THE LEGITIMACY OF THE UNITED NATIONS' USE OF ARMED FORCE IN DEFENCE OF THE FUNDAMENTAL HUMAN RIGHTS OF NATIONALS.

by

NANA KOJO BARNES

LL.B., THE UNIVERSITY OF GHANA, 1990
B.L., GHANA SCHOOL OF LAW, 1992

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

July 1994

* NANA KOJO BARNES, 1994
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

(Signature)

Department of LAW

The University of British Columbia
Vancouver, Canada

Date 30th July 1994
Abstract

This thesis explores the constitutional legitimacy of the United Nations' use of armed force to protect nationals from governmental violation of their human rights. The viability of the use of armed force is also considered. The thesis does not purport to be concerned with United Nations military intervention in cases, which, though being threats to international peace and security, do not arise from or turn on governmental violations of the fundamental human rights of nationals.

It is advanced herein that the constitutional legitimacy of the United Nations use of armed force to protect nationals from governmental violations of their human rights primarily turns on the violations creating a threat to international peace. It is argued that consequences of extensive, deliberate and persistent governmental violation of nationals' human rights could constitute a threat to international peace. It is further argued that, notwithstanding the existence of a threat to the peace, where the use of armed force may impact negatively on the maintenance of international peace it may not be legitimate in constitutional terms for the United Nations to apply armed force.

Even where the constitutional grounds for the United Nations resort to armed force are met, the view is expressed herein that the raison d'etre for the resort to armed force in any particular situation must not be ignored. Where the raison d'etre is the need to protect nationals against a government violating their human rights, the probable impact of the United Nations' use of armed force must be a major consideration in the decision
whether or not to apply armed force.

It is argued that there exists a real probability of high civilian casualties where armed force is applied against a target government in areas where the target government is intermingled with the local population. Consequently, it is suggested herein that, armed force not be used.

Were one to discount the fear of high civilian casualties consequent on the use of armed force, the point is made in the thesis that, despite the end of the cold war, most United Nations member states lack the political will, resources, and national tolerance levels necessary to equip the United Nations to carry out prompt, strong and sustainable military action in defence of nationals from governmental violation of their rights.

Against this background, but more particularly, the probability that the use of armed force may impact negatively on the human rights of the nationals sought to be protected, it is suggested herein, as an alternative to the use of armed force, the early imposition of target-government-focused-sanctions by the United Nations. The position is taken that imposing such sanctions during the early days of governmental repression may help preempt the escalation of the human rights violations, and perhaps significantly reduce, if not eliminate the violations altogether.

To facilitate the early imposition of these sanctions, it is suggested, inter alia, that a
Security Council Resolution be adopted expressly incorporating in the Security Council's interpretation of matters which constitute threats to international peace, "extensive and persistent" governmental violations of human rights. The interpretation of "extensive and persistent" will be left to a specialised United Nations' department advocated herein, to wit the "Governmental Sanctions Department."

This Department, in its determination of "extensive and persistent" human rights violations, will rely not on the strict grammatical meaning of the phrase "extensive and persistent," but rather, on the urgency to first, preempt the escalation of the governmental human rights violations, and second, to forestall the outbreak of local armed rebellion or unilateral foreign interventions which may be consequential on large scale and prolonged governmental human rights abuses.

Reducing the probability of the eruption of armed hostilities within the target state may also reduce pressure on the United Nations to intervene militarily, in defence of the rights of nationals as the need for such intervention may be eliminated.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abstract</td>
<td>ii</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>v</td>
</tr>
<tr>
<td>Acknowledgement</td>
<td>ix</td>
</tr>
<tr>
<td><strong>INTRODUCTION</strong></td>
<td></td>
</tr>
<tr>
<td>1.0 Concern For Human Rights</td>
<td>1</td>
</tr>
<tr>
<td>1.1 Multilateral Institutionalized Protection of Human Rights</td>
<td>5</td>
</tr>
<tr>
<td>1.2 Constitutional Problems</td>
<td>6</td>
</tr>
<tr>
<td>1.3 Thesis Focus</td>
<td>9</td>
</tr>
<tr>
<td>1.4 Chapter Layout</td>
<td>11</td>
</tr>
<tr>
<td><strong>CHAPTER ONE  HUMANITARIAN INTERVENTION:CLASSICAL TO CONTEMPORARY</strong></td>
<td></td>
</tr>
<tr>
<td>2.0 The Right of Unilateral Humanitarian Intervention</td>
<td>13</td>
</tr>
<tr>
<td>a. Practice</td>
<td>13</td>
</tr>
<tr>
<td>b. Humanitarian Focus--Defence of Minority Rights</td>
<td>17</td>
</tr>
<tr>
<td>c. Evolution to a Multilateral Institutional Framework</td>
<td>18</td>
</tr>
</tbody>
</table>
2.1 Deficiencies in the Minority Rights protection scheme

2.2 Widening of the Rights Protection Focus

a. Global Supervision

b. From Minority Rights Protection to Human Rights Promotion/Protection: The Concept of Fundamental Human Rights

i. Character

ii. Content

CHAPTER TWO  THE LEGITIMACY OF UN INTERVENTION IN DEFENCE OF NATIONALS' RIGHTS

3.0 Grounds

3.1 Intervention on the Basis that there exists a Threat to International Peace

a. Article 2 (7) and the scope of Domestic Jurisdiction

b. "Threat to the peace": Pre-1989 UN Practice

c. Politicisation of Human Rights Issues

i. Pakistan, 1971-1972

ii. Cambodia, 1975-1978
d. "Threat to the peace": Post-Cold war Practice
   i. Iraq, 1991 63
   ii. Somalia, 1991-1993 65
   iii. Haiti, 1993 68

CHAPTER THREE  THE UN'S USE OF ARMED FORCE TO

PROTECT NATIONALS RIGHTS

4.0 Prerequisites to the Application of Armed Force 72
   a. Prior Application of Article 41 Measures

       Precondition to the Use of Armed Force? 73

   b. Application of Armed Force Conditional on

       Security Council's Prior Express Determination

       of the Inadequacy of Article 41 Measures? 75

   c. Maintenance and/or Restoration of

       International Peace 77

4.1 The Viability of the UN's Use of Armed Force to

       Protect Nationals 79

       i. Somalia, 1993 79

       ii. Bosnia-Hercegovina 84

       iii. Lack of adequate infrastructure 88
CHAPTER FOUR  MANDATORY SANCTIONS, A FORCEFUL ALTERNATIVE TO THE UN’s USE OF ARMED FORCE

5.0 The Forceful Alternative

a. Focus

b. Constitution or Composition of the Sanctions

c. Specifying the legal basis for the invocation of the Sanctions

d. The Permanent Governmental Sanctions Department

e. A Phased Approach in the Imposition of Sanctions

f. Timely Imposition of Sanctions

5.1 CONCLUDING REMARKS
Acknowledgement

My profound thanks to Professors Peter Burns and Karin Mickelson, under whose able and insightful supervision I have carried out this research. Their thought-provoking comments and suggestions proved crucial to the successful completion of this thesis.

To Professor Maurice Copithorne, I owe a debt of gratitude. His seminar on International Legal Problems proved invaluable to me in the preparation of this thesis. His seminar gave me deep insight into some of the issues dealt with in this thesis.

I assume full responsibility for any inaccuracies and errors in the thesis. Likewise for the views and suggestions expressed herein.

To the British Columbia Law Foundation I express my deep gratitude. The successful completion of my LL.M studies was greatly facilitated by the generous financial assistance they extended to me.

Providing me with emotional and moral support which proved crucial to me during my LL.M. studies, were Law Faculty and staff. To them I remain indebted.
INTRODUCTION

1.0 CONCERN FOR HUMAN RIGHTS.

The need to protect nationals against governmental violation of human rights\(^1\) has assumed pervasive *global* urgency during the post-World War I period. Though the pre-World War I period did evidence concern and efforts aimed at protecting nationals against governmental violation of human rights, such efforts were essentially regional in nature, with roots in 18th and 19th century European state practice.

With the emergence of a global village this century, concern for human rights has also assumed global proportions. This concern, particularly since the dawn of the United Nations Organisation (hereinafter, UN) era, has been articulated in numerous ways. These include the establishment of an institutional legal and moral framework for the protection of human rights through international human rights instruments; the use of multilateral pressure and moral suasion through the media of the UN and some regional political organisations; and in some cases, the use of unilateral pressure by some states.\(^2\)

---

\(^1\) References to governmental violation of human rights or the potential thereof are, in the context of this thesis, to violations or potential violations the character of which is extensive, deliberate and persistent.

\(^2\) Such pressure under certain circumstances has been labelled as "interventionist", especially when it has involved the use of coercive armed force. This Thesis focuses on intervention of a multilateral nature, specifically under the auspices of the UN. Unilateral intervention would not so much be the focus of the thesis as the debate as to its constitutional legitimacy has become virtually sterile in the light of near overwhelming legal authority as to its illegitimacy. The
contemporary legal position on unilateral intervention may perhaps be summed up in these terms, "the overwhelming majority of contemporary legal opinion is against the existence of a right of [unilateral] humanitarian intervention for three reasons: First, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; Secondly state practice in the past two centuries, especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments none at all, and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation."


For case law against the lawfulness of unilateral intervention see, Corfu Channel Case [1949] I.C.J. 4, 35 stating that "the alleged right of [unilateral] intervention as the manifestation of a policy of force (emphasis added) such as has, in the recent past given rise to the most serious abuses and such cannot, whatever be the present defects in international organisations, [emphasis added] find a place in international law." See also, Case Concerning Military And Paramilitary Activities in and against Nicaragua (Merits) [1986] I.C.J. Rep.14, 108,(hereinafter, Nicaragua versus United States).


This pervasive urgency\(^3\) to protect nationals from or against governmental violation of human rights has been informed not only by the phenomenon of an emergent global village but also by a number of other factors which include;

(a) an enhanced global consciousness of the shared dignity and worth of humankind and a widely held belief that peculiar to all humankind are certain common rights whose recognition and protection are necessary to maintain the dignity and perpetuation of humankind,

(b) a widely shared urge born of our membership of the human species to protect and preserve other members of the species and,

---

\(^3\) This pervasive urgency, has, in some instances, been exploited by some individual states to advance their private interests (e.g. The 1978 Vietnam overthrow of the Khmer Rouge government of Cambodia) or to settle personal scores (e.g. The 1978 Tanzanian overthrow of Uganda's Iddi Amin who had challenged the Tanzanian leader to a boxing match.) See, Hassan, F., "Realpolitik in International Law: After Tanzanian-Ugandan Conflict,'Humanitarian Intervention' Reexamined," (1981) 17 Willamette Law Review 859, 890, stating that unilateral intervention is "simply a cloak of legality for the use of brute force by a powerful state against a weaker one."
(c) a recognition that governments if left alone can not be fully trusted to recognise and respect the human rights of nationals as, inherent in the concept of human rights, is the limitation of governmental authority as well as the imposition of governmental responsibility.\(^4\)

This distrust of governments as credible sole guarantors of human rights has been engendered in part by a catalogue of governmental lack of regard for the fundamental human rights (hereinafter rights) of nationals since time immemorial. For example, the period of humankind's history preceding the League of Nations had revealed that national minorities, be it on the basis of race, religion, language etc., had been particularly vulnerable to rights abuses by national governments which more often than not were

\(^4\) Under the western liberal tradition, most civil-political rights operate as restraints on governmental authority viz. nationals, and socio-economic and cultural rights largely require positive governmental action to make such rights realisable and assessible to nationals. See, generally, United States Constitution. The International Bill of Rights (The Universal Declaration of Human Rights, International Covenant of Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights) reflects the same position.

However under the strict socialist tradition both categories of rights require positive governmental conduct. See, Socialist Concept of Human Rights, Halasz J., ed., (Budapest: Academiai Kiado, 1966) 67, where he states that human rights are "a legal potentiality which require governmental activity to become a social reality, a social fact." See also, the 1936 USSR Constitution where human rights are portrayed as what the state would do for the citizens. They are, therein, described as state policy objectives.
dominated by national majorities.\textsuperscript{5}

1.1 MULTILATERAL INSTITUTIONALIZED PROTECTION OF HUMAN RIGHTS.

The focus of the urgency to protect the rights of nationals against governmental abuse has, especially since 1919, beginning with the establishment of the League of Nations, gradually evolved from emphasis on unilateral state based defence of the rights of nationals to emphasis on institutional multilateral media. Such media has been in the form of international organisations which contemporarily, include the United Nations (UN), Organisation of American States (O.A.S), Organisation of African Unity (O.A.U) etc. Of these organisations the UN is the one with the widest mandate.

The UN in the execution of its mandate to promote human rights, has utilised a whole host of mechanisms or measures.\textsuperscript{6} These measures predominantly appear to be peaceful and non-coercive and depend a great deal on the voluntary compliance of states for their success. Some of the major measures taken by the United Nations in this direction include the definition of human rights standards, the preparation of human rights studies, the provision of human rights advisory services at the request of states, the establishment


of special committees under the various human rights conventions to oversee and promote the implementation of the relevant specific conventions, the making of recommendations and adoption of resolutions by its specialised agencies and organs\(^7\) and in a few cases the use of some of the coercive mandatory measures provided for in Chapter VII\(^8\) of the UN Charter (hereinafter Charter).

### 1.2 CONSTITUTIONAL PROBLEMS.

However the realisation of the ideal of protecting the rights of nationals, against governmental abuse through the UN system has not been readily achievable as first envisaged and hoped for. Constitutional problems among others, have bedeviled these efforts. Disputes have arisen between the UN and states and also between states as to matters of jurisdictional competence in the protection of rights of nationals.\(^9\)

---

\(^7\) For a more detailed discussion of the UN's application of some of these measures especially the non-coercive ones, see, *Ibid.*, 544-551.

\(^8\) Arts. 39-51. It is entitled "Actions with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression."

These constitutional problems have revolved around the interpretation of the Charter as well as of contemporary international law. Some advocates of the exclusive territorial jurisdiction and sovereignty of states doctrine\(^\text{10}\) have contended that no where in the Charter is the UN mandated to "protect"\(^\text{11}\) rights. Also, that the protection and/or abuse of rights of nationals remains within the exclusive jurisdiction of the nation-state which alone reserves the right to accept or reject international supervision/assistance in the execution of its jurisdictional competence.\(^\text{12}\)

The UN Charter contains a general prohibition against UN intervention in matters that are "essentially within the domestic jurisdiction of any state"\(^\text{13}\) However, this prohibition is inoperative in the event of "a threat to the peace, breach of the peace or

\(^{10}\) A classical description of this doctrine is given by Max Huber the Arbitrator in the Island of Palmas Arbitration, (1928) 22 A.J.I.L. 867, 875, where he states thus, "Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other state, the functions of a state."

\(^{11}\) "Protect" is interpreted to imply proactive conduct. Reference is made to the Charter provisions dealing with UN rights activities where the words "promote and encourage" are used, words which in many ways are non-proactive.

\(^{12}\) The only exception to the exclusive jurisdiction of a state in the treatment of its nationals recognised by this school, is where a state by virtue of an international agreement has agreed to respect specific human rights. See, Goodrich, L., et al, Charter of the United Nations:Commentary and Documents, (New York: Columbia University Press, 1969) 71 , (hereinafter, Commentary.)

\(^{13}\) See, Art. 2 (7) providing in part that, "Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state ......."
act of aggression"14 The issue arises as to whether governmental violations of nationals' rights may legitimately be subsumed under this ground of intervention. Academicians have contributed to the debate on this issue.15 The dominant UN practice has failed to clarify the situation.

Further to the constitutional debate is the view that, the defence of rights, "a strictly humanitarian objective,"16 did not extend to the use of coercive armed force in achieving that objective.17

14 Ibid., stating that "but this principle shall not prejudice the application of enforcement measures under Chapter VII." For a brief description of Chapter VII see, supra, note 8.

15 See, "Intervention," supra, note 2 at 190, stating that there exists no indication in the travaux preparatoires to the UN Charter that the drafters perceived a state's mistreatment of nationals as constituting a threat to international peace and security. See also, Fenwick, D.T., "A Proposed Resolution Providing for the Authorization of the Use of Force by the United Nations, a Regional Organisation, or a Group of States in a State Committing Gross Violations of Human Rights," (1973) 13 VA.J.Int'l.L. 340, 355, stating that, the maintenance of international peace and the protection of human rights are necessarily interconnected.

16 See, Nicaragua versus United States, supra, note 2 at para. 268, stating that, "... the use of force could not be the appropriate method to monitor and ensure ... respect [for human rights].... the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations...."

17 Ibid. See also, Charter Art. 2 (4) stating that, "all Members shall refrain in their international relations from the threat, or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
1.3 THESIS FOCUS.

This Thesis explores the issue of the constitutional legitimacy of the use of armed force by the UN to protect the fundamental human rights (hereinafter, rights) of nationals in the face of governmental violations of them. This is an issue which is of particular concern for two major reasons, namely:

(a) It remains a highly controversial constitutional issue as many governments see its validation as a potential threat to their domestic authority and,

(b) Governmental abuse of rights appears to be a rising phenomenon in our century and some states and international commentators have increasingly been calling for a more proactive and timely response by the UN to safeguard and guarantee the rights of nationals among others.

In examining the constitutional issue raised above, whilst a textual legal analysis will be utilised I propose to go beyond the black letter rules of the Charter. This is necessary since, the UN body or organ with the primary responsibility for authorising the UN's use

---

18 See, supra, note 1.

19 See, Rummel, R.J., "The Rule Of Law: Towards Eliminating War And Democide" (unpublished paper on file with the American Bar Association Committee on Law and National Security) where he states that, "while about 37,000,000 people have been killed in battle in all foreign and domestic wars in our century, government democide (genocide and mass murder) have killed over 148,074,000 ... and over 85% of these were killed by totalitarian governments."
of armed force remains a political organ which in the execution of its mandate continually reflects the dynamics of international political relations.

Within this political context the usually diverse national interests of members of the Security Council as well as of the General Assembly are at play. These political dynamics greatly influence not only the development and interpretation of international law but its effectiveness as well.

These dynamics may have a bearing on the legitimacy of the authority of the Security Council as perceived by its non-members represented in the General Assembly. Pervasive perceptions of illegitimacy may breed uncooperative attitudes which ultimately may affect

---

20 This is the Security Council. See, Art. 24(1) of the UN Charter. The General Assembly may assume this responsibility where, "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." See, Uniting for Peace Resolution G.A.O.R. 377 (V) (1950).

21 For example, the non-cooperative attitude that characterised international relations between the former East and West ideological blocs during the Cold-War was reflected in the near paralysis of the Security Council. Since 1990 however, the fair measure of cooperation which has emerged between these former ideological foes has been reflected in the rejuvenation of the once sterile Security Council. See, "United Nations: Security Council Summit Statement Concerning the Council and the Maintenance of International Peace and Security," reprinted in, (1992) 31 I.L.M. 758, 761 stating that, "the members of the Security Council consider that...there are now favourable international circumstances under which the Security Council has begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security."
the enforcement potential of the UN. Especially in connection with the UN’s protection of the rights of nationals. History has shown that the UN is only as effective as its members and non members make it.

1.4 CHAPTER LAYOUT.

The Thesis is divided into five main parts the first of which is the introduction. The subsequent parts are each composed of a chapter.

Part I, the introduction, seeks to isolate the issues to be explored in the thesis, hence revealing the thesis focus. It also describes briefly the layout of the subsequent Parts.

Part II, essentially, discusses the existence of a right of unilateral humanitarian intervention under classical international law and traces its legal development through modern history showing its replacement by a right of multilateral humanitarian intervention under an institutional framework. The concurrent evolution in the definition of fundamental human rights and the standards in ascertaining governmental violation of same from a unilateral base to a more multilateral scheme of things will be emphasised.

Part III discusses the circumstances or grounds under which this right of multilateral humanitarian intervention may be invoked.
Part IV examines whether this right extends to the use of armed force. In other words, whether governmental violation of rights of nationals constitutionally legitimises the multilateral use of force as a measure of protection. This Part further assesses the viability of the use of armed force by the UN as a measure of protection of rights of nationals against governmental violation of them. The military experiences of the UN in its protection of the Bosnian Muslims (Sarajevo and Gorazde), as well as of the Somalis will be heavily drawn upon. The relevant military experiences from those situations will also be contrasted.

Part V, consequent upon the assessment of the protective value of the UN’s use of armed force in Part IV, suggests an alternative to the UN’s use of armed force. The form and mode of implementation of this alternative is also covered. It is envisaged that this alternative to the use of armed force, may contribute to rendering redundant, the practical problems that plague the UN’s use of armed force. Also, the view is expressed that the proposed alternative may contribute more positively to the UN’s proactive defence of nationals against governments inclined to abuse the rights of their citizens.
2.0 THE RIGHT OF UNILATERAL HUMANITARIAN INTERVENTION.

(a) Practice.

During the close of the 18th century and the first half of the 19th century, though European states recognised that each independent European state had some form of exclusive jurisdiction in the matter of its treatment of its citizenry, especially within its territorial boundaries, when a state's treatment of its citizens/nationals was so cruel as to be considered a violation of "the fundamental laws" it was deemed legitimate among European states to use or threaten to use armed force to remedy the situation.  

---

22 This exclusive jurisdiction was an attribute of the notion of territorial sovereignty, a notion whose legal foundations may be traced to the 1648 Treaty of Westphalia. See for example Arts. LXIV, LXV, LXXVI of the treaty, reprinted in, Vol I Major Peace Treaties of Modern History 1648-1967, Israel, F.L., ed., (New York: Chelsea House Publ. in association with M'cGraw Hill Book Co., 1967) 7, (hereinafter, Treaties)

23 See, Hodges, H.G., The Doctrine of Intervention And Morality. (1988) 5, where he quotes Hugo Grotius thus, "Any Sovereign may justly take up arms to chastise nations which are guilty of enormous faults against the laws of nature." (90. n 29.) This phenomenon has variously been described as "humanitarian intervention." It is an "intervention" because it amounts to a forceful and dictatorial interference with a state/government's exercise of its traditional exclusive territorial jurisdiction over nationals. Such an intervention assumes its "humanitarian" nature from its ostensible object of protecting human rights either of nationals of the target
What these "fundamental laws" were, was essentially not determined by reference to the positive laws of the target state(s) but rather the prevailing moral values and level of human rights consciousness of the intervening state(s).  

It appeared immaterial to the issue as to the legitimacy of such an intervention that the positive laws of the target state recognised no such rights or even legally permitted the governmental conduct which the intervening state(s) found abusive of rights. In this context an act of humanitarian intervention appeared to be a statement by the intervening state(s) that the rights it purported to protect derived their existence independently of positive law and their enjoyment were not subject to differences in nationality. In other words the protection of rights of nationals were not strictly a matter for the territorial state, or the intervening state or a third state. See, Stowell, E., Intervention in International Law, (Washington D.C.: John Byrne & Co., 1921) 53.

Unilateral humanitarian intervention is a phenomenon which dates back many centuries. One of the earliest cases on record dates back to 450 B.C. In that episode the Prince of Syracuse demanded of the Carthagians as a precondition for the cessation of military hostilities, their abandonment of the tradition of child sacrifice. See, International Protection, supra, note 6 at 178.

24 See, Rougier, A., "La théorie de l'intervention d'humanité," (1910) 17 R.G.D.I.P. 468, 526 where he states that, "whenever one power intervenes in the name of humanity in the domain of another power, it can not but impose its concept of justice and public policy on the other state [emphasis added] by force if necessary. Its intervention tends definitely to draw the [other] state into its moral and social sphere of influence [emphasis added]."
In the isolated cases in which these "fundamental laws" had been spelt out, for example in bilateral or multilateral treaties, the issue as to their infraction or violation by the obliging state was a matter determined by the intervening states(s) according to its unilateral standards.

Such interventions did not always involve the use of armed force or threat thereof, however the use of armed force remained the main instrument of intervention. The use of armed force as an instrument of state foreign policy was not illegitimate so long as

25 This seems to have been pre-1855 practice. Dominant state practice subsequent to that period and through the League of Nations era was an expression of the view that issues of human rights were strictly matters of domestic jurisdiction except where such sovereign rights had been compromised by treaty. This was the position of the United States in 1859 and Russia in 1863. These claims were generally acquiesced to by other major independent states. Majority of post-1855 independent state victims of unilateral intervention were states whom had specifically signed treaties not to violate the rights of their nationals, and the interventions were executed on the basis of enforcing specific treaty obligations allegedly owed to the intervener(s). See, Cutler, L., "Internationalization of Human Rights" (1990) Illinois Law Review 575, 580, (hereinafter, Cutler); Russo, A.L., International Protection of Human Rights, (Washington D.C.: Lerner Law Book Co.,1971) 17, (hereinafter, Russo).

26 See, infra, note 41, and accompanying text.

27 It appears though, that, from the second half of the 19th century European states rarely resorted to the use of force as a tool to protect rights, at least in Europe. This seems to confirm the assertion by a number of international commentators that from that period such use of force had lost its legitimacy in international relations and legal discourse. Resort to its use were sporadic and definitely not the
it fell within the corpus of "just causes".

The protection of the fundamental human rights of nationals and subjects of the target state were perceived as a just cause. In the words of Vattel, the 18th century Swiss jurist, "If a prince by violating the fundamental laws gives his subjects a lawful cause for resisting him .... any foreign power may rightfully [emphasis added] give assistance to an oppressed people .... To give help to a brave people who are defending their liberties against an oppressor by force of arms is only part of justice [emphasis added] and generosity."28

Vattel's views reflected the dominant European state practice of that period.29 Two notable examples include Russia in 1774, compelling Turkey to guarantee the 'natural rights' of its Christian subjects and, Russia, Prussia and Great Britain compelling Poland at the close of the eighteenth century to respect the basic rights of its Protestant


29 This is not to say that the legitimacy of the practice was never challenged. See e.g., [1843] 156 Edinburgh Review 365, where Nassau Senior states that, "according to modern international law, it appears to be doubtful whether a nation has any right against its sovereign; it is certain that, if it had any, they are rights which no third party is justified in supporting."
(b) Humanitarian Focus —Defence of Minority Rights.

The focus of much of the humanitarian interventions during classical times were on behalf of national minorities. Such minorities, defined on the basis of their language, religion, race, culture or such other attribute which set them apart from the relevant national majority, were particularly vulnerable to governmental excesses.

Such vulnerability appeared partly to be a consequence of their lack of control and insignificant participation in the governmental apparatus which invariably, were dominated by national majorities.

Atrocities committed by some governments against their national minorities during World War I further emphasised the vulnerability of national minorities and following the war a continued need was felt to protect this particularly vulnerable group. It was felt that some domestic governments may not respect the rights of this group hence the need for international protection and supervision.31

30 See, Russo, supra, note 25. For a survey of leading instances of such military intervention during that period see, Ibo, supra, note 2 at 178-182.

31 As has been shown, the vehicle of earlier protection had been mostly unilateral intervention. The basis of intervention especially during the 19th century ceased from being simply, prima facie, a reaction to the violation of what Vattel termed "fundamental laws" by the target state, to one to compel compliance with "fundamental laws" which the target state(s) had by way of specific treaty obligations undertaken to
(c) Evolution to a Multilateral Institutional Framework.

The approach adopted to protect minorities, while still treaty based, was significantly different from the 18th and 19th centuries treaty practice in a number of ways.

First, the protection was to be by an international organisation, the League of Nations (hereinafter League), of which a majority of the then independent states were members, rather than by individual states. Under this arrangement, certain countries, essentially the defeated World War I states and states created or enlarged following the war, guaranteed in treaties their respect and protection of the rights of their national minorities, as had been the practice in the 18th and 19th centuries.

These treaty obligations were owed to the League directly and not to individual signatory states as had been the pre-League practice. Thus the right of enforcing the

---


33 See, Russo, supra, note 25 at 25.

34 See for e.g., the 1878 Treaty of Berlin, reprinted in, Vol.II Treaties, supra, note 22 at 975, under which the treaty obligations undertaken by Montenegro, Serbia, and Roumania with regard to their nationals were owed to the signatory states of the other part in their individual capacities.
obligations thereunder now resided in an international organisation and not individual states.

The rationale for this shift from unilateral to institutional multilateral enforcement was essentially to eliminate abuses which had occurred under the pre-League treaty guarantee practice. Under the pre-League treaty guarantee practice, unilateral claims of defending the rights of minorities by way of enforcing treaty compliance had been partly based on the desire of the intervening state(s) to advance its political interest and tilt the "balance of power" in Europe in its favour.35

The treaty obligations under the League practice, were characterised as "obligations of international interest"36 which the obliging state could not modify "without the consent of a majority of the Council of the League."37

The second major innovation or improvement on the pre-League treaty practice, was the

35 This apparently perennial tendency of unilateral humanitarian intervention to be used as a pretext to advance the private and special interests of the intervener remains one of the greatest obstacles against its legal validation. See for e.g., "Intervention," supra, note 2 at 291, where Professor Schachter states, with reference to unilateral humanitarian interventions that, "experience has shown how readily more powerful states have used the pretext of a higher good to impose their will and values on weaker states..."

36 See, closing articles of minority treaties. Some of the minority treaties are cited, supra, note 32.

37 Ibid.
transfer of the forum for determining governmental violation of minority rights enshrined in the treaties, from the signatory state(s) of the other part to the Permanent Court of International Justice.\textsuperscript{38} The treaties provided that disputes as to treaty compliance were disputes of international character over which the Permanent Court of International Justice had jurisdiction,\textsuperscript{39} the judgment of which was to be final and binding.

The objective for this shift was the ideal of providing, hopefully, an impartial and objective forum devoid of political intrigues and the subjective standards of individual signatory states.\textsuperscript{40}

While the need to institutionalize the minority rights treaty protection system was a factor, the overriding rationale for the shift from unilateral guarantee of minority rights to that of a multilateral institutional framework was to preempt the tendency for unilateral interventions on behalf of minorities (usually by the state of which they formed the national majority) to result in wars which disrupted international peace and security.\textsuperscript{41}

\begin{footnotes}
\item[38] \textit{International Protection, supra}, note 6 at 216.
\item[39] See e.g., Article 12 of the 1919 Treaty of Versailles with Poland.
\item[40] See, \textit{International Protection, supra}, note 6 at 217.
\item[41] See for e.g., sentiments expressed by United States President Woodrow Wilson in a speech delivered on May 31st 1919 during plenary session of a Peace Conference, quoted in, \textit{Ibid.} at 217, " take the rights of minorities. Nothing I venture to say is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities. And therefore if the Great Powers are to guarantee the peace of the world in any sense, is it unjust that they should be satisfied that the proper and
By way of removing lingering assumptions that customary international law still recognised unilateral use of force, the Covenant of the League\(^{42}\) required members "to respect and preserve against external aggression the territorial integrity and political independence of all members...\(^{43}\) and, to apply immediate sweeping economic and financial sanctions against any member resorting to war in violation of its obligations."\(^{44}\) If these provisions outlawing the use of unilateral force (except in self defence) were not definitive enough the following, it is submitted, left little room for ambiguity: "the settlement or solution of all disputes or conflicts of \textit{whatever nature or of whatever origin} [between state parties]...\textit{shall never be sought except by pacific means}[emphasis added]."\(^{45}\)

The rights of minorities sought to be guaranteed included rights to life, liberty, religious freedom and equal protection before the law. Also included were rights to maintain separate social and charitable institutions to preserve their culture.\(^{46}\) The purpose of these guarantees ostensibly was to assure to national minorities equal status before the


\(^{43}\) Art. 10.

\(^{44}\) Art.16. The prohibition against the unilateral use of force was intended to apply to non League members as well. See, Art. 17 of the Covenant of the League.

\(^{45}\) Art.2, Paris Treaty For The Renunciation Of War, (Kellogg-Briand Pact) [1928], 94 LNTS, 54.

\(^{46}\) See, Russo, \textit{supra}, note 25 at 25.
law, a status national majorities, generally speaking, enjoyed.

Recognising the weakness in the 18th and 19th centuries minority rights treaty protection scheme, clear stipulations were put in these treaties providing that minority rights "be recognised as fundamental laws of the nation and that no domestic law or regulation be in conflict or paramount to those stipulations." 47

The essential thrust of these treaties was that a number of "states as a result of the conclusion of those treaties accepted a limitation to their sovereignty in favour of the international protection of minorities." 48 It must be noted that independent states that were not part of the national minorities rights protection scheme, by and large, enjoyed the extent of sovereignty described by Max Huber 49 not only in relation to other states but in relation to the League as well. 50 In other words, independent of specific treaty obligations, the protection of rights of nationals was perceived as one of domestic jurisdiction.

47 See, opening articles of minority treaties. Examples of minority treaties cited, supra, note 32.

48 See, supra, note 46.

49 See, Island of Palmas Arbitration, supra, note 10.

50 See e.g., Art. 15(8) of Covenant of League which states in part that, "if the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council . . . . shall make no recommendation as to its settlement [emphasis added]."
As I have sought to portray it, the dawn of the League marked the legal shift from the hitherto unilateral intervention especially with armed force, to intervention under an multilateral institutional framework (albeit with very limited focus) personified in the League. The issue as to whether this limited right of multilateral intervention extended to the use of armed force will be dealt with in Chapter Three.

2.1 DEFICIENCIES IN MINORITY RIGHTS SCHEME.

Many international legal commentators were not happy with the minority rights protection mechanism administered by the League for a number of reasons. First, the League's approach adopted was too narrow as it was limited essentially to the minorities in defeated World War I states and new states. The protective regime did not cover national minorities in the victorious World War I states. Thus, in the United States for example, black populations as well as Asian immigrants denied certain basic rights could not claim any international protection of those rights.

Interestingly enough, as suggested by Professor Humphrey, the reason why attempts to enshrine human rights in the Covenant of the League of Nations failed was due primarily, to the apprehension which developed among many states mainly Western States when Japan pushed for the Covenant to mention the equality of nations and to provide for the just treatment of their nationals. Many of those states had laws which
restricted the rights of Asian immigrants.  

Another shortcoming with the focus on the minority rights regime was the virtual lack of international protection of the rights of national majorities. It appears that all independent states were not inhibited under international law in the treatment of their national majorities except in matters dealing with slavery and labour which were to some extent subject to international scrutiny and protection.

Thus with the exception of the above mentioned areas it appeared that states could violate the fundamental human rights of their national majorities and safely hold aloft the banner of exclusive jurisdiction over domestic affairs.

This lacunae engendered by the focus on the minority rights regime was exploited by many governments in oppressing their non-minority nationals and subjects. Such violations were particularly patent and widespread in Russia and Turkey following their revolutions in 1917 and 1920 respectively.

---


52 Russo, supra, note 25 at 32.
2.2 WIDENING OF THE RIGHTS PROTECTION FOCUS.

The League failed to come to grips with the deficiencies inherent in its focus on the minority rights regime. Things were to change though following two major events;

(a) Germany’s exploitation of the League’s excessive focus on minority rights to justify its interventionist and expansionist ambitions in Europe. Germany cited the protection of the fundamental human rights of national minorities of German descent in Czechoslovakia, Poland and Austria-Hungary as legitimating grounds for its invasion of those countries in the 1930’s, an occurrence which directly precipitated World War II.53

(b) The sheer scale and manner of atrocities committed by certain governments on their citizenry, minorities and majorities alike, during World War II, revealed that not only minorities or more specifically minorities in defeated states needed protection, but everyone did, irrespective of the country of nationality.

These developments vindicated a belief shared by many international commentators that all governments and not only those of the defeated states could not be fully trusted to be the sole custodians of the fundamental human rights of their citizenry, hence the urgent need for some global machinery which would monitor and oversee the conduct of all

---

53 Ibid. at 31.
governments in the promotion and protection of the human rights of nationals among others.

This development was a significant departure from the League era where it was believed, especially by the victorious World War I states, that only some governments were likely to abuse the rights of some of their citizenry. And thus, the need for international protection and supervision to oversee, monitor and enforce respect for domestic rights of national minorities in those countries.

By the end of World War II it was apparent that respect for, and protection of, fundamental human rights on a global scale was imperative and could no longer be delayed.

This realization precipitated two major developments;

(a) The extension of the international supervision of governments with respect to the treatment of their nationals from a few governments to all governments.54

(b) The widening of the human rights focus from emphasis on minority rights to that of human rights in general.

54 The UN in its general practice has held itself competent to monitor and discuss human rights issues in any country even in the face of strong governmental opposition. See, infra, note 104 and accompanying text.
(a) Global Supervision.

The UN in many respects a successor to the League of Nations, has been empowered to "promote respect for, and observance of, human rights and fundamental freedoms for all..." Member governments are required to cooperate with the UN in carrying out this mandate.

There is the view that this requirement of cooperation extends to non-members as well or, put another way, that non-members are bound by the terms of the Charter.

Applying the res inter alios gesta principle as well as that of the sovereign equality of independent states, principles whose essential thesis is that no state can be bound by a treaty to which it is not a party, it appears that the UN Charter a multilateral treaty,
may not (at least during the early days) have been binding on non-parties.\textsuperscript{59}

The UN throughout its practice has held non-members bound to cooperate with it in its encouragement, promotion and protection of rights.\textsuperscript{60} Also it has not perceived non-membership as a bar to the reach of its rights promotion and protection tentacles.\textsuperscript{61}

Though Charter Article 2 (7) contains a general prohibition against UN intervention in matters that may be said to be "essentially within the domestic jurisdiction of any state," it nevertheless permits UN intervention in circumstances which the appropriate organ\textsuperscript{62} of the UN has made a determination that a "threat to the peace, breach of the peace, or act of aggression" exists. The UN has on a number of occasions subsumed governmental violations of rights of nationals as "threats to the peace" and consequently as legitimating

\textsuperscript{59} There exists legal authority that contemporarily, the basic principles of the UN Charter may have acquired customary legal status. See, \textit{Nicaragua versus United States}, supra, note 2.

\textsuperscript{60} See, Repertoire of the Practice of the General Assembly, Vol.I; Supp.1, & Supp.2, Vol.1, for examples of General Assembly resolutions which have been directed to "all Members and all other states," "all states," "every state" etc. See also, Security Council Resolution 418 (1977), reprinted in,......... (imposing mandatory arms sanctions against the Union of South Africa in which "all states" were requested to comply.)

\textsuperscript{61} See for e.g., GAOR/3d Sess., 2d Part/1949/ad hoc Pol. Ctte./34th-41st Mtgs./and 189th-203d Plen. Mtgs (General Assembly's inquiry into allegations of rights violations by Hungary and Bulgaria who were then non-members of the UN).

\textsuperscript{62} See, \textit{supra}, note 20.
grounds for its intervention.63

(b) From Minority Rights Protection to Human Rights Promotion/Protection: The Concept of Fundamental Human Rights.

Due to a number of major factors already highlighted, the dawn of the UN marked the beginning of the transition from emphasis on minority rights protection to that of human rights in general. Despite this transition, the character or classification of the rights sought to be protected remained largely unchanged although there was some extension in the content of rights recognised as fundamental.64 As the League and classical interveners had purported to do, the UN also sought to promote governmental recognition and respect for "fundamental human rights."65

The question remains, however: what are fundamental human rights? This question may, perhaps, be dealt with from two perspectives namely, the determination of their character and content.

63 These categorisations and subsequent interventionist activities will be the focus of Chapters Two and Three, infra.

64 A comparison of the rights recognised in the League's minority treaties and that of the UN's International Bill of Rights discloses a growth in volume.

65 See, supra, note 55, for references to the UN's intent to promote fundamental human rights.
(i) CHARACTER.

Many classical interventions in Western Europe were premised on the protection of the dignity of humankind. Dignity, it was believed, distinguished humankind from other living creatures. This dignity was seen as the sum total of humankind's unique rational nature, and upright carriage. 66

This dignity was not perceived as a consequence of some positive law but rather of humanity. Hence this dignity was characterised as "inherent", part and parcel of the package of humanity. The maintenance of this dignity involved the exercise of certain rights. These rights were thus "basic," "natural," and "inalienable". 67 These rights were indivisible from the dignity of humankind. They were in fact an expression, as well as evidence of humankind's dignity. They were not conferred on humankind by positive law but rather, by nature or some superior being who had created humankind. 68 This conception essentially reflects the thesis of the Natural law school, which also perceived


67 Ibid.

68 This view of the source of rights has not been without criticism even in Western thought. See, Hart, H.L.A., "Utilitarianism and Natural Rights," in, Essays in Jurisprudence and Philosophy (Oxford [Oxfordshire]: Clarendon Press; New York: Oxford University Press, 1983) 181-182, where he states that, "without government and law, men have no rights and can have none". See also, Bentham, J., "Anarchical Fallacies" in, Human Rights, Melden, A.I., ed., (Belmont Calif.: Wadsworth Publ. Co., 1970) 28, 32, where he states that, "natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,---nonsense upon stilts."
the individual as the fulcrum around which society revolved.  

The conception of the character of fundamental human rights as "basic," "natural," and "inalienable" "peculiar" and "common" to humankind has carried over to the UN era and the International Bill of Rights reflects this. The first preambulars to the Universal Declaration of Human Rights70 (hereinafter, Universal Declaration), the International Covenant of Civil and Political Rights71 (hereinafter, Political Rights Covenant) and the International Covenant on Economic, Social and Cultural Rights72 (hereinafter, Economic Rights Covenant) all speak of "the inherent dignity ... inalienable rights of all members of the human family." Both Covenants affirm that fundamental human rights "derive from the inherent dignity of the human person."73

Some states, however, deny the "inherent" and "inalienable" character of fundamental human rights. The Peoples' Republic of China (P.R.C.) for example, perceives of these rights as a creation or grant by the state.74 Fundamental human rights exist not because


72 G.A.O.R. 2200 (1966)
73 See, 2nd preambulars.
of their supposed "inherent" and "inalienable" nature, but rather, by virtue of their being granted by the state. Thus within the Chinese constitutional conception a right derives its fundamental character from such characterisation by the state and not because it is "inherent" and "inalienable."  

The common denominator though, that permeates the aforementioned conceptions of the character of fundamental human rights is that, independent of the source of these rights, they have the character of being at least "essential" or "basic" or the "minimum" of those rights necessary for the development and perpetuation of humankind.

(ii) CONTENT.

The issue as to the content of rights has raged since time immemorial. The dispute appears to have been exacerbated in the UN era with the coming together of many diverse polities and cultures in one body, the UN. Not only has the issue been

---

75 The subordinate nature or character of rights in the Chinese politic is perhaps revealed in Art. 51 of the Constitution which provides that, "the exercise by citizens .... of their freedoms and rights may not infringe on the interests [emphasis added] of the state, of society and of the collective."

76 But the Chinese do not deny that certain basic rights are necessary if the state, society and collective are not to become extinct.

77 This has sparked off a debate as to the universality of fundamental human rights. The dominant view advanced by most Western states is that certain specific rights (fundamental human rights) have universal validity and applicability. Other views contributing to this debate include those of;

(i) Economic determinism, that is human rights are essentially
engendered by cultural and economic differences but also been plagued by politicisation as well.

The UN, in an attempt to introduce some uniformity and consensus spelt out a whole host of rights which it characterised as fundamental. These rights were, in some detail, first specified in the Universal Declaration, a document not intended to be binding upon states. The rights specified therein include civil, political, economic, social and

dependent on the socio-economic conditions of any given society, and these conditions determine their content. See, Przetacnik, F., "The Socialist Concept of Human Rights," (1977) 1 Revue Belget 238


It is beyond the scope of the present thesis to do an in-depth study of the issue of the universality of fundamental human rights. The approach adopted herein is, keeping in focus the substantive issue raised in the thesis topic, to develop objective criteria, which facilitates consensus (even in the face of differing conceptions of the content of rights) that the rights of nationals are in danger, or being abused by a local government.

Though certain views subsequently expressed herein may, one way or the other, relate to the issue of the universality of fundamental human rights, they are purely coincidental and not directed at resolving the issue.

78 This may be inferred from the Universal Declaration. See, preambular 5 and article 2 thereof.

79 This document is believed by many to have acquired customary legal status. See, Sohn, L.B., "The New International Law: Protection of the Rights of Individuals Rather Than States,"
cultural rights.

This perception of all those rights as fundamental was for close to three decades thereafter, not accepted by the majority of states. This lack of agreement was reflected in two major ways;

(i) widespread non-ratification of either the International Covenant on Civil and Political Rights (which contained civil and political rights), or the International Covenant on Economic, Social and Cultural Rights (which contained social, economic, and cultural rights) or both. These two treaties were adopted for the express purpose of giving legal effect to the rights listed in the Universal Declaration. It was only in 1976, ten years after their being initially opened for ratification that enough ratifications were obtained bringing them into force.

(ii) The non-recognition of most of the rights therein as fundamental in domestic constitutions and state practice. This was particularly prevalent, though not limited to new states. The approach was simply to ignore most of the rights80 or where they were

---

(1982) 32 Am. U. L. Rev. 1, 17, where he states with reference to the Universal Declaration that, "the declaration, as an authoritative listing of human rights has become a basic component of customary law, binding on all states, not only members of the United Nations.

80 For e.g., under the 1957 Ghana Constitution, (hereinafter, Independence Constitution) only three justiciable rights were recognised. These were freedom of conscience, freedom from discrimination and the right to enjoy private property. See, Art. 31(3), Independence Constitution, (Order-in-Council No.
recognised their fundamentality was impliedly denied. This denial by implication could be seen in the rights being made non-justiciable or essentially subordinate to the political interests of the state or government, or being excluded from authoritative state statements of recognised fundamental human rights.

277, 1957). See also, the 1964 Malawi Constitution, Art. 2.

81 Under the 1961 Ghanaian Republican Constitution, the President was required to make a declaration affirming the "fundamental principles" in Art. 13(1) therein. These fundamental principles included rights such as freedom from discrimination, rights of access to the courts of law, and to the enjoyment of private property; freedoms of religion, speech and of assembly. In the now infamous case of Re Akoto [1961] G.L.R. 523, 528, the Ghanaian Supreme Court held that, art.13(1) was not tantamount to a Bill of Rights capable of being constitutionally enforced by court action, rather, "in our view the declaration merely represents the goal to which every President must pledge himself to achieve. It does not represent a legal requirement which can be enforced by the courts...[emphasis added]. The peoples remedy for any departure from the principles of the declaration, is through the ballot box and not through the courts."

See also, Arts. 126 and 128 of the 1982 Chinese Constitution, supra, note 74, where, though first generation rights are recognised in arts. 35-41 they are substantially unenforceable against the state or government.

82 See, supra, note 75.

83 See, Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States (1987), section 702, where rights or freedoms (mostly first generation), from the underlisted acts are considered fundamental. See, Reporters note 11. The said acts are; genocide, slavery, murder, or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention and systematic racial discrimination.

See also, the European Convention for the Protection of Human Rights and Fundamental Freedoms, which lists essentially civil and political rights.
There, however, appears to be growing acceptance of most if not all of the rights enunciated in the Universal Declaration and subsequently in the Covenants as being fundamental. This assertion is made based on the following developments. First, the number of state parties to both Covenants (International Covenant on Civil and Political Rights; International Covenant on Social, Economic and Cultural Rights) has contemporarily come to include a significant majority of states.

Second, the Council of Europe has complemented its 1950 Convention on Fundamental Freedoms with the 1961 European Social Charter which contains a list of most of the social, economic and cultural rights recognised under the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights. This adds to other regional arrangements where the civil, political, social, economic and cultural rights

84 Professor Theodor Meron suggests some criteria for determining the customary or fundamental nature of a human right. These criteria include; (i) the extent to which a particular right in a human rights instrument is repeated in other human rights treaties and, (ii) conformist state practice as revealed primarily (but not exclusively) in domestic legislation. See, Human Rights And Humanitarian Norms As Customary Law, (Oxford: Clarendon Press; New York: Oxford University Press, 1989) 93.

Applying this criteria it is possible to say that most if not all the rights in the Universal Declaration are customary or fundamental.

85 As of 1990 92 states out of 170 had ratified both the Political Rights Covenant and the Economic Rights Covenant. This number has significantly increased since then.

listed in the Universal Declaration are all therein recognised as being fundamental.87

Third, reference to Peaslee's Constitution of Nations88 reveals a sizable number of nations cutting across the East/West and developed/developing divide which, in their constitutions and domestic practice recognise many of the rights enunciated in the Universal Declaration as fundamental. For example, 79 of the 89 nations covered, recognise the right to education as basic; 84 the right to personal liberty; freedoms of conscience, speech, and due process; 59 recognise the right to social security. Other rights substantially (that is, by over fifty states) recognised as fundamental include equality before the law, freedoms of assembly, association and movement, and protection against deprivation of private property among others.

Fourth, the indivisible link between first, second and third generation rights has become particularly patent in recent times with the proliferation of civil wars and the consequent disruption of the social life of the people directly affected by such civil strife. The breakdown of law and order invariably has the effect of depriving the affected


These documents together with the Political Rights and Economic Rights Covenants are largely repetitive of the fundamental principles enunciated in the Universal Declaration and this in itself may be said to be an important articulation of state practice.

government(s) and people of legitimate avenues to enjoy second generation rights such as rights to food, shelter, health care, and work among others.

The non-satisfaction of these rights invariably inhibits the enjoyment of first generation rights such as the right to life, freedoms of movement, association and assembly. Also compromised is their freedom from torture, cruel and unusual treatment and punishment.

This linkage appears to have received worldwide recognition in widespread calls for UN humanitarian intervention, where human rights, be they first and/or second generation are in serious danger of being compromised. This recognition was given expression during the recent Somali humanitarian crisis. The UN action in Somalia has been supported morally, politically, and materially by virtually every independent state in one

89 See e.g., G.A.O.R. 43/131, (1988) (which provides that "that the international community should respond speedily and effectively to appeals for humanitarian assistance made in particular through the Secretary-General." It is further provided therein that, "convinced that, in providing humanitarian assistance, in particular the supply of food, medicine or medical care for which access to the victims is essential, rapid relief will avoid a tragic increase in their number."

90 Worldwide consensus was of such compelling magnitude that the UN Security Council found itself having to take the hitherto unprecedented step of citing "the magnitude of the human tragedy caused by the conflict in Somalia" as contributing to its finding of a threat to international peace and security. See, Security Council Resolution 794 (1992), in, UN Doc. S/PV. 3145 (1992).

It also condemned all violations of humanitarian law occurring in Somalia " including in particular, the deliberate prevention of the delivery of food and medicine essential to the survival of the civilian population [emphasis added]." See, Ibid. para 5.
way or the other, with the Western world, especially the United States, Britain and Italy, at the forefront.

Quite apart from these developments, it is submitted that the Universal Declaration in its entirety may be an authoritative listing of the content of fundamental human rights.91 This position is taken against the background that the Universal Declaration may have acquired the status of customary law. If this is its current status, then, its statement of all the rights listed therein as fundamental may not only be binding on states, but also the most extensive specification of fundamental human rights.

Holding out all the rights in the Universal Declaration as fundamental is likely to be met by the contention that all those rights may not be fundamental since some of the rights are more basic than others.

It is submitted in rebuttal that, even amongst the least disputed of fundamental human rights, such as the right not to be arbitrarily deprived of life and freedom from slavery, there still exists some disparity in their basic nature. The right to life is clearly more basic than the freedom from slavery, for it is only through the enjoyment of life that the freedom from slavery assumes any meaning.92

91 This is not to imply that the Universal Declaration is a comprehensive and immutable listing of fundamental human rights.

The obvious relativity in the importance of the two rights mentioned above, however
does not detract from their fundamental nature as they are both necessary though not
sufficient to ensure or safeguard the dignity of humankind. In other words fundamental
nature should be a derivative of the relation between a particular right and its
contributory role in ensuring the dignity of humankind. The logical extension of this view
is to confer fundamental status on practically all the so-called human rights.93

93 Some specific rights which have received fairly
authoritative recognition (outside of the Universal
Declaration) as being fundamental and which are relatively
less controversial include;
(i) Freedom from arbitrary deprivation of life --- Art.4(2)
International Covenant of Civil and Political Rights;

(ii) Freedom from torture, or cruel, inhuman or degrading
treatment or punishment --- Ibid.;

(iii) Freedom from slavery --- Ibid.; Art. 3(1) Supplementary
Convention on the Abolition of Slavery, the Slave Trade, and the
Institutions and Practices similar to Slavery,(1956);

(iv) Freedom from arbitrary imprisonment --- Art.4(2)
International Covenant on Civil and Political Rights;

(v) Freedom from imprisonment under retroactive legislation --
- Ibid.;

(vi) Freedom of thought, conscience and religion --- Ibid.;

(vii) Right to be recognised as a person before the law, Ibid.;

(ix) Freedom from genocide --- Art. I, Convention on the
Prevention and the Punishment of the Crime of Genocide (1948);

(x) Freedom from racial discrimination --- Advisory Opinion in
the Continued Presence of South Africa in Namibia [1971]
I.C.J. 16, para. 131.

(xi) Freedom from wrongful imprisonment --- United States
Being sensitive to the practical problems this view may portend 94, as well as the practical reality of some lack of unanimity in the world community of nations as to the fundamentality of certain rights, it is important to go beyond this arid legalistic scheme of things.

It is submitted that in practical situations in which the issue arises as to the fundamental character of any particular right(s) in the face of actual or potential governmental violations of them, the issue should be evaluated by reference to whether the actual or potential violation of the right(s) concerned raises fairly worldwide abhorrence and condemnation.95 If it does, then, the fundamental character of that right, for the purposes of engendering global consensus and action, may have been practically recognised.

---


94 This view may make virtually every government on the globe guilty on an ongoing basis of violating one human right or the other.

95 Professor Schachter suggests using state practice and the intensity of third party condemnation of violations in determining the fundamental nature of a right. See, "International Law In Theory And Practice," (1982-V) 178 Recueil des Cours 334, 335-6.

Though subscribing in principle to Professor Schachter's test I think that it suffers the major flaw of being too restrictive in the conception of "third party." It is submitted that the fundamentality test would be more objective if the third party is expanded to include the majority of states rather than a few states.
Adopting such an approach, may not only help to effectively eliminate prior differences, but may also provide the consensual forum necessary for concerted and sustainable global action to remedy or prevent such abuse. This is particularly important since the UN as a body is only as effective as its members and non-members alike make it.

This Chapter, has in a general sense, sought to reveal the existence of a right of intervention by the UN on behalf of nationals whose fundamental human rights are being violated or in danger of being violated by domestic governments. An attempt has also been made to ascertain or provide the means to ascertain what these fundamental human rights may be. The specific legal ground(s) by which the UN may legitimately intervene on behalf of nationals as well as the political dynamics involved in the invocation of that ground(s) is the subject of the next Chapter.

96 The practical worth of this approach was revealed in the global consensual abhorrence that fuelled and accompanied the UN's characterisation of the practice of apartheid as a violation of fundamental human rights during the 1970's. Before then not all states were agreed as to the fundamental nature of freedom from racial discrimination, however the consequences of the practice were of such nature as to evoke fairly worldwide abhorrence. This worldwide abhorrence served as an objective determinant of the fundamental character of the rights involved. It also facilitated a fair measure of sustained global action.
CHAPTER TWO

THE LEGITIMACY OF UN INTERVENTION IN DEFENCE OF THE RIGHTS OF NATIONALS

3.0 GROUNDS.

It appears that there may be two main grounds on which the UN may legitimately intervene to protect nationals from governmental violation of their rights. The first ground is where the UN makes a determination that the governmental violations are of such character as to constitute a threat to the peace.97 The second, is when the violations are so egregious as to transform the issue of the direct protection of nationals from one of domestic competence to that of international competence.98

The first ground is the less controversial of the two. This is so since it reflects an inherent recognition of the primary domestic jurisdiction of the state with respect to the treatment of nationals, interfering only when a threat to international peace has arisen. The second proves to be more controversial as its assertion is tantamount to the UN


98 Ibid., at 15.
claiming residual jurisdiction in the protection of the rights of nationals irrespective of whether there exists a threat to international peace.

On the occasions that the UN purported to intervene on behalf of nationals it relied more on the finding that a threat to international peace existed, than on the ground that it had residual jurisdiction in the treatment of nationals. This preference, for the former ground of intervention rather than the latter, is a reflection of the general unacceptability among many states of the latter ground of UN intervention.

We thus focus on intervention on the basis that the consequences of governmental violation of nationals' rights may create threats to international peace.

3.1 INTERVENTION ON THE BASIS THAT THERE EXISTS A THREAT TO INTERNATIONAL PEACE.

(a) Article 2 (7) And The Scope of Domestic Jurisdiction. Article 2 (7) of the UN Charter states a general prohibition against UN intervention. It provides that "nothing contained in the present Charter shall authorize the UN to intervene in matters


Security Council Resolution 688 (1991), reprinted in, 30 I.L.M. 858 (demanding that Iraq stop its repression of its Kurdish and Shiite moslem population.)

Security Council Resolution 841 (1993), reprinted in, 32 I.L.M. 1206 (imposing a trade embargo on Haiti.)
that are essentially within the domestic jurisdiction of any state...."\(^{100}\)

The scope of the domestic jurisdiction of states, it has been authoritatively stated, is "an essentially relative question [dependent] upon the development of international relations."\(^{101}\) Traditionally though, states have asserted absolute competence, absent of specific treaty obligations, over the treatment of their nationals, especially within their territorial boundaries.\(^{102}\) They have claimed that included in such jurisdiction are all

\(^{100}\) Under customary international law, states were as a general rule, prohibited from intervening in the domestic affairs of other states. This was derived from the fundamental principles of the sovereign equality and political independence of states. See, Buergenthal, T., "Domestic Jurisdiction, Intervention and Human Rights: The International Perspective," in, Human Rights And United States Foreign Policy, Brown, P., & Maclean, D., eds., (1979) 111, 113. This prohibition was extended to the UN so as to prevent powerful and influential states from using the Organisation to achieve what they were otherwise prohibited from doing. See, Friedman, "Human Rights Internationalism: A Tentative Critique," in, International Human Rights: Contemporary Issues, Nelson, J., & Green, V., eds., (Stanfordville, New York: Human Rights Publ. Group, 1980) 29, 32.


\(^{102}\) See, Kirgis, F., International Organisations In Their Legal Setting, (1977) 775, stating that, "until the formation of the UN, there was virtually no significant challenge to the proposition that what a government does to and for its citizens within its own territory is its own business, in the absence of a specific provision to the contrary." This position has, in the UN era, been maintained by many states. See, supra, note 9 for examples of states that maintained this position.
matters pertaining to the treatment of their nationals.\textsuperscript{103}

UN general practice reflects a rejection of this perception of the extent of the domestic jurisdiction of states with respect to the treatment of nationals. In a study commissioned by the UN in 1953 to determine the competence of UN bodies including the General Assembly (hereinafter, Assembly) and the Economic and Social Council to enquire into human rights abuses by states, the study revealed that the majority of UN member states did not view the listing and discussion of alleged state violations of human rights as a matter falling within the exclusive jurisdiction of states.\textsuperscript{104} Also excluded were the drafting and adoption of recommendations by the UN on human rights issues around the world.\textsuperscript{105} However, matters that involved the direct protection of the rights of nationals such as enforcement measures, were seen as falling within the domestic jurisdiction of

\textsuperscript{103} For example, in 1946, during a UN discussion of a draft resolution calling on South Africa to take administrative and legislative steps to terminate its discriminating treatment of its Asian population, South Africa moved that the proposed resolution "be deleted from the provisional agenda in accordance with Article 2, paragraph 7". Her reason for this motion was that the mere listing of the proposed resolution on the agenda amounted to an intervention by the UN in matters which were essentially of domestic character. See, Discussions of Joint Committee of the First (Political) and Sixth (Legal) Committees of the General Assembly 21-30th Nov.1946, condensed in, International Protection, supra, note 6 at 559.


\textsuperscript{105} Ibid.
The application of such enforcement measures were seen as impinging on the jurisdiction of the state and consequently interventionist. The results of this study were accepted by the Assembly.

The view that the jurisdiction of states extends to the preclusion of the adoption of non-coercive measures by the UN aimed at indirectly protecting the rights of nationals would, if respected, render a Charter purpose of ".. assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," meaningless.

Art. 2 (7) though generally prohibiting UN intervention in the domestic affairs of states further provides that "but this principle shall not prejudice the application of enforcement measures under Chapter VII." Chapter VII provides for the application, under the

---

106 Ibid.
107 Ibid.
108 See, G.A.O.R. 721 (VIII) (1953), [8 GAOR, Suppl. No. 17 (A/2630) 1953 at 6-7].
109 See, Art. 1(3).
110 The Charter requires certain UN bodies such as the General Assembly and the Security Council to routinely take non-coercive steps directed at the international protection of UN human rights standards worldwide. See, supra, note 56 for the relevant Charter articles.
authority of the UN, of essentially coercive measures ranging from sanctions to the use of armed force aimed at maintaining or restoring international peace and security.\textsuperscript{112}

The invocation of Chapter VII however depends on the Security Council\textsuperscript{113}(hereinafter, Council) making a determination\textsuperscript{114} that a threat or breach of the peace or act of aggression has occurred.\textsuperscript{115} This determination as well as the application of the enforcement measures must be done within the context of the Purposes and Principles of the UN Charter.\textsuperscript{116}

The issue arises as to whether governmental violation of the rights of nationals may legitimately be subsumed under threats to international peace.

\textsuperscript{112} Arts. 41-42.

\textsuperscript{113} The Security Council is one of the Organs of the UN. It has a membership of 15 states, 5 of whom enjoy permanent membership status (China, United States, the United Kingdom, France, and Russia). The remaining 10 members are elected for two-year terms by the General Assembly. See, Art. 23(1) & (2) of the UN Charter.

\textsuperscript{114} Such a determination involves a substantial, non-procedural issue hence requires at least 9 non-negative votes, inclusive of the concurrence of all the permanent members. Abstention from voting by a permanent member does not amount to a negative vote. See, Art. 23(7) of the UN Charter; Bailey, D.S., The Procedure of the Security Council, (Oxford [Oxfordshire]: Clarendon Press; New York: Oxford University Press, 1988) 107, (hereinafter, Bailey).

\textsuperscript{115} See, Art. 39.

\textsuperscript{116} See, Art. 24(2) providing that the "Security Council shall act in accordance with the Purposes and Principles of the United Nations" in the execution of its duties under Chapter VII of the Charter.
(b) "Threat to the Peace": Pre-1989 UN Practice.

The parameters of "threat to the peace" are not specified in the UN Charter. The Conference Committee that drafted Charter article 39 decided to "leave to the [Security] Council the entire decision of what constitutes a threat to the peace ..."117 The rationale for this perhaps lay in the lack of agreement amongst the drafters of the Charter as to the exact scope and content of the phrase.118 Early Council practice indicated disagreement, especially amongst the major powers, as to the scope of the phrase. This lack of agreement was two dimensional. The first dimension being the question of what amounted to a "threat".119 The second dimension of the disagreement was whether the word "peace" encompassed both international and internal peace or was limited to international peace.120

See, 12 U.N.C.I.O Docs. 505.

See, Commentary, supra, note 12 at 295. See also, "Rhodesia," supra, note 97 at 7, stating that the operative rationale was that "for the effective discharge of the very difficult and delicate task being imposed on it, the Security Council should be accorded a large measure of freedom to make ad hoc determinations following a full, contextual examination of the peculiar features of each specific situation of threat or coercion."

See, Commentary, supra, note 12 at 296-297. See also, Council's first consideration of whether the practice of racial segregation in the Union of Africa South constituted a threat to the peace, infra, pp 50-53.

See, Commentary, supra, note 12 at 296, stating that this dispute as to the scope of "peace" was evident when the question of Palestine was being considered by the Council in 1947, the United Kingdom (U.K.) interpreted "peace" to mean international peace only. The United States (U.S.) argued that this interpretation was too restrictive, citing in support the non-use of the word "international" in Charter Art. 39. It submitted that internal disorders could legitimately be subsumed under threats to the peace.)
The question whether governmental violations of the rights of nationals could be subsumed under threats to the peace first came before the Council in the matter of the practice of racial discrimination in South Africa. Though the UN had as early as 1946 been seized with the issue of racial discrimination in South Africa it was not until 1963 that it found itself being called upon to make that determination.\textsuperscript{121} This followed a request by 32 African states for enforcement action in the light of regional tensions which had been engendered as a result of the South African government’s apartheid policies, and refusal to respect UN resolutions recommending that it put an end to the practice.\textsuperscript{122}

During the ensuing Council discussions, the United States of America (hereinafter, U.S.) argued, in part that, the situations envisaged under Chapter VII\textsuperscript{123} of the Charter [threat to the peace, breach of the peace or acts of aggression] were "situations where there was an actuality of international violence or such a clear and present threat to peace as to leave no reasonable alternative but to resort to coercion."\textsuperscript{124}


\textsuperscript{122} Ibid., at 691.

\textsuperscript{123} Arts. 39–51. The Chapter is entitled "Actions with Respect to Threats to the Peace, Breaches of the Peace, Acts of Aggression."

\textsuperscript{124} See, International Protection, supra, note 6 at 694–695.
The United Kingdom (hereinafter, U.K.) argued that "a distinction should be made between a situation which engendered international friction and one which constituted a threat to peace".\textsuperscript{125} In its view, threats to international peace included threats to the territorial integrity and political independence of states. Hence in so far as no evidence existed pointing to the South African government threatening the territorial integrity and political independence of any state, the exception to Article 2(7) could not be legitimately invoked.\textsuperscript{126}

The Union of Socialist Soviet Republics (hereinafter, U.S.S.R) expressed a different opinion. In its view the character of the human rights violations perpetrated as well as the consequent arms build up in the region were such that a threat to international peace had arisen.\textsuperscript{127} The lack of consensus among the permanent members of the Council (hereinafter, permanent members) on this issue resulted in the Council not making that characterization.\textsuperscript{128}

The various views as to whether governmental violations of the rights of nationals could amount to a threat to the peace were influenced not solely by legal considerations, but

\textsuperscript{125} Ibid., at 698.
\textsuperscript{126} Ibid.
\textsuperscript{127} Ibid., at 703.
\textsuperscript{128} Ibid., at 706. It was not until 1970 that the Council recognised the consequences of apartheid as creating a "potential" threat to the peace. See, Security Council Resolution 282 (1970), reprinted in 9 I.L.M. 1090.
economic, political and strategic reasons as well.

The U.K. when she advanced her opinion on the issue also gave some insight into the factors which influenced her view. She pointed to her political, economic and military interests in South Africa asserting that "the United Kingdom’s trade with, and investments in South Africa were of great importance to the United Kingdom’s external economic position and therefore had implications for world trade generally."

In seeking to reveal the reason for the opposition of some Western states such as the U.S., the U.K., and France to the characterisation of the practice of apartheid as a threat to the peace, and consequently as grounds for the application of enforcement measures Mr. Louw, the South African Foreign Minister, suggested that it was their desire not to lose "a substantial source of raw materials."
The Assembly by majority vote adopted a position opposite to that of the U.S. and U.K.\(^{131}\) While not denying the probability that the Assembly may have been right, it seems the Assembly's position was influenced by extra-legal considerations.\(^{132}\) The major role this extra-legal consideration among others played becomes more glaring in the light of the fact that the Assembly in its general practice, has been most unwilling to classify governmental violation of the rights of nationals as amounting to threats to international peace. There are other reasons for this unwillingness.

The politicisation of human rights issues, has been an operative factor, but not the sole factor. Other particularly important factors include factors which are peculiar to the Assembly, especially the developing member states. The Assembly, numerically, is dominated by developing nations.

The fear that a pattern of such characterisations may be precedent setting has particularly informed the unwillingness of many members of the Assembly to make such

\(^{131}\) The Assembly characterised the practice of apartheid as amounting to a threat to the peace. See, G.A.O.R. 2396 (XXIII) (1968).

\(^{132}\) It appeared more to have been moved, in its December 2nd characterisation of the consequences of apartheid as creating a threat to international peace, by the intense anger of some African states who saw the practice of racial discrimination against blacks as a direct insult to the black race as a whole. Many African countries appear to have championed the characterisation of the practice of apartheid as "a threat to the peace" more on the basis of racial sympathy than a genuine objective concern for human rights in general.
characterisations. It is feared that, precedents may be ‘exploited’ by the permanent members if they manage to achieve the necessary consensus amongst themselves and at least four other Council members, to ‘unduly’ intervene in the affairs of these particularly vulnerable members of the Assembly. This fear is particularly heightened by the fact that governmental violation of nationals’ rights are almost a regular feature in their domestic jurisdictions. This situation may increase their vulnerability to enforcement action were they to lend unqualified support to the view that such violations could be a threat to the peace.

---

133 See, Nanda, V., "A Critique of the United Nations Inaction in the Bangladesh Crisis," (1972) 49 Denv. L.J. 53, 60 (hereinafter, Nanda) stating, (with reference to the Assembly's inaction during the 1971 Pakistani atrocities against its Bengali citizens) that, "intervention particularly military intervention was unacceptable to a vast majority of the UN members for fear that it might set an unhealthy precedent". See also, UN Doc. S/PV. 2982 (1991) (providing text of Council debates to Security Council Resolution 688 on Iraq. See, sentiments expressed therein by Yemen, Zimbabwe, and Cuba who voted against the said Resolution which characterised the consequences of the Iraqi government repression of its civilian population as constituting "a threat to international peace and security").

134 See, e.g., Hossie, Linda, "Plan to Keep World Order Threatens Sovereignty," The Globe and Mail, May 25, 1993, A12, col. 3, stating that developing countries already believe the UN and other multilateral bodies intrude too much into their affairs by monitoring human rights..."now they fear that military options being considered by the UN to keep peace in the world will protect the interests of the major powers at the expense of the developing world."

This danger is particularly apparent against the background that some permanent members, have for decades, been applying all forms of unilateral pressure ranging from the suspension of economic and military assistance to the threat or actual use of force\textsuperscript{136} to coerce some of these states to improve their domestic human rights performance, particularly in the civil and political rights category. This category of rights, though recognised by many developing countries as fundamental, have not been domestically protected. The oft-cited excuse being that a fair measure of social, economic and cultural rights ought to be achieved before the enjoyment of civil and political rights becomes meaningful, and to do so there is the need for a strong state which will then work towards the advancement of the rights of the individual through first achieving the rights of the collectivity.\textsuperscript{137}

Another reason which may have informed the general unwillingness of the Assembly to characterise, as a matter of general practice, governmental abuse of the rights of nationals as constituting threats to international peace was the view that the enforcement

\textsuperscript{136} The U.S. and France stand out amongst the permanent members in that regard. An example of U.S. adoption of the use of armed force ostensibly to coerce states to improve their domestic human rights record is its military assistance to the "Contra" rebels of Nicaragua during the 1980's. For an account of this assistance see, Nicaragua versus United States, supra, note 2, paras. 75, 85, 91, 92, 95, 99, 267, 268.

\textsuperscript{137} As one state delegate of an African state put it, "the young states must guarantee human rights. They also know better than anyone else that there can be no human rights where there is no state. That is why our countries are particularly concerned with the security of the state -- in other words the collectivity at the expense of the individual." Quoted in Humphrey, supra, note 51 at 11-12.
measures specified under Chapter VII of the Charter may be used against them and not against any of the permanent members.\textsuperscript{138} Given the veto\textsuperscript{139} privilege of the permanent members, it is most improbable that the Council may be able to pass a resolution characterising a present and voting permanent member's abuse of nationals rights as being a threat to the peace.\textsuperscript{140}

Though the Assembly could circumvent the veto privilege by invoking its powers under the "Uniting for Peace" Resolution,\textsuperscript{141} such characterisation may prove sterile as the supposed military and political might and influence of any of the permanent members may render the application of enforcement measures an exercise in futility.

As revealed in the UK example\textsuperscript{142} economic reasons greatly informed state practice

\textsuperscript{138} Though this is a statement of fact rather than of law, it has been suggested that enforcement action was not intended by the Charter to be applied against a permanent member. See, Hiscocks, R., The Security Council: A Study In Adolescence (London: Longman, 1973) 294.

\textsuperscript{139} This is the right which any permanent member by casting a negative vote in any substantive non-procedural issue voted on in the Council blocks its adoption.

\textsuperscript{140} See, Lall, A., The Security Council In A Universal United Nations, (Carnegie Endowment for International Peace, 1971) 8, noting that the permanent members as a general practice, are supportive of Security Council action only when their interests will be served by so doing. Between 1966-86, a total of 119 vetoes were exercised. 12 by France, 18 by the former U.S.S.R., 21 by China, 23 by the U.K. and, 57 by the U.S. In each of these cases the interests, one way or the other, of a vetoing member(s) was at stake. See, Bailey, supra, note 114 at 209.

\textsuperscript{141} G.A.O.R. 377 (V) (1950). For relevant text see, supra, note 20.

\textsuperscript{142} See, supra, text accompanying note 129.
within the Council. There were also, other factors at play. One factor which greatly inhibited consensus, during the Cold war years, that governmental violation of nationals’ rights could constitute a threat to the peace, was the politicisation of human rights issues.¹⁴³

(c) Politicisation of Human Rights Issues.

(i) PAKISTAN, 1971-1972.

The atrocities committed by the Pakistani military in the then East Pakistan on its Bengali citizens were on such a scale that some writers categorised them as amounting to selective genocide.¹⁴⁴ As a consequence of these violations an estimated 10,000,000

¹⁴³ The practice of the Security Council in the matter of international human rights protection, in the current post cold war era, in which the Council appears less politically polarised, seems to underscore the view that political polarisation in the past greatly informed the Security Council's general unwillingness and inability to characterise governmental violations of fundamental human rights as constituting threats to international peace and security. Its post cold war practice includes characterising as creating threats to international peace, the violation of nationals rights by some governments. The factors indicating that the violations created a threat to the peace, were not as patent as those that existed during the 1971 Pakistani atrocities or the 1975-78 Cambodian tragedy.


Genocide may be defined as "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group." Acts which are genocidal include:
(i) Killing members of the group;
(ii) Causing serious bodily or mental harm to members of the group;
(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
Bengalis fled to India as refugees. There was sufficient evidence that this state of affairs had seriously strained Indo-Pakistan relations. It is suggested that these were adequate indicators that there existed a threat to the peace.

The Council, though seized with these facts did not discuss the matter till the outbreak on December 3, 1971 of armed hostilities between India and Pakistan.

(iv) Imposing measures intended to prevent birth within the group;


146 See, Nanda, supra, note 133 at 56.


148 The UN Secretary-General, in a memorandum to the Council during the heat of the Pakistani atrocities, submitted that the consequences of the Pakistani action had become a "potential threat to the peace." See, Memorandum to the President of the Security Council, UN Doc. S/10410 (Jul. 20, 1971). Text in 8 UN Monthly, Aug.-Sept. 1971, 56-57, cited in, Nanda, supra, note 133 at 63.

149 Nanda, Ibid., at 57, stating that, the Council began formal deliberations on Dec. 4 1971. For text of Council discussions see, 9 UN Monthly Chron., Jan. 1972, 3-25, (hereinafter, Council Discussions). India, during the Council's discussion of the situation said, "Refugees were a reality. Genocide and oppression were a reality. The extinction of all civil rights was a reality .... The Council was nowhere near reality....while developments proceeded on their inexorable course toward the present tragedy, the United Nations continued to be inhibited by considerations of domestic jurisdiction."
The apparent reason for the Council's failure to characterise the Pakistani government's human rights atrocities as being a threat to the peace despite supporting evidence, seemed be a consequence of the opposing political interests among Council members in developments in that region.\textsuperscript{150}

The politicisation of human rights was evident during attempts by the Council to adopt resolutions calling on India and Pakistan to observe a cease-fire. China which supported a call for an immediate unconditional cease-fire and troop withdrawal, was accused by the U.S.S.R. of "trying to divert attention from the main cause of the conflict ...which was the monstrous and bloody repression of East Pakistan."\textsuperscript{151} The U.S.S.R. vetoed two early resolutions calling for a cease-fire.\textsuperscript{152} It however voted in favour of a resolution calling for a ceasefire when India had on December 17, 1971 unilaterally declared a

\textsuperscript{150} But, Nanda, \textit{supra}, note 133 at 57, suggests that the operative factors were the fear of creating an unhealthy precedent, and the belief that United Nations intervention would not have been effective. But subsequent discussions in the Council after the outbreak of hostilities between India and Pakistan suggest that the key factor may have been opposing political interests amongst some of the permanent members. The U.S.S.R. and Poland, political allies of India, were the only Council members who argued for a linkage between the call for an immediate ceasefire and the need to address the wishes of the Pakistan Bengalis. Addressing these wishes was tantamount to recognising and supporting the secession of East Pakistan, a situation which will have enhanced India's influence in the region at the expense of Pakistan, a political ally of the U.S.

\textsuperscript{151} See, Council's Discussions, \textit{supra}, note 149 at 11.

\textsuperscript{152} Ibid., at 19, 20.
ceasefire following the surrender of the Pakistani forces.\textsuperscript{153}

(ii) \textbf{CAMBODIA, 1975-1978.}

The failure of the Council in its general practice, to characterise governmental violations of the rights of nationals as creating threats to international peace, was demonstrable during the three years of virtual genocide committed by the Khmer Rouge government\textsuperscript{154} in Cambodia between April 1975 to December 1978 against some of its citizenry. It is believed that close to a third of the then seven million population were victims of this deliberate pattern of human rights violations inflicted by the Khmer Rouge government.\textsuperscript{155} The then chairman of the United Nations Human Rights Sub-Commission characterised the human rights violations as "the most serious to have occurred anywhere since Nazism."\textsuperscript{156} Cambodian refugees, bent on ousting the Khmer Rouge government, formed the United Front for the National Liberation of Kampuchea (hereinafter, United Front). Vietnam, now at odds with the Khmer Rouge government,


\textsuperscript{154} The Khmer Rouge supported by China and North Vietnam (Vietnam) overthrew the U.S. and South Vietnam supported Republican government on April, 17 1975 after defeating their forces in a civil war. The new regime then proceeded to eliminate supporters of the deposed government. See, Bazyler, M., "Reexamining the Doctrine of Humanitarian Intervention in the Light of the Atrocities in Kampuchea and Ethiopia," (1987) 23 Stan. Journal of Int'l. L. 547, 551-552 (hereinafter, Bazyler.)


\textsuperscript{156} Quoted in, Bazyler, supra, note 154 at 552.

The Security Council during the period of the Khmer Rouge government atrocities and the consequential cross border forays by the Vietnam-backed United Front, made no finding that a threat to the peace existed. It did not discuss the human rights situation in Cambodia until after the December 25th, 1978 Vietnamese invasion of Cambodia. It is submitted that the silence of the Council may be traced to fears that China, a backer of the Khmer Rouge government, may have vetoed any Council resolution condemning the communist Khmer Rouge government or characterising the consequences of its human rights violations as creating a threat to international peace. There may have been the added factor of the preparedness of the U.S.S.R. to protect Communist regimes even in


158 Ibid.

159 However individual states mainly the western and non-aligned states had condemned the human rights violations. For e.g. U.S. President Jimmy Carter referred to the Khmer Rouge government as "the worst violator of human rights in the world today." Quoted in, Ronzitti, supra, note 157, at 99 n61.

160 During Council deliberations following Vietnam's invasion of Cambodia, China strongly condemned Vietnam for the invasion making no allusion to the atrocities committed by the Khmer Rouge. See, Ronzitti, supra, note 157 at 99.

With the end of the Cold War in 1989, a new spirit of cooperation and accommodation\footnote{162}{See, supra, note 21 for statement by permanent members acknowledging this new spirit of cooperation.} has emerged within the Council especially amongst the permanent members. This spirit of cooperation has greatly lessened the politicisation of human rights issues therein, though not eliminated it altogether.\footnote{163}{In order to secure the passing of Security Council Resolution 688, it is believed that the U.S. had to do some horsetrading with Russia and China. The U.S. is said to have assured Russia and China not to cast its eyes on their domestic human rights practices as well as promising them some economic benefits. See, Fein, B., "Kurdish Enclaves More Curio Than Paradigm," N.J.L.J. May 23, 1991, available in LEXIS, Nexis Library, NJLAWJ File. Cited in, Gallant, J.A., "Humanitarian Intervention and Security Council Resolution 688: An Appraisal in the Light of a Changing World Order," (1992) 7 AM. U. J. INT'L L. & POL'Y 881, 906, n158.} One consequence of this spirit of cooperation and accommodation has been the willingness of the Council to more objectively, though on a case by case basis, determine whether governmental violations of nationals’ rights constitutes a threat to the peace.
(d) "Threat To The Peace"—Post Cold War Practice.

(i) IRAQ, 1991.

This willingness of the Council was first put to test during the Iraqi government's suppression of its civilian population, mainly the Kurds and Shiite Muslims, in the aftermath of the Gulf war. It is estimated that about 2 million Kurds fled mainly to Iran and Turkey to escape the atrocities unleashed on them by the Iraqi regime. The atrocities were on such a scale as to be termed genocidal. The Council responded fairly quickly, characterising the consequences of the Iraqi government's repression as constituting a threat to "international peace and security in the region." Further, it demanded that, "as a contribution to removing the threat to international peace and security in the region [Iraq] immediately end this repression."

A factor contributing to the Council finding a threat to the peace, was the resultant "massive flow of refugees towards and across international frontiers and to cross border incursions" Professor Schachter suggests that reliance on this factor by the Council


166 See, S/C Res. 688, supra, note 99 at para. 1.

167 Ibid., at para. 2.

168 Ibid., preambular 3.
in finding that a threat to the peace existed was legitimate.\textsuperscript{169} He points to the tension that arose between Turkey, Iran, the main recipients of the fleeing Kurds, and Iraq\textsuperscript{170}.

While this factor undeniably contributed to creating a threat to the peace, it seems the Council was particularly influenced in making this characterisation by a feeling of having indirectly contributed to the repression of the Iraqi Kurds. Professor Schachter points out that "the internal strife was in some respects a consequence of the international military action, [against Iraq following its annexation of Kuwait] placing responsibility of a political and humanitarian character on the coalition to prevent massive attacks by the Iraqi forces against noncombatants belonging to particular ethnic and religious communities."\textsuperscript{171}

This added factor to some extent detracts from the precedential value of S/C Res. 688 as authority for the proposition that the Council clearly recognised governmental violation of the rights of nationals as constituting a threat to the peace. Even if this added factor were disregarded, S/C Res. 688 still suggests that mere governmental violation of nationals rights may be insufficient to support a finding that a threat to the peace existed. The violations must have the consequence of creating large outflows of refugees across international borders and further, create belligerent feelings between the refugee receiving

\textsuperscript{169} See,"Gulf Conflict," \textit{supra}, note 135 at 469.\textsuperscript{170} \textit{Ibid}.\textsuperscript{171} \textit{Ibid}.
neighbours and the oppressive government.\textsuperscript{172}

The subsequent practice of the Council indicates however that a massive outflow of refugees across international borders coupled with belligerent feelings of the receiving country(s) are not prerequisites to its finding that a threat to the peace exists. This position is evident in the Council’s handling of the human rights crisis in Somalia and Haiti.


A humanitarian crisis had emerged in Somalia following the civil war that had raged between a number of local warlords.\textsuperscript{173} The civil war and ensuing lawlessness made the cultivation of crops nigh impossible. This led in part to an acute domestic shortage of food and other necessities of life.\textsuperscript{174} To meet this humanitarian crisis, relief agencies moved into the country with the prime purpose of distributing humanitarian assistance to the needy people.\textsuperscript{175} These relief efforts were greatly hampered by some of the local

\textsuperscript{172} The Council linked up these factors in S/C Res. 688, \textit{supra}, note 99. See, preambular 3 thereof.


\textsuperscript{174} \textit{Ibid.}, at 39, col.2, stating that, "the famine grew out of clan and civil wars, drought, the destruction of agriculture, livestock, infrastructure, and the death of the economy."

\textsuperscript{175} \textit{Ibid.}
warlords and their supporters who stole from the relief agencies. Additionally many relief workers found their lives threatened. A consequence of these negative developments was the increased suffering of the Somali population at large.

The Council being seized with these facts made a determination that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security." This characterisation was unprecedented. Prior findings of threats to the peace had, to a significant extent, turned on the actual existence of interstate tensions. The Council found itself having to make this finding in order to provide the legal basis for UN intervention to protect and facilitate the distribution of the humanitarian assistance. The presence or otherwise of elements of massive

---

176 Ibid., at 41, col. 2 & 3, recounting that a warehouse of the International Committee of the Red Cross (I.C.R.C.) was routinely looted at gunpoint by Somalis. He also mentions the theft of 10 CARE trucks loaded with relief items by Somalis.

177 Ibid., at 42, n5.

178 S/C Res. 794, supra, note 90.

179 For examples of Security Council resolutions that reflect this point, see text of resolutions cited at, supra, note 99.

outflow of refugees\textsuperscript{181} and tension within the "Horn of Africa"\textsuperscript{182} were not perceived by the Council as inhibitory to its finding of a threat to the peace.

It must be stated though that, the precedential value of the Somali case, having regard to the issue at hand, must not be over-emphasised. Unlike in the Iraqi case,\textsuperscript{183} the activities which were inhibiting the enjoyment by the nationals of their rights were perpetrated by warlords and their supporters and not the national government.\textsuperscript{184} One however ought not to ignore the fact that the Somali case revealed some recognition on the part of the Council that an inherent or potential threat to the peace may be just as valid as the actual or imminent threat in making a finding that a threat to the peace exists.

\begin{footnotesize}
\begin{enumerate}
\item See, Sheehan, \textit{supra}, note 173 at 39, col. 2 & 3, stating that the majority of an estimated two million Somali refugees were displaced within the country. Others in the hundreds of thousands had fled to neighbouring states.
\item It was difficult to isolate the existence of regional tension (that is after the overthrow of the Siad Barre government). The attitude of neighbouring states was one of cooperation and willingness to assist the warring Somali clans settle their differences politically. See, Afwerki, I., "Can Somalia Survive U.N ?," \textit{Manchester Guardian Weekly}, Oct. 24, 1993, 17, col. 2, stating that neighbouring states did enjoy the confidence of Somalis and were in the "best position" to make a positive and tangible contribution to resolving the Somali crisis. Afwerki, I., is the President of Ethiopia.
\end{enumerate}
\end{footnotesize}
The closest the Council has come, in the post cold war period, to linking governmental violation of nationals rights to threats to international peace, without relying on the additional factor of regional tension consequent on the outflow of refugees across international borders may be found in its handling of the Haitian crisis. The Haitian crisis is ongoing.

(iii) HAITI. 1993.

Following the ouster of the constitutional government of Jean-Bertrand Aristide by the military in September 1991, a wave of human rights atrocities were unleashed on the deposed President's local supporters.185 The incumbent defacto government led by army commander General Raoul Cedras is believed to be behind these atrocities which are ongoing.186 The violations have in part precipitated a massive outflow of refugees to neighbouring countries such as the U.S. and the Dominican Republic. However, at the time Security Council Resolution 841187 was adopted, it was difficult to isolate the existence of actual or imminent regional tension ensuing from the refugee exodus.188

186 Ibid.
The Council nonetheless found the existence of a threat to international peace and security. In so doing the Council placed emphasis on "the incidence of humanitarian crisis [largely perpetrated by the defacto government] including mass displacements of population .." in making that finding. No allusions were made to the transboundary tensions relied upon in the Iraqi case.

The Somali and Haitian cases taken together appear to suggest that in so far as the governmental violations result in massive outflow of refugees across international borders the ingredients for finding a threat to the peace exists. It may not be a prerequisite to the finding of a threat to international peace that regional tensions be consequent on refugee outflows.

Analyzing the Council's practice with specific reference to Security Council Resolutions 688, 794, and 841, one sees a growing willingness in the Council to extend the

a trade embargo against Haiti, the U.S. government in early February 1992, unilaterally decided to relax its enforcement of the embargo. Also that "larger Latin American nations [appeared] reluctant to use force with regard to Haiti...."

See also, "Cedras Thumbs His Nose," The Economist, Nov. 6, 1993, 43, col. 3, stating that, neighbouring Dominican Republic "has long turned a blind eye to contraband goods flowing across [its borders to Haiti]. The above accounts are indicative of the state of affairs at the time the Security Council made its first finding of the existence of a threat to the peace.

S/C Res. 841, preambulars 9, 14.

Ibid.
traditional interpretation of threat to the peace (that is palpable interstate hostilities) to include situations where the potential for such threats exist. However, it may be premature to say that the Council's current practice indicates the Council's recognition of a general rule that governmental violation of the rights of nationals accompanied by an outflow of refugees creates threats to international peace. The Council has been careful to emphasise that its characterisations were limited to the instant cases it considered.191

The Council's progressive but cautious approach is a reflection that the Council may not want to strain the new found cooperation that exists amongst its permanent membership by doing what it may believe, to be too much all at once.192

191 See, e.g. S/C Res 841 preambular, 14, stating that, "determining that, in these unique and exceptional circumstances, [emphasis added] the continuation of this situation threatens international peace and security in the region....acting therefore, under Chapter VII .." Note also statement by UN official that the Council authorised intervention in Somalia was unique because the Council deemed Somalia to be a country without a government. See, supra, note 184.

192 It must nonetheless be noted that the finding of a threat to international peace is essentially a question of fact. See, "Rhodesia," supra, note 97 at 8.

History both past and current have revealed the real linkage between the consequences of extensive, and persistent abuse of the fundamental human rights of nationals by governments and threats to international peace. The threats may lay in: (i) the real likelihood of unilateral humanitarian intervention (See, Fonteyne, Jean-Pierre, L., "The Customary International Law Doctrine of Humanitarian Interventions: Its Current Validity Under the United Nations Charter," (1980) 17 Comp. Int'l. L. Q. 27, 83, stating that past ineffectiveness or inaction of the UN was used to justify unilateral interventions;
Security Council resolutions 688, 794, and 841 indicate that the Council is developing its practice slowly but definitely in the direction of protecting nationals against governmental abuse of their rights. This it is doing through expanding its perception of matters which create threats to international peace to include the consequences of some governmental violations of the fundamental human rights of their nationals.

The Council, having made a determination that the consequences of governmental violation of the rights of nationals has created a threat to international peace, may under the UN Charter, resort to coercive measures (including the use of armed force) to maintain international peace. That is the subject of the next chapter.

(ii) oppressed nationals finally taking up arms to defend themselves with the attendant transboundary consequences recent vindications of this view include the 1990 Liberian civil war, the 1991-93 Somali civil war and the ongoing civil war in Rwanda which all had their roots in armed rebellion of some nationals against repressive governments.

The danger of armed rebellion is recognised in the Universal Declaration of Human Rights. Its preamble states in part that, respect of fundamental human rights "is the foundation of freedom... and peace in the world" and that governmental violation of rights tantamount to "tyranny and oppression" may compel humankind as a last resort, to take up arms in rebellion.

See also, Nafziger, J.A.R., "Self-Determination and Humanitarian Intervention in a Community of Power," (1991) 20 Denv. J. Int.L & Pol'y 9, 31, stating that, "large scale deprivations of human rights unquestionably [emphasis added] threatens international peace and security"; See, "Rhodesia," supra, note 97 at 18, stating that, "in the contemporary world, international peace and security are inescapably interdependent [emphasis added] and that the impact of the flagrant violation of the most basic human rights of the great mass of the people in a community cannot possibly stop short within the territorial boundaries in which the physical manifestations of such deprivations first occur."
CHAPTER THREE

THE UN’s USE OF ARMED FORCE IN PROTECTION OF THE RIGHTS OF NATIONALS

The use of armed force or use of force\(^{193}\) is one of the measures that the UN Charter permits the Council to authorise in the execution of its mandate of maintaining or restoring international peace and security.\(^{194}\) It remains to be ascertained whether there are additional factors which have to be complied with before the constitutional legitimacy for the application of armed force will be complete.\(^{195}\)

4.0 PREREQUISITES TO THE APPLICATION OF ARMED FORCE.

Article 42 provides for the use of armed force where the Council considers, "that measures provided for in Article 41 would be inadequate or have proved to be

---

\(^{193}\) The use of force may be "either in the form of direct military action" or "in the indirect form of support for armed activities within [a] state." See, Nicaragua versus United States, supra, note 2, para. 203.

\(^{194}\) Art. 42 provides in part that "the Security Council.....may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

\(^{195}\) Art. 39 of the UN Charter states, "the Security Council ....shall..... decide what measures shall be taken in accordance with Articles 41 and 42 [emphasis added], to maintain or restore international peace and security."
inadequate. Two issues arise from the above. First, does the Council have to apply measures not involving the use of armed force before it may legitimately resort to armed force? Second, is the express determination or finding by the Council of the inadequacy of measures not involving the use of armed force a precondition to the application of armed force?

(a) Prior Application of Article 41 Measures Precondition to the Use of Armed Force?

The legal position with respect to this issue appears to be that the prior application of article 41 measures (measures not involving the use of armed force) is not a precondition to the application of armed force.

Article 41 confers a discretion on the Council as to whether or not to apply measures not involving the use of armed force. This discretion may be found in part, in the use of a permissive word "may" to refer to the Council's decision with respect to the application article 41 measures.197 The view that the use of force is not preconditioned on the prior application of non-armed force measures is further strengthened by Article 42 of the UN Charter.

---

196 Art. 41 provides for the application of "measures not involving the use of armed force..." Such measures include but are not limited to sanctions. The sanctions may be economic, diplomatic or military, inter alia. Ibid.

197 The relevant phrase in Art. 41 reads thus "the Security Council may [emphasis added] decide what measures not involving the use of armed force are to be employed."
Article 42 permits the application of armed force (in the context of maintaining or restoring international peace) on two alternate grounds. These are where Article 41 measures "would be inadequate" or "have proved to be inadequate". The former ground may be read as envisaging situations where article 41 measures have not been applied at all because of a belief in their inadequacy.

Articles 41 and 42 read together suggests that its drafters intended to give the Council "a discretion in the choice of measures for maintaining or restoring international peace and security." At first blush it appears that this discretion in the choice of measures is indicative that the Council is not obliged to authorise the use of armed force in defence of the rights of nationals where the consequences of governmental repression has created a threat to the peace.

It is submitted, however, that where the following two elements are present the UN may be obligated to authorise the UN’s use of armed force. First, the particular circumstances of the threat to the peace must be such that it appears the use of armed force is the only effective measure that may prevent a breach of the peace. And second, the UN has the requisite resources to apply armed force. This submission is made on the basis that, the

—

198 The instant phrase in Art. 41 reads thus, "should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

199 See, "Rhodesia," supra, note 97 at 6-7.
Council, is required under the UN Charter, to take *effective measures* \[emphasis added\] in accordance with Articles 41 and 42 to maintain international peace and security.\(^{200}\)

Thus, where the use of armed force appears to be the only effective measure that could eliminate the threat to international peace, and the UN has the necessary resources to apply armed force, the non-use of force under those circumstances may amount to the Council shirking its primary responsibility, under the UN Charter, to maintain international peace.\(^{201}\)

(b) Application of Armed Force Conditional on Security Council’s Prior Express Determination of the Inadequacy of Article 41 Measures?

This issue arose during the Council’s discussion of Security Council Resolution 678.\(^{202}\)

Cuba and Yemen, non-permanent members of the Council, questioned the constitutional validity of the Council’s authorization of the use of armed force, their main bone of contention being that the Council had not made an express determination that the

\(^{200}\) See, Art. 39.

\(^{201}\) See, Art. 24.

sanctions were inadequate or had proved to be inadequate.\textsuperscript{203} The Council admittedly had not made an express determination as to the inadequacy or otherwise of the sanctions.\textsuperscript{204}

A reading of the Charter, though, does not reveal a requirement for such an express determination prior to the authorization of the use of armed force.

Article 42 which deals with the Council's authorization of armed force begins, "should the Council consider that the application of Article 41 measures are inadequate or have proved to be inadequate...." The form in which such consideration may be expressed is not specified. It is submitted that the non-specification of the form in which the Council may express this determination, taken together with the general connotations of the term "consider", may be read as conferring on the Council a discretion in the choice of means to express its determination.

For example, the Council by authorizing the use of armed force against Iraq may be deemed to have impliedly determined that the Article 41 measures it had imposed on Iraq had proved inadequate. This inference may be drawn as, the authorization of the use of armed force was directed at achieving the same purpose that the sanctions were intended

\textsuperscript{203} See, "Gulf Conflict," \textit{supra}, note 135 at 462.

\textsuperscript{204} \textit{Ibid.}, stating that, "it is true that the Council did not formally declare the inadequacy of the economic sanctions under article 41."
to do. Namely to coerce Iraq to withdraw unconditionally from Kuwait by January 15, 1990.

The essential thesis of the above discussion is that, first, the Council need not necessarily apply measures not involving the use of force before it can authorize the use of armed force. Second, that the Council is not required to make an express determination of the inadequacy of non-armed force measures before it may resort to the application of armed force. Its application of armed force may be deemed to be an implied determination of the inadequacy of non-armed force measures.

(c) Maintenance and/or Restoration of International Peace.

Another factor bearing on the constitutional legitimacy of UN's use of armed force under its Charter, in defence of the rights of nationals is the impact of the armed force on the maintenance of international peace and security. Where the circumstances are such that the application of armed force will only serve to exacerbate the threat to international peace, then, perhaps, the constitutional legitimacy for the application of armed force may be in doubt.

---

205 As will be recalled, UN military intervention is being invoked on the basis that the consequences of governmental repression has created a threat to international peace. Art. 39 of the Charter envisages that the resort to armed force will be directed at maintaining international peace.

206 Ibid.
Circumstances which may contribute negatively to the maintenance of the peace include situations where some states are politically opposed to the UN’s military intervention and actively intend to lend substantial military support to the target government. Another negative factor may be the high probability that the UN military intervention may bog down in a war of attrition.

A war of attrition may lead to high UN troop casualties, and this may cause some states which may have contributed to the UN contingent to get directly involved in the conflict. This they may do in the hope of protecting their units, part of the UN force. The direct participation of the troop contributing states may serve to widen the arena of conflict across international borders.

In sum, notwithstanding the existence of the threat to the peace, where the circumstances are such that the UN’s application of armed force may serve as a catalyst to the breach of international peace, the UN may not legitimately resort to armed force in defence of oppressed nationals.
4.1 THE VIABILITY OF THE UN’s USE OF ARMED FORCE TO PROTECT NATIONALS.

Notwithstanding the legitimising grounds for the authorization of the use of armed force in defence of the rights of nationals it remains questionable whether such force may contribute positively to the defence of the rights of nationals.

First, there exists the high probability that the intended beneficiaries of the use of armed force (nationals) may be caught in the crossfire between UN troops and those of the target repressive government.\(^{207}\) The probability of the nationals being caught in a crossfire exists in geographical circumstances where the target government and its supporters are intermingled with the oppressed local population. Such intermingling may make it difficult to establish, away from the local population, clear battle lines. The UN's experience in the recent Somali crisis vindicates this view.

(i) SOMALIA, 1993.

The UN Security Council ordered the arrest of a local warlord whom was believed to have been behind the killing of some 23 Pakistani UN peacekeepers.\(^{208}\) To facilitate

\(^{207}\) It is assumed that the armed force will be directed at the perpetrators of the human rights violations, that is the government and its agents.

\(^{208}\) See, "Making Monkeys of the UN," *The Economist*, Jul. 10, 1993, 4, col.1, stating that General Farah Aidid, a local warlord was believed to have been behind the 5th June killing of 23 Pakistani soldiers by a local militia (hereinafter, "Monkeys.")
this arrest UN troops were mandated to use armed force, if necessary, against the target local warlord and his militia.\textsuperscript{209} The target warlord and his armed supporters were intermingled with the local civilian. It was nigh impossible to isolate or create clear battle lines away from the local civilian population. Armed force was thus applied in residential areas creating an urban warfare scenario.\textsuperscript{210}

During the approximately four and a half months that the UN relied on armed force in its bid to arrest the target warlord an estimated 6,000-10,000 civilian casualties, mostly women and children were inflicted on the Somali population.\textsuperscript{211} Despite the use of armed force the UN was unable to effect the arrest of the warlord. In the opinion of 26 international relief agencies then working in Somalia, "the [military] tactics used by the United Nations peacekeeping forces in Somalia [had] caused unnecessary civilian casualties and hindered the distribution of aid."\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{209} See, Security Council Resolution 837 (1993), in, Resolutions and Decisions of the Security Council, 1993 -- S/INF/49 (SCOR, 48th year), providing that UN troops use "all necessary means" to arrest those behind the June 5th killings.
\item \textsuperscript{210} See, "Monkeys," supra, note 208 at col. 3, quoting UN official describing clashes between UN troops and Aidid's militia as "urban guerilla wars."
\item \textsuperscript{211} See, Schmidt, Eric, "Somali War Casualties May Be 10,000," New York Times, Dec. 8, 1993, A14, col.1, (hereinafter, "Somali Casualties.")
\item \textsuperscript{212} This view was expressed in a memorandum they submitted to UN secretary-general, Bhoutrous-Bhoutrous Ghali. See, "UN Tactics in Somalia 'Excessive'," Manchester Guardian Weekly, Aug. 22, 1993, 3, col.2.
\end{itemize}
The inappropriateness of the use of force in defending the rights of nationals where the targets (be they governments or warlords) are intermingled with the local civilian population and difficult to isolate, was later recognised by the Security Council. The Council, as a result called off its hunt for the target warlord.

The Somali experience also revealed that there exists a strong probability that high civilian casualties amongst the local population may result in a loss of support both internationally and locally for the UN’s reliance on armed force.

A consequence of this loss of support internationally may take the form of some member countries refusing to lend material and political support to subsequent uses of armed force by the UN and/or withdrawing or relocating their troop units which may be part

---

213 See, "UN Calls off Hunt for Aaidid," Reuters News Agency, Nov. 17, 1993, quoting British representative to the Security Council to the effect that the Security Council recognized, "there were aspects of the earlier approach (use of force against the local warlord) which were not working."

See also, "Somali Casualties," supra, note 211, quoting U.S. Pentagon officials that the high casualties amongst non-combatant Somalis highlighted "the problems peacekeeping forces face in trying to avoid civilian casualties while waging urban warfare."

Lorch, Donatella, "Somalis Mired in War, Torn by Feelings About Americans," New York Times, Oct. 17, 1993, A6, col. 5, stating that "in guerilla war it is often impossible to tell the difference between combatants and civilians."

214 Ibid. The UN now limited its use of armed force to self defence and the protection of relief personnel.
of the UN armed force. On the local front the civilian population may turn against the UN, refusing to cooperate in facilitating UN humanitarian efforts in the country.

Another factor which may impact negatively on the UN's reliance on armed force in scenarios where there exists a high probability of civilian casualties is the probability that the target repressive government may exploit civilian casualties to its political advantage. In Somalia for example, Aidid, widely believed to be inhibiting the UN

215 See, for e.g., Richburg, Keith, "Italians to Leave Mogadishu," Manchester Guardian Weekly, Aug. 22, 1993, 18, col. 1, stating that Italy had decided to withdraw its troops, part of the UN military operation in the Somali capital "because of disagreement with the UN's methods (use of force) and philosophy in opposing fugitive militia leader... Aidid." (hereinafter, "Italians Leave Mogadishu.")

Italy also called for an end to the UN's use of armed force. See, "Italy Seeks Halt to Peacekeepers Fighting," The Globe and Mail, Jul. 13, 1993, A1, col. 1 & 2.

216 See, "Hope Behind the Horror," The Economist, Jun. 19, 1993, 41, col. 1, stating that, "the killing of civilians by [UN] Pakistani troops had turned some [Somalis] bitterly against the UN," (hereinafter, "Behind the Horror.")

See also, York, Geoffrey, "What Went So Wrong In Somalia?," The Globe and Mail, Jul. 15, 1993, A1, col. 5, intimating that following UN inflicted civilian casualties many local Somalis were "now very, very angry [and there was now] a...divorce between the UN and the Somali people."

Note also, Ibid., quoting Mr. Sahnoun former UN envoy to Somalia, that following the civilian casualties, "the Somali people feel now that it [UN peacekeepers] is now an occupation force with a hidden agenda to take over the country, they do not feel that the UN troops have come to protect the humanitarian assistance."

217 See, "Behind the Horror," supra, note 216, col. 2 & 3, implying that Aidid's visits to injured Somalis and his clever tactic of asking them to cooperate with the UN, helped enhance his political stature.
humanitarian mission in the country, greatly profited from the backlash consequent on UN inflicted civilian casualties. Many Somalis who prior to the UN inflicted civilian casualties were opposed to Aidid now rallied around him to fight off the common enemy, the UN.\textsuperscript{218}

The above factors, especially as revealed in the Somali case, suggests that the use of armed force by the UN, against repressive governments to protect the rights of nationals, may detract from, rather than enhance their human rights.

This is not to suggest that in all cases the use of armed force may be inappropriate or contribute negatively to the defence of the rights of nationals. Armed force may be appropriate in circumstances where it is possible to geographically isolate the target government and its troops, from the local population. This may significantly reduce the probability of the intended beneficiaries (nationals) of the UN's use of armed force, from being caught in the probable crossfire.

See also, Richburg, Keith, "Truce Takes Grip in Somalia," Manchester Guardian Weekly, Oct. 17, 1993, 16, col.5, quoting Ikram, commander of the Pakistani UN contingent, that, the UN campaign to arrest Aidid had "probably made Aidid a hero."

\textsuperscript{218} See, "Somali Casualties," supra, note 211, stating that the Somali civilian casualties influenced many Somalis, "many of whom did not agree with General Aidid, [to rally] around him when the UN tried to arrest him...."

See also, "Monkeys," supra, note 208, stating that by virtue of the UN's hunt for him Aidid "achieved the status of a martyr among his...clan."
The positive effect of the UN authorised air strikes against Bosnian Serb troops and military equipment appears to support this view. Before elaborating on this point some background to the ongoing Bosnian civil war may be helpful.

(ii) BOSNIA-HERCEGOVINA.

The secession of Bosnia from the former Yugoslavia, precipitated a secessionist move by Bosnian Serbs to form a state of their own in Bosnia. The secessionist bid by Bosnian Serbs degenerated into a civil war with the Bosnian Muslims. The UN with the consent of the parties to the Bosnian civil war established a 9000 strong peacekeeping force in Bosnia. This force was mandated to supervise a non-existent ceasefire between the warring parties, and to provide and protect the UN-led distribution of

---

219 Under an arrangement between the UN and The North Atlantic Treaty Organisation (N.A.T.O.), the UN may call upon N.A.T.O. to launch air strikes against Bosnian Serb troops and military equipment, where Bosnian Serb troops were endangering the lives of UN peacekeeping personnel in Bosnia or its relief efforts. The UN secretary-general has been mandated by the Security Council to call for such air strikes. The secretary-general in turn, has delegated this authority to his special envoy to Yugoslavia, who works closely with the military commander of UN troops in Bosnia. See, Gordon, M.R., "Serbs Slip Away as U.S. Gunships Wait," New York Times, Mar. 14, 1994, A7, col. 4.


221 Ibid.

222 This force is part of the UN Protection Forces in the former Yugoslavia (UNPROFOR). See, "UN Recommends Sending More Troops to Bosnia," The Globe and Mail, Jun. 5, 1993, A13, col. 1-3.
The UN envisaged that, were the need for the application of armed force to arise in its protection of the "safe havens", the armed force will be provided by N.A.T.O. in the form of air strikes against offending Bosnian Serb troops.  

The geographical dynamics of the Bosnian situation made it possible to isolate or identify clear battle lines between the opposing parties to the Bosnian civil war. The warring Bosnian Muslims and Serbs have in the waging of this war, occupied areas sufficiently geographically distinct from each other.

This geographical scenario has proved favourable to focusing the full impact of UN authorised application of armed force against the Bosnian Serbs. Also the relatively

---

223 However with the strong evidence that Bosnian Muslims especially the civilians in six cities designated by the UN as "safe havens", were the people in most peril from Serbian artillery, the UN troops were mandated to protect them. Though the form the protection was to take was not clear, it was understood that the UN troops were not to use armed force except in self defence. See, Ibid.

224 See, supra, note 219, recounting the arrangement between UN and N.A.T.O. for N.A.T.O. air support at the request of the UN to defend UN personnel and its humanitarian relief operations.

225 The UN called for N.A.T.O. air strikes against Bosnian Serb troops engaged in the shelling of the Bosnian Muslim city of Sarajevo. The air strikes were to come into effect if the Serbs failed to comply with a UN ultimatum to stop their shelling of Sarajevo and to remove their heavy weapons 12.4 miles from the beleaguered city. See, Gordon, M.R., "Serbs Slip Away as U.S Gunships Wait," New York Times, Mar. 14, 1994, A7, col. 4.
ideal geographical scenario was a significant factor contributing to N.A.T.O. accepting the UN's request to use its air power.226

Other cases in Bosnia where force or threat thereof (in the form of N.A.T.O. air strikes) was successfully used in alleviating the violation of the human rights of Bosnian Muslims by the Bosnian Serb troops, include the Bosnian cities of Gorazde,227 Tuzla,228 Bihac,229 Srebrenica and Zepa.230 The common denominator in all these cases was

226 See, Gordon, M.R., "Pentagon Wary of the Role of Air Power in Bosnia," New York Times, Mar. 15, 1994, A4, col. 4, quoting General Shalikashvili, Chairman of U.S. Joint Chiefs of Staff, that, "Sarajevo was a special case because the Serbs artillery positions were in open country..." See also, Ibid., at col. 3, quoting William J. Perry, U.S. Defense Secretary thus, "air power in situations where the combatants were close together could increase civilian casualties."

227 Bosnian Serb troops initially refused to comply with a UN ultimatum to stop shelling Gorazde, but following N.A.T.O. bombings of their artillery positions, they withdrew their troops and heavy guns. See, Sudetic, Chuck, "Shelling of Gorazde Declines," New York Times, Apr. 13, 1994, A6, col. 1, stating that, "besieging Serbian nationalist forces heeded United Nations warnings of further air strikes unless their guns were silenced."

228 See, Allesandra, Stanley, "Bosnian Serbs Yield on Relief Airlift," New York Times, Mar. 2, 1994, A4, col.1, stating that Bosnian Serbs on March 2nd, met a March 7th UN deadline that they allow the Tuzla airport to be used by flights carrying food and medicine or face the prospect of N.A.T.O. air strikes.

229 See, Whitney, Craig, R., "NATO Warns Serbs to Halt Attacks or Face Bombings," New York Times, Apr. 23, 1994, A1, col.1-2, stating that N.A.T.O. extended its air protection over Sarajevo and Gorazde to include Tuzla, Bihac, Srebrenica, and Zepa. The Serbs were prohibited from moving any heavy weapons within 12.4 miles of the above cities on pain of further air strikes.

230 Ibid.
the militarily significant geographical separation between the intended beneficiaries of the use of armed force (Bosnian Muslims) and the dominant violators of their human rights (the Bosnian Serb armies).

With the existence of clear battle lines, the danger of Bosnian Muslims being caught in the crossfire between N.A.T.O. air forces and Bosnian Serb ground troops was greatly diminished. Consequently the viability of the use of armed force to protect the human rights of the Bosnian Muslims enhanced.231

Notwithstanding the geographical compatibility of the Bosnian scenario to the UN’s use of armed force, it remains doubtful whether the UN by itself may be able to effectively apply such force.232 The UN in a practical sense lacks the infrastructure necessary for the effective application of armed force. This weakness impacts negatively on the viability of its use of armed force even in favourable geographical scenarios as in Bosnia.

231 See, Cohen, Roger, "Bowing to NATO Serbs Pull Back From Muslim City," New York Times, Apr. 25, 1994, A1, col.6, quoting Yasushi Akashi, top UN official in Bosnia thus, "the situation is not perfect, but the progress is substantial...the Serbs have moved from refusal, to reluctance, to compliance and now toward full compliance and you have to consider this," (hereinafter, "Serbs Pull Back.")

232 Though the Bosnian air strikes attest to the viability of the use of armed force under such favourable geographical scenarios, it is worthy of note that the armed force was directly applied by N.A.T.O. and not by UN troops.
(iv) **LACK OF ADEQUATE INFRASTRUCTURE.**

First, it has no standing army. To that extent the UN has and continues to rely on voluntary troop contributions of member states to form its military missions.

The timeliness, quality, and quantity of these voluntary contributions are themselves, subject to the peculiar and dynamic domestic circumstances of actual or potential contributing states. These circumstances include issues of national interest; public opinion; foreign policy; ability to equip, transport and support troops; and national casualty tolerance levels.

Many states appear unwilling to contribute troops to UN military missions, which may involve the use of armed force, for fear that their troops may suffer "unacceptable

---

233 Under the collective security system envisaged under the UN Charter, the UN was to have a standing army. This was to take the form of an agreed number of armed forces and supporting equipment pledged by member states to the UN, and whom the UN could have assess to upon request. Member states would have been obliged to make available the troops in fulfilment of agreements they had entered into with the Security Council to that effect. Thus such troops when requested by the Council under the terms of the envisaged agreements, may not strictly speaking, be referred to as voluntary troop contributions by member states. See, Art. 43 of the UN Charter.

The agreements envisaged under the collective security scheme have however not been entered into, partly because of the cold war which ended in 1989. Currently, efforts are under way to implement Art. 43. See, Hossie, Linda, "UN Wrestling with New Role," The Globe and Mail, May 22, 1993, A9, col.3, stating that, "a seven-nation team has been commissioned to negotiate agreements with UN member states to provide standing forces," (hereinafter,"UN Wrestles.")
casualties." What amounts to unacceptable casualties remains a relative question dependant on the particular tolerance levels of each state. This unwillingness to contribute troops thus presents the UN with a smaller pool of countries willing to contribute troops to its military missions.

Another factor inhibiting the UN's mobilisation of adequate armed force is the problem of insufficient financial resources. Though member states contribute the troops and logistics the UN remains directly financially responsible for the pecuniary expenses of

---

234 See, Lewis, Paul, "Peacekeeper in Chief Needs Soldiers," New York Times, Mar. 4, 1994, A5, col. 1, stating that, "many governments are reluctant to risk their soldiers lives in the increasingly dangerous missions the UN is being asked to undertake," (hereinafter, "UN Needs Soldiers.")

See also, Greenhouse, Steven, "Georgia Asks U.S to Back Force," New York Times, Mar. 10, 1994, A6, col. 1, stating that Bill Clinton, U.S. President, said he will support UN deployment of troops in Georgia on certain conditions one being that the U.S. is not called upon to contribute troops.

235 Examples of tolerance levels include; (i) Italy's withdrawal of its troop contingent in Mogadishu following the killing of three Italian soldiers. See, "Italians Leave Mogadishu," supra, note 215.


(iii) Belgian withdrawal from Rwanda following death of 10 Belgian UN peacekeeping troops. See, Sciolino, Elaine, "For the West, Rwanda is not Worth the Political Candle," New York Times, Apr. 15, 1994, A3, col. 2, (hereinafter, "Rwanda")

236 See, "UN Needs Soldiers," supra, note 234 at col. 2, quoting Kofi Annan, the head of UN peacekeeping department that, "we can't get troops because we haven't the money to pay for them......"
running UN military missions.\textsuperscript{237}

The Somali experience revealed that the financial costs of running UN military missions which involve the use of armed force may be very high and perhaps beyond the present financial resources of the UN.\textsuperscript{238} The high financial cost of the Somali UN military operation has made countries, who pay relatively higher peacekeeping dues, wary of endorsing further UN military missions. More so, where large armed forces are needed and there exists the probability that armed force may have to be applied over a long period of time.\textsuperscript{239}

\textsuperscript{237} The UN runs these missions primarily from peacekeeping dues paid by member states. See, \textit{Ibid.}, stating that as of March 1994, unpaid peacekeeping dues from UN members stood at about 1.4 billion U.S. dollars.

\textsuperscript{238} It has been estimated that it cost the UN 1.5 billion U.S. dollars to run its military mission in Somalia during one year. The U.N force, during the period in question was 25,000 strong. See, Oakley, Robert, "A UN Volunteer Force—The Prospects," \textit{Vol.XL New York Review of Books}, Jul.15, 1993, 52, col. 2.

\textsuperscript{239} See, for example, Lewis, Paul, "Security Council Votes to Cut Rwanda Peacekeeping Force," \textit{New York Times}, Apr. 22, 1994, A1, col. 1, stating that the probability that a large peacekeeping force comparable to the UN force used in Somali, was needed in order to impose peace in the Rwandan civil war, was a factor in the Security Council's unanimous decision to reduce the UN troop strength to about 250 men.

See also, Lewis, Paul, "U.S. Reverses Position at UN on Sending Troops to the Balkans," \textit{New York Times}, Apr.1, 1994, A2, col.1 recounting that the U.S. on March 31, blocked Security Council move to send an additional 10,000 troops to Bosnia because the U.S. "was not sure Congress would agree to pay U.S. share of the extra cost." It however agreed to 2,500 troops.
Noting also that many developing countries willing to contribute troops, are unable to do so, "if they have to pay themselves," it appears doubtful that the UN by itself may be able to put together and sustain a force of sufficient strength to effectively exert armed force in defence of the rights of nationals even under favourable geographical conditions as in Bosnia.  

Last but not least, the UN lacks the necessary staff and command structure to effectively coordinate its use of armed force. Somalia, where armed force was used by the UN in defence of the fundamental human rights of the local population endangered by the activities of local militias, laid bare some deficiencies in the UN command structure.

First, some troops though understood to be serving under UN command, waited for orders from their home countries.

It has been suggested that a reason for the unwillingness of some troops contributing

---

240 "UN Needs Soldiers," supra, note 234, quoting head of UN peacekeeping department that, "frankly if the response of governments remains the way it is today, we couldn't get another mission off the ground."

241 At March 1994, the UN peacekeeping department (the UN department that coordinates UN military missions) had a staff of about 130. About 50 of these were military officers "most lent by their governments," with the rest being civilian staff. This department responsible for keeping track of almost 90,000 troops currently serving in UN peacekeeping missions around the world, has been described as "heavily overworked."See, "UN Needs Soldiers," supra, note 234, col.1; "UN Wrestling," supra, note 233, col.4.

countries to place their troops fully under UN command in missions involving the use of armed force, seems to be lack of faith in the ability of the UN and its commanders to make decisions which will not only contribute positively to the effective utilisation of the force available, but also serve to protect their troop units. It does not seem likely that this lack of faith in the UN command structure, may be quickly become a thing of the past.\textsuperscript{243}

The negative effect of a diffuse command structure on the successful application of armed force was also highlighted in Somalia.

\textsuperscript{243} The problem appears to be not so much one of a lack of quality UN commanders but rather the chasm that may exist between individual state perceptions of what ought to be done, militarily speaking, and that of the UN which has to reconcile the views of its general membership in its actions. This assertion is made primarily on the basis that individual states often tend to apply subjective analysis (informed by national interest and foreign policy objectives) in their expression of what they think UN commanders should do. The UN on the other hand, in its decision making, has to take into account the implications of its actions on the success of the instant endeavour, its future credibility and, on the world at large. For example, recently the UN rejected a request by N.A.T.O. to be allowed to bomb Bosnian Serb artillery positions which had not fully complied with a UN ultimatum to withdraw their heavy weapons from Gorazde. N.A.T.O. was not pleased with the UN's rejection. The UN however said that it was not prepared to start a war simply because of the "minor" Bosnian Serb non-compliance. See, Cohen, Roger, "Serbs Comply With N.A.T.O Demand on Arms Pullout," \textit{New York Times}, Apr. 27, 1994, A1, col. 6, quoting Lieutenant-General Michael Rose, (commander of UN troops in Bosnia) that, "we [the UN] are not going to start a war for one broken-down tank."

The United States, for example, though it placed some of its troops in Somalia under UN command, often sought to dictate how and when the troops were to be used, thus effectively denying the UN commander the discretion of determining their role. The U.S. is on record to have asked the UN not to use its troops for patrol duties. In reaction to this request, a senior UN official stated that "if the American troops do not help the peacekeepers fully, it will limit the flexibility of the peacekeeping force and definitely affect our mission."

Some political commentators have put forward suggestions directed at enhancing the ability of the UN to effectively mobilise and deploy armed force to defend the rights of nationals. Those views appear to be deficient in their perception of the worth of the

---


245 Ibid.

246 Ibid.

247 Some of these suggestions include; (i) the establishment of a highly trained international volunteer armed force drawn from UN member states. See e.g. UN secretary-general's "Agenda for Peace', Preventive Diplomacy and Peacekeeping," in, (1992) 4 African J. Int'l. & Comp. L. 740, 754.


(iii) The establishment of a UN military college to train officers and troops.

(iv) Providing the UN with the ability to stockpile military equipment and, to quickly transport troops and logistics to
use of armed force, to defend nationals against governmental violation of their rights.

In other words, they reflect a measurement of the effectiveness or viability of the UN’s use of armed force based on the UN’s ability to quickly mobilise and deploy a sophisticated large armed force with an effective command structure. The consequences of the application of such force against a government or local authorities as happened in Somalia, appears not to have been factored in by advocates of UN military intervention. Hence their reliance on the need for a strong UN military machinery to defend the rights of nationals.

Instead, it is submitted that the likely success of the UN’s use of armed force in defence of the fundamental human rights of nationals must be a substantial consideration in deciding whether or not to apply armed force. As has been suggested in an earlier part of this thesis, the application of armed force, in geographical scenarios as Somalia, may not contribute significantly to protecting nationals from repressive local authorities be they governments or militias.

the field of operations.

248 Where armed force is applied to defend nationals from a repressive government, the armed force may be directed at the repressive government or de facto local authorities, (Somalia) rather than against some government troops which are geographically separated from the repressive government (Bosnia).

249 See, supra, pp. 79-82.
The high probability of civilian casualties amongst the local population, consequent on the application of such armed force, and the backlash such casualties may have on the international and local support base of the UN renders the protective value of armed force small.\textsuperscript{250}

Were the UN to eliminate the inhibitory effect that the current low national tolerance levels of troop casualties has on its ability to mobilise, deploy and maintain UN a military force, through having at its disposal a high powered volunteer army, the high financial costs of adequately maintaining and supporting such a force poses practical difficulties.

Currently strong indicators exist suggesting that many states are not financially able or willing to underwrite the high financial expenses that may be involved in running such UN military missions.\textsuperscript{251} There is also the fear that there is no telling the number of military missions that the UN may be called upon to undertake.

With these practical realities in mind, a forceful alternative to the UN’s use of armed force to defend the nationals against repressive governments may have to be considered. This forceful alternative is the imposition of mandatory sanctions under article

\footnote{Ibid.}

\footnote{See, supra, note 234, for examples of states' unwillingness to underwrite extra costs involved in fielding large UN military missions.}
41 of the UN Charter on members of the repressive government.\textsuperscript{252}

\textsuperscript{252} The Council, in imposing sanctions under Article 41 (Chapter VII having been legitimately invoked), may decide that all UN member states abide by them. In that event member states will be bound not to violate the sanctions by virtue of Article 25 of the UN Charter. These sanctions may thus be described as mandatory.
CHAPTER FOUR

MANDATORY SANCTIONS, A FORCEFUL ALTERNATIVE TO THE UN's USE OF ARMED FORCE

Generally the track record of UN mandatory sanctions, be they economic, military, diplomatic or sports, has not been one of resounding success.253 But, the type of mandatory sanctions being advocated in this thesis are different in their focus, constitution and time of imposition from earlier cases of mandatory sanctions imposed by the UN.254

5.0 THE FORCEFUL ALTERNATIVE

(a) Focus

The sanctions will be focused directly and exclusively on members of the repressive government. It will thus differ from the past practice of the UN to impose the sanctions on a target state as an entity rather than directly on members of government.255


255 The underlying rationale for this past practice of the UN was the view that state sanctions, especially economic sanctions, will, through invoking hardship on the local population, help build domestic pressure for the local government to comply with the demands of the UN. See,
Limiting the focus of the sanctions to members of the repressive government may have certain advantages over imposing them on the state as a whole.

First, it may render redundant the tendency of sanctions imposed against a state (state sanctions), to cause some of its citizens to rally around their government in a defiant mood. As has been observed, "the people are likely to work together with their government to overcome the burden of the sanctions." Significantly reducing the domestic bonding effect usually created by state sanctions, may increase the prospects of sanctions which are focused specifically and directly at members of a repressive government succeeding.

A second advantage of focusing sanctions on members of the repressive government rather than on the state is that it reduces the probability that states with strong economic interests in uninterrupted economic cooperation with the target state may sabotage the implementation of economic sanctions. The fear of suffering significant economic losses has been a contributing factor to the poor track record of UN imposed mandatory economic sanctions.

Another factor supporting the focusing of sanctions on members of the repressive government is the need not to undermine the primary object of the sanctions being


256 Ibid., at col. 2.

257 Ibid.
advocated in this thesis, that is, the object of defending the rights of the oppressed nationals. In other words, the sanctions should not have the effect of seriously impairing the ability of the local population to attain and enjoy their human rights.

Case studies have shown that where sanctions, especially economic sanctions, are focused on a state qua state, the brunt of the sanctions are borne by the most economically vulnerable of the population rather than by the repressive government. The case of Haiti is a current example of the vulnerability of a local population.

**HAITI, 1993**

The UN and the Organisation of American States (O.A.S.) acting on the basis that the September 1991 Haitian coup d'etat was a violation of the democratic rights of the Haitian people proceeded to impose sanctions on Haiti.\(^{258}\)

The first to put sanctions in place was the O.A.S., which soon after the coup imposed a regional trade embargo on Haiti. It was hoped that the sanctions would invoke economic hardship on Haiti, and consequently coerce the coup leaders to respect the democratic rights of Haitians.\(^{259}\) This trade embargo leaked so badly that on June 23rd,

\(^{258}\) See, S/C Res. 841, *supra*, note 99, particularly preambulars 9,10 and para.16. See also, O.A.S Resolution MRE/RES 1/91 OEA/SER. F/V.1, Oct.3, 1991.

1993, the UN Security Council, persuaded by the O.A.S., imposed a "universal and mandatory" trade embargo on Haiti.\textsuperscript{260} In addition, the foreign assets of the coup leaders and the Haitian government were frozen. With the exception of the assets freeze, the rest of the sanctions were applied across the board to all of Haiti.\textsuperscript{261} To alleviate the sufferings of the poor ordinary Haitian populace for whose larger interest the sanctions had purportedly been imposed, the sanctions were said to exclude items "for verified essential humanitarian needs."\textsuperscript{262} Such humanitarian items have included basic medical supplies and food staples.

After close to three years of economic sanctions there exists strong evidence that the brunt of the economic sanctions has been borne by the Haitian poor.\textsuperscript{263} One source describes their situation thus, "by some estimates, 150,000 jobs have been lost and tens of thousands of Haitians survive on handouts from humanitarian agencies"\textsuperscript{264}, a source

\textsuperscript{260} See, S/C Res. 841, \textit{supra}, note 99, particularly paras. 3 and 9.

\textsuperscript{261} \textit{Ibid.}, particularly para.5. The marriage of the foreign assets freeze imposed on the coup leaders with economic sanctions against the state of Haiti may have diluted the impact of the foreign assets freeze on the coup leaders. The hardship brought on ordinary Haitians by the economic sanctions may have led to some of them who might not have supported the coup to band together with the coup leaders to fight off a perceived common enemy, the international community of nations led by the UN and the U.S.

\textsuperscript{262} \textit{Ibid.}, para 7.


which itself is "in jeopardy, for lack of transport." The economic sanctions imposed on Haiti has also resulted in children being malnourished and consequently, "dying at twenty times the usual rate from measles and other illnesses, which have spread uncontrolled since earlier sanctions forced public health programmes to grind to a halt."  

It appears that the longer economic sanctions continue against Haiti, the more difficult it will be for the local population at large to enjoy some of their fundamental human rights, especially those that relate to the enjoyment of adequate shelter, medical care, and sustenance. To that extent, it appears that sanctions imposed on a state in defence of the rights of its nationals, may rather worsen the plight of the nationals.

Limiting or focusing the sanctions on members of the repressive government, may be one way of avoiding the hardship that sanctions imposed on a state causes to the local population at large. The sanctions need to be constituted in a manner so as to cause

---

265 See, "Cedras Thumbs His Nose", The Economist, Nov.6, 1993, 43, col.1.

266 Ibid., col. 3.


268 The case for such essentially selective sanctions is perhaps strengthened by the recognition that it was the foreign assets component of the Haitian sanctions that drove some of the backers of the defacto government amongst the wealthy Haitian elite to indirectly withdraw their support for the defacto government. See, "Haiti's Business Leaders Push For Army Concessions," The Globe and Mail, Feb.9, 1994, A5, col.5 & 6.
them to impact directly on the members of the repressive government.

(b) Constitution or Composition of the Sanctions.

The sanctions may include but need not be limited to;

(i) A freeze on the foreign assets (liquid and capital assets) of members of the repressive government and their frontmen.

(ii) The imposition of international travel restrictions on members of the repressive government and their frontmen.

(iii) And as a final sanction, the withdrawal of international recognition for the credentials of members of the repressive government and their frontmen as members of the state government. A consequence of the application of this sanction will be to deprive the affected persons of all the privileges and immunities on the international scene that go with being a representative of a recognised government.

As part of a mechanism to ensure that the use of the sanctions described above, will serve to discourage repressive or potentially repressive governments from becoming set in a repressive mould it is also suggested that the Security Council, which has primary responsibility for authorising UN intervention, specify the legal circumstances that permit the invocation of the sanctions.
(c) A Clear Legal Basis for the Invocation of the Sanctions.

The legal circumstances legitimating the invocation of the sanctions should be specified in a Security Council Resolution. This resolution would echo the UN Charter ground of intervention, to wit, that the instant conduct be a threat to international peace. But more importantly, the resolution will go further in stating that the consequences of persistent and extensive governmental violation of the human rights of nationals creates threats to international peace.\(^{269}\)

Further the resolution should also state that threats to international peace include potential or/and imminent threats to international peace. Expressly including potential threats to international peace in the meaning of the term threats to international peace, may make it possible for early forceful UN intervention (by way of sanctions) before an imminent threat to international peace arises.

Such a resolution will serve as advance notice to governments that, the deliberate and systematic violation of the human rights of nationals by a government, is not only a violation of international law, but also a ground for forceful UN intervention. Also were this basis for UN intervention clearly spelt out in advance, it will create a more level

\(^{269}\) But the resolution would not define what amounts to "persistent and extensive" governmental human rights violations. The determination of "persistent and extensive" governmental violations would be left to a specialised UN department, the Governmental Sanctions Department, to be established by the General Assembly. For an elaboration on how the Governmental Sanctions Department will determine persistent and extensive violations see, infra, note 274.
playing field than exists today.

The passing of the resolution being advocated herein, may give states some measure of assurance that the permanent members of the Security Council may not abuse their privileged status in the Council. The abuse may lay in the Council characterising governmental repression of nationals in other states (including those of the its non-permanent members) as creating threats to the peace whilst preventing the Council from doing the same when the spotlight falls on comparable mistreatment of nationals by governments of some of the permanent members.

The UN body which will be responsible for determining when the fundamental legal circumstances, for the invocation of UN intervention by way of mandatory sanctions have arisen, would be the Governmental Sanctions Department.

(d) Create a Permanent "Governmental Sanctions Department."

The General Assembly should be empowered to set up a Permanent Governmental Sanctions Department.270 This Department may be chaired by the UN Commissioner

---

270 This Department will be unlike other sanctions committees set up by the Security Council in the following aspects; (i) It will be a permanent Department. Earlier sanction committees have had life spans concurrent with the duration of the particular episode of sanctions they were set up to monitor. (ii) The character of the sanctions to be handled by this Department, will be restricted to sanctions imposed on members of repressive governments as a measure in protection of the fundamental human rights of nationals. The use of sanctions for other purposes will still remain under the present scheme
on Human Rights, and its membership should be constituted the same way as that of the Security Council, but without the veto privilege of the permanent members.\textsuperscript{271} The General Assembly will have the power to veto the decisions of the Department.\textsuperscript{272} This veto must be expressed by 4/5ths of the General Assembly's total membership.\textsuperscript{273}

The Department, will specialise, inter alia, in determining whether particular governmental violations of national rights are persistent and systematic.\textsuperscript{274} Also it will

\textsuperscript{271} The empowerment of the Governmental Sanctions Department in the form being advocated, will in effect, amount to a removal from the Security Council of the decision whether to impose mandatory sanctions on a repressive government. Bearing in mind the important role that the influential permanent members of the Council, play in international relations, and the need to retain their support, whilst at the same time, limiting their present ability in the Council, to block UN's imposition of sanctions on a repressive government, there will be the need to maintain a measure of their international influence in the membership of this Department.

\textsuperscript{272} This is to provide a check against the permanent members of the Council using their membership in the Department to promote their private interests as may be possible in the Council. Second, this suggestion is intended to engender more responsibility and cooperation, through participation, by the General Assembly with respect to the active protection of nationals against repressive governments.

\textsuperscript{273} Though the right of veto may empower the General Assembly, it may be expedient to make it difficult, if not impossible for a few repressive, or potentially repressive governments to frustrate the work of the Department, through the General Assembly.

\textsuperscript{274} This it may do, not necessarily by reference to the strict grammatical meaning of the said terms but rather to the likelihood that if the violations were not nipped in the bud, the danger of an armed rebellion by oppressed nationals in the foreseeable future or perhaps, even of unilateral
oversee the effective application of sanctions directed at members of repressive governments. To facilitate the attainment of this goal, the Department must be clothed with jurisdiction to monitor the human rights practices of governments, and to decide when a pattern of repression is emerging. This could be done by sampling public opinion in the target state.\(^{275}\)

It may then invoke the Security Council resolution suggested above,\(^{276}\) (providing the basis for UN intervention) and request the General Assembly to recommend to the target government to abandon its repressive practices.\(^{277}\)

\(^{275}\) The importance of public opinion in the state governed by the target government need not be underemphasised. First, the probable relativity amongst some cultures in the perception of whether they are being oppressed by their governments, requires that before the UN intervenes, local public opinion reflects a recognition of the existence of domestic repression or likely repression. This is necessary because, the nationals, as intended beneficiaries of the UN imposition of sanctions, have to accept the sanctions as necessary. If they do not, there exists the probability of they cooperating with the target government to fight off a common enemy (the UN), by working together to render the sanctions significantly ineffective.

\(^{276}\) See, supra, pp. 103-104.

\(^{277}\) The underlying rationale for the suggestion that the General Assembly make the recommendation rather than the Council, is to improve the chances of the recommendation being made, irrespective of the target government. If the Council were to be charged with making the instant recommendation and were the target government one or the other of the Council's permanent members, the affected member may resort to its veto privilege to block the adoption of a resolution containing the instant recommendation.
The recommendation will serve as notice to the repressive government that UN intervention in the form of sanctions may follow swiftly if it does not comply with the Assembly's recommendation. The Department will also be responsible for the imposition, coordinating, monitoring, and reviewing the sanctions.

(e) A Phased Approach in the Imposition of Sanctions.

In imposing the sanctions the Department must adopt a phased approach.\(^{278}\) The approach may be as follows; first, the freezing of any foreign assets of members of the target government. This first step should be accompanied, with, diplomatic efforts led by the UN Commissioner on Human Rights to dissuade the target government from continuing its evolving repressive activities.

The choice of the foreign assets freeze as a first step has been influenced by a belief that it may serve as a strong indication of UN disapproval at the continued governmental repression as well as not being too confrontational, thus leaving room for concurrent

\(^{278}\) The underlying rationale for the suggested phased approach include (i) to slow the emergence of a highly public confrontational stance between the UN and the target government, hence allowing room for concurrent quiet diplomacy and affording the target state adequate room to back off with an appearance of intact dignity both domestically and internationally.

(ii) to enable the UN sway public opinion (local and international) in its favour in case more forceful action is required. This it may do by affording the target government the opportunity to acquire the dubious reputation as the party promoting the emerging confrontation. The importance of favourable public opinion to the enforcement of sanctions cannot be overemphasised.
diplomatic dialogue.

Also, applying the assets freeze, which is a coercive but not too confrontational measure, together with concurrent diplomatic efforts may afford the target government room to back down on its emerging repressive activities without appearing to lose political face. Where the assets freeze appear not to be successful, the sanctions may promptly be escalated.

The next step could then be the imposition of international travel restrictions on members of the repressive government. The last of the repressive-government-focused-sanctions that may be imposed, could be the withdrawal by the UN and its member states of recognition of individual members of the repressive government as legitimate representatives of the government of the state in question. This withdrawal of recognition will be tantamount to denying the affected persons all the privileges and immunities on the international plane that go with being the head, or an accredited member of a recognised government.

The application of sanctions in a phased manner is seen as as ineffective. The case of Rhodesia is often cited as an example of how not to impose sanctions. But the phased

approach being advocated herein differs from that of Rhodesia in not being applied against a target state and most importantly, they are imposed before the target government has time to settle into a repressive mould. By settling in a repressive mould is meant the government has through force of habit made repression a definite part of its policy and has thus become hardened. The timely imposition of sanctions is thus very crucial to their success.

(f) Timely Imposition of Sanctions.
Sanctions should be activated before the target government gets set in a repressive mould. That is, as soon as the government begins to reflect significant repressive tendencies. Indicators of these tendencies may include, local public opinion reflecting a belief that their human rights may be endangered by the emerging repressive practices of the government; growing governmental intolerance of domestic political dissent; an emerging muzzling of the judiciary and the press.

When a government has settled into a repressive mould, it will be less amenable to international pressure to abandon its repressive activities. Yielding to international pressure of any form may, in the opinion of that government, be tantamount to publicly conceding ground on a line of conduct which it, by becoming hardened through its use, had publicly indicated to its nationals and the international community to be part of its

---

280 In the Rhodesian episode the imposition of the sanctions began well after the defacto Rhodesian government had been practising racial discrimination against its Black African citizens. See generally, "Rhodesia," supra, note 97.
policy. Thus the fear of losing face and appearing weak may make a target government less amenable to any coercive measure put in place by the UN.\textsuperscript{281}

The importance of timeliness in the imposition of the mandatory sanctions to their ultimate success, requires that the Council unambiguously and formally recognise that the inherent threat that the consequences of governmental violation of the rights of nationals pose to international peace in the short term may mature into an imminent threat in the long term. That irrespective of the nonexistence of an actual or imminent threat in the short term, a threat to international peace in the long term does exist.

With such a clear recognition in place, the mandatory sanctions advocated herein may be legitimately invoked, under Chapter VII of the UN Charter, and applied as a measure preemptive or anticipatory to the actual outbreak of armed hostilities consequent on the continuation and escalation of the human rights violations.\textsuperscript{282} If the sanctions are

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{281}] Cases in point include Rhodesia and South Africa.
\item[\textsuperscript{282}] It is quite possible that the ongoing human tragedy that has almost torn Rwanda apart, may have been averted if the UN, prior to the outbreak of the ongoing civil chaos, had exerted coercive pressure (perhaps in the form of government-focused-sanctions) on Rwandan authorities to respect the human rights of all Rwandan nationals. See, "Rwanda," \textit{supra}, note 235, col.3, stating that "critics argue that the international community squandered a chance to help Rwanda break the cycle of violence and instability in the months before the recent massacre began. The Security Council members did not pressure the Rwandan government to live up to its promises to respect human rights and curb paramilitary groups operating under its influence [emphasis added]."
\item For a background to the ongoing humanitarian crisis in Rwanda see, Schmidt, William, E., "Rwandan Capital Plagued in Terror
\end{itemize}
\end{footnotesize}
applied timely and objectively it may contribute significantly to successfully coercing an emerging repressive government to amend its ways. It may thus reduce the probability of governmental violations breeding, in the long term, local rebellion which may escalate into a civil war which may contribute to the creation of an imminent threat to international peace.

Also the fewer the number of civil wars caused by long term governmental repression of nationals, the less pressure there will be for UN military intervention on behalf of oppressed nationals. Even if the UN managed to surmount the practical problems constraining its mobilising and deploying armed force the military intervention may be ineffective, especially where the risk of high civilian casualties exists.\(^{283}\)

---

**5.1 CONCLUDING REMARKS**


\(^{283}\) An exception to this view may be, where there are strong indications that, baring the use of armed force governmental repression may reach genocidal proportions, and that probable civilian casualties consequent on the UN intervention, may be acceptable to the local population as a necessary price to pay for their redemption.
As has been portrayed earlier the consequences of extensive, deliberate and persistent governmental violation of nationals' rights could constitute a threat to international peace.\(^{284}\)

Quite apart from the issue of a threat to the peace emerging, the extent of the human suffering that victims of governmental repression undergo necessitates bold and firm action on the part of the UN to protect them. Considerations of national sovereignty should not be allowed to stand in the way of affirmative action by the UN to protect the rights of nationals.

The interdependent nature of states in these modern times creates a situation in which the consequences of governmental violation of the human rights of nationals are felt invariably, not only in the state of abuse but also in states geographically distant from the state of abuse. Neighbouring states may be deluged by the flow of refugees and/or be used as staging posts for cross border incursions by nationals of the abusing state who may have resorted to force of arms in defence of themselves.

\(^{284}\) See, *supra*, pp. 57-70. Also, *supra*, note 192.

It has also been noted that there exists a strong probability of high civilian casualties where armed force is applied in areas where the government is intermingled with the local population hence the view that armed force may not be the appropriate measure to adopt in defence of nationals. But see, *supra*, note 283.
Thanks to the magic of television non-neighbouring states may find themselves pressured domestically to contribute material resources towards humanitarian relief directed at the refugees. It is not inconceivable that sudden requests for large scale humanitarian relief may negatively affect the otherwise carefully planned budgetary programmes of the contributing countries. It may be thus be in the larger interest of the international community, working through the UN, to take the steps advocated in the thesis, directed at preempting the unjustifiable human suffering usually consequent on governmental disrespect of human rights.

If member states of the UN permit considerations of national sovereignty to stand in the way of early and effective preemptive UN action to safeguard nationals against governmental violation of their rights, these states may end up paying a higher price in the form of threats to international peace, higher political refugee numbers, and fiscal planning thrown off course by unbudgeted humanitarian relief contributions.

The time to embrace the urgent need to protect humankind against abusive governments is now, and the international community of states must seize this opportunity. They must relegate the concept of national sovereignty, in the matter of the treatment of nationals, to the discards of civilization where it rightly belongs.

The realisation of the above sentiment clearly involves uncommon political will on the part of world leaders. They however, have to look at the vast human tragedy that has
unfolded in Rwanda in a space of just four months,\(^{285}\)

and its impact on the world at large, to see the urgency for the expression of the necessary political will.

\(^{285}\) For an account of the causes, nature and extent of the Rwandan human tragedy see for e.g., "Rwanda," supra, note 235.

SELECTED BIBLIOGRAPHY

A. INSTRUMENTS AND DOCUMENTS


United Nations Charter


Charter of the Organisation of African Unity (1963), reprinted in (1963) 2 I.L.M 766

Pact of the League of Arab States (1945), 70 U.N.T.S 237


Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A.O.R. 2131 (1965)


G.A.O.R. 721 (VIII) (1953)


G.A.O.R. 2396 (XXIII) (1968)


12 U.N.C.I.O Docs. 505

UN Doc. S/PV. 2982 (1991)


Paris Treaty For The Renunciation Of War (1928), 94 LNTS, 54.

1936 U.S.S.R. Constitution


1961 Ghana Republican Constitution

1964 Malawi Constitution


B. BOOKS


Kirgis, F., *International Organisations In Their Legal Setting*, (1977)


Maritian, J., *Rights of Man and Natural Law* (1945)


C. ARTICLES


British Foreign And Commonwealth Office, Foreign Policy Document No. 148, reprinted in, (1986) 57 British Year Book of International Law 614


Rougier, A., "La théorie de l'intervention d'humanité", (1910) 17
Revue Générale de droit Internationale Public 468

Rummel, R.J., "The Rule Of Law: Towards Eliminating War And Democide" 4 (unpublished paper on file with the American Bar Association Committee on Law and National Security)

Schachter, O., "International Law In Theory And Practice," (1982-V) 178 Recueil des Cours 334


Schachter, J.B., "Decline of the International Protection of Minority Rights," (1951) 4 Western Political Science Quarterly 1


D. OTHER ARTICLES


"Cedras Thumbs His Nose," *The Economist*, Nov. 6, 1993, 43


"Haiti’s Two Solitudes", *The Globe and Mail*, July 6, 1993, A18


"Italy Seeks Halt to Peacekeepers Fighting," The Globe and Mail, Jul. 13, 1993, A1


"Making Monkeys of the UN," The Economist, Jul. 10, 1993, 4


Sciolino, Elaine, "For the West, Rwanda is not Worth the Political Candle," *New York Times*, Apr. 15, 1994, A3


"UN Calls off Hunt for Aidid," *Reuters News Agency*, Nov.17, 1993


Whitney, Craig,R., "NATO Warns Serbs to Halt Attacks or Face

E. CASES

Tunis-Morocco Nationality Decrees, Permanent Court of International Justice, Series B, No.4 (1923) 24

Island of Palmas Arbitration, (1928) 22 American Journal of International Law 867

Corfu Channel Case [1949] International Court of Justice Reports 4

Advisory Opinion in the Continued Presence of South Africa in Namibia [1971] International Court of Justice Reports 16

United States Diplomatic and Consular Staff in Tehran [1980] International Court of Justice Reports 3

Case Concerning Military And Paramilitary Activities in and against Nicaragua (Merits) [1986] International Court of Justice Reports 14