nations University Press, Tokyo, New York, Paris, 2000. p. 56.

- Humanitarian intervention might increase observance of human rights in weak states;
- The need for international law enforcement in spite of Security Council paralysis; and
- Humanitarian intervention without authorization from the Security Council in order to enforce high regional standards.²⁷²

The 'just war' doctrine also established criteria by which war could be considered just and legitimate. These include:

- Right authority – which actor has the authority to decide on war?
- Just Cause – is the cause legitimate?
- Right Intention – what are the motives behind the launching of the war?
- Last Resort – have other actions been considered?
- Open Declaration – did the war start with a declaration?
- Proportionality – is the act of war proportionate to the harm inflicted? and
- Reasonable hope – is there a reasonable chance for a successful outcome?²⁷³

Although the proposed criteria seem to have provided a useful framework for action, the whole issue is prone to abuse. In fact, no approach can guarantee the elimination of genocide or the violation of human rights. Even under existing international law there is much scope to conduct humanitarian intervention with the authorization of the U.N. Security Council, but powerful states have the tendency to bypass the U.N. when it does not suit their interests.

²⁷² DUPI Report, *op. cit.*, pp. 99-101.

²⁷³ See Dan Smith, "Interventionist dilemmas and justice," in Anthony McDermott (ed.), *Humanitarian Force*, PRIO Report No. 4, published jointly with the Norwegian Institute for International Affairs (Oslo: PRIO, 1997) cited in Chantal de Jonge Oudraat, *op. cit.*, p. 57.

Several scholars have also demanded reformation of the U.N. Security Council decision-making process. They argue that veto power limits the possibilities for constructive decision-making and that under existing procedure only weak states are targets for potential intervention. Actions against the powerful states are impossible to undertake even if they commit gross violations of human rights.

From the above discussion, it will be seen that the notions of 'state sovereignty' and 'humanitarian intervention' evolved on the basis of particular political decisions and that their subsequent evolution reflected the requirements of the political situations of the time. Over time, 'state sovereignty' became an essential attribute of the state and it is recognized as such by customary international law. On the other hand, it would be premature to say that 'humanitarian intervention' has received legal authorization. It should be kept in mind, however, that international law does not have the immutable force of scripture like the Bible or al-Quran. It has been developed by human beings and modified by human beings for social and political needs. Humanitarian intervention seems to be the crying necessity of the day in many respects. It should, therefore, be conducted, but under certain strict legal norms. Certainly, there is no guarantee that states will follow any code of conduct developed by authorized international legal institutions. Nevertheless it is better to have a body of rules for legal intervention. There is no doubt that this procedure would require the political understanding of the major powers. There is also no doubt that, in this process, politics, as always, would outweigh law. Glennon remarks, "The first and last geopolitical truth is that states pursue security by pursuing power. Legalist institutions that manage that pursuit maladroitly are ultimately swept away."²⁷⁴

²⁷⁴ Michael J. Glennon, *op. cit.*

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