

A REAPPRAISAL OF HUMANITARIAN INTERVENTION

by

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Abstract

A new threat to international peace and security exists in the post Cold War years. The demise of the Cold War has brought chaos in its wake as ethnic and religious disputes engulf several regions of the world often resulting in humanitarian tragedies. The tumultuous developments of recent years have however, opened up new possibilities for international action and cooperation under the auspices of the United Nations. Consequently, a radical shift has taken place in the international community as recent humanitarian crises have not only compelled the United Nations to take a prominent role in world affairs but also a chance to expand the competence of the UN into areas previously regarded as being within the exclusive jurisdiction of member states. Moreover, the humanitarian crises of recent years have called for a reappraisal of the controversial doctrine of humanitarian intervention. This thesis explores the theoretical justifications to support the doctrine under the UN Charter and general international law and also offers a contemporary appraisal of the applicable norms in light of evolving conceptions of state sovereignty and non-intervention in internal affairs. The overall hypothesis is that not only is substantial change in the theoretical norms appropriate but that the operational capability of the United Nations to conduct a humanitarian intervention must also be reexamined in light of recent events. The remaining section of the thesis therefore considers how the United Nations can establish a more effective operational military capacity for future collective humanitarian interventions.

Table of Contents

Abstract	ii
Table of Contents	iii
Acknowledgement	v
Introduction	1
Part One THE DOCTRINE OF HUMANITARIAN INTERVENTION	7
Traditional norms of Humanitarian Intervention	10
(i) The non-use of force	12
(ii) Non-intervention into domestic affairs	14
(iii) State Sovereignty as a Barrier to Humanitarian Intervention	18
Changing Views of the Doctrine of Humanitarian intervention	22
(i) Classical School of Thought	22
(ii) Neo-classical school of thought	26
Humanitarian Intervention and the UN Charter	33
A New Doctrine of Humanitarian Intervention	38
(i) The Erosion of Absolute Sovereignty	42
Conclusions on sovereignty and non-intervention in internal affairs	52
Collective Humanitarian Intervention	53
A Conceptual Appraisal of Humanitarian Intervention in Practice	58
Incident Studies	59
(i) Humanitarian intervention and the Kurds	59
(ii) The Former Yugoslavia	70
(iii) Somalia - Operation Restore Hope	76
Conclusions on recent humanitarian interventions	80
Part Two THE BASIS OF UN JURISDICTION IN A CIVIL CONFLICT	84
Humanitarian crises as a threat to the peace under Chapter VII	88
Issue of Consent	93
Regional Developments	98
Human Suffering as a Ground for UN Jurisdiction	102
Codifying Humanitarian Intervention	106
Conclusions	116

Part Three	OPERATIONAL ASPECTS OF HUMANITARIAN INTERVENTIONS	118
	The United Nations Charter and the use of force	120
	The revival for UN forces	125
	Traditional Norms of UN Peacekeeping	130
	(i) The non-use of force	130
	(a) The Congo Crisis	132
	(ii) Traditional norm of impartiality	134
	Evolving norms of UN peacekeeping operations	136
	(i) Departure from Impartiality as a Norm	138
	(ii) Problems in UN Command and Control of Peacekeeping	140
	UN Troops and the Use of Force	143
	(i) The Former Yugoslavia - Peacekeeping or Peace-enforcement?	146
	(a) Original Deployment and Mandate of UNPROFOR	147
	(b) Expanded Mandate of UNPROFOR	149
	(c) Critical Appraisal of UNPROFOR	151
	(ii) Somalia - Deployment and Mandate of UNOSOM	153
	(a) Critical Appraisal of UNOSOM	155
	A Legal Basis for UN Peacekeeping	156
	Conclusions on the role of peacekeeping	161
	A UN Army Under Chapter VII	164
	Legal Difficulties as regards the creation of a UN army	171
	Circumstances in which a UN force could be deployed	175
	Conclusions	176
	Final Conclusion	179
	Bibliography	181

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INTRODUCTION

The law is one thing, but the safeguard of a population is another, quite precious to which humanity cannot be indifferent

Statement by the French Foreign Minister, Roland Dumas, April 5th 1991

A new threat to international peace and security exists in the post-Cold War era. The end of the East-West confrontation has brought chaos in its wake as bitter ethnic and religious disputes supplant classical aggression, originally addressed by the framers of the UN Charter. Humanitarian crises have instead become the hallmark of the new world order. Televised images of Somali warfare, Bosnian orphans and now the massacre of thousands of civilians in Rwanda continue to fill our screens, while sporadic reports from troubled countries as disparate as Yemen, Tibet, Afghanistan and Zaire suggest ethnic rivalry may yet be unleashed.

The tumultuous developments of recent times have ironically opened up new possibilities for international action and cooperation in many areas of humanitarian activity, the multinational intervention in Northern Iraq being an obvious example. Consequently, a radical shift has taken place as events have compelled the United Nations to take a prominent role in humanitarian crises quite different from the earlier practice of the United Nations throughout the Cold War years. The thaw in East-West relations has not only given the UN a unique opportunity to reassert itself in international affairs, but also a chance to expand the competence of the UN into areas previously regarded as within the exclusive jurisdiction of sovereign states.

The UN is, however, ill-equipped to deal with internal strife. Part of the problem lies in Article 2(7) of the UN Charter, a disclaimer that delineates the jurisdiction of UN authority.

Article 2(7) states that

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Despite the emphatic language of this provision, the centrality of sovereignty and non-intervention under traditional international law has not prevented the UN having a role, albeit a limited one, in controlling civil strife. The UN response to the Kurdish crisis suggested for example, that the international community will no longer tolerate blatant and excessive human rights violations by a sovereign nation against its own citizens. Moreover, the ubiquitous reach of global telecommunications ensures that governments cannot keep information from their people and that domestic activities cannot be hidden from international scrutiny.

Accordingly, this thesis seeks to demonstrate that certain norms of humanitarian intervention are no longer applicable in contemporary international relations. Substantial revision of the doctrine of humanitarian intervention is therefore appropriate given the prominent role currently accorded to the United Nations. The discussion throughout the paper will focus almost exclusively on the authority of the United Nations to perform a humanitarian intervention. While varying degrees of intervention exist ranging from indirect forms of persuasion to economic sanctions, the display of force is the most controversial at the present time in international relations and thus, lends itself more easily to description and

evaluation. One should bear in mind, however, that the use of force as means of UN action is not exclusive and is usually complementary and often interrelated to more pacific forms of intervention.¹

Theoretical considerations about the acceptability of intervention by the United Nations have, however, remained secondary to the practical problem of how it should be conducted. So far the international community has failed to develop consistent policies and, indeed, effective mechanisms for overcoming the difficulty of sovereignty in order to provide humanitarian assistance.² The humanitarian operations in the former Yugoslavia and Somalia have been conducted in an "ad hoc" fashion with no consistent policy or defined objectives. Granted that most international lawyers have failed to address such procedural problems, Part II of this paper will seek to identify coherent and consistent criteria which the international community should adhere to when dealing with humanitarian crises. The aim is to pursue a contemporary inquiry focusing on the issue of when humanitarian concerns will override the prohibition on intervention in Article 2(7). It should be noted from the outset that Part I of this paper will focus almost exclusively on intervention in terms of humanitarianism and therefore, not under the two most cited principles, self-defence under Article 51 of the UN Charter or threat to international peace and security under

¹ For a general overview of pacific measures, see Oscar Schachter, *The United Nations and Internal Conflict*, in *Law and Civil War in the Modern World* 401, 401-442 passim (J.N.Moore ed. 1974)

² According to McDougal and Bebr "...the most difficult problem still confronting the framers of the United Nations' human rights program is that of devising effective procedures for enforcement" See McDougal and Bebr, "Human Rights in the United Nations" 58 *American Journal International Law*, (1964) 603 at 629

Article 39 of the Charter. Although reference to these principles will from time to time be necessary throughout the discussion, the study will be narrowly focused. The more traditional interpretation of the concept of threats to international peace will be explored in Part II. Recent humanitarian crises have not only highlighted the normative inadequacies of the doctrine of humanitarian intervention but also revealed that the international community still does not have in place an effective collective enforcement mechanism for protecting human rights. UN peacekeepers have, instead, become embroiled in civil wars, contrary to their traditionally perceived image as mediators. As the UN involves itself in less ideal scenarios for keeping the peace, it is evident that the applicable norms governing traditional peacekeeping have also changed. Accordingly, the aim of this final section is to highlight some particular criticisms of the operational capacity of the UN to conduct a humanitarian military intervention with reference to recent engagements in the former Yugoslavia and Somalia. This section does not therefore purport to trace the historical developments of peacekeeping but, rather, to discuss the evolving norms in light of recent events. Some legal and practical alternatives will be articulated in an attempt to resolve the current operational criticisms of UN peacekeeping. In order to preserve the collective nature of humanitarian interventions, proposals will be made to create an international enforcement mechanism under Article 43 to give the UN the means to intervene in internal crises. The conceptual, practical and political difficulties that this raises will not all be resolved, rather emphasized. It is important to point out at the outset just how big this topic is. The enormity of the subject would be less daunting if more of its various aspects had been subject to academic research. Apart from topical and historical discussions of specific internal wars, however, the

interrelationship of civil strife, human rights and international institutional control has never really been the subject of systematic legal scholarship until fairly recently. Certainly, there have been no shortage of recommendations throughout the post war years, yet closer analysis reveals that traditional legal scholars have been largely influenced in their work by the ideological political struggle that has been the hallmark of international relations since 1945. The analytical aspects of internal war and human rights in the international community have therefore been neglected by political theorists and international lawyers, the focus being more on the threat of "international war" in light of the East-West divide. Accordingly, it is important to note the factual and normative ambiguity of much of the legal parlance used throughout this thesis. I do not attempt to define the concept of civil war which has, over the years been subject to more obfuscation than clarification by international lawyers. Nor do I aim to engage in an ideological analysis of what amounts to intervention in this context. My intention was to avoid any linguistic problems and focus more on the critical policy issues at stake within a contemporary normative framework.³ In view of the definitional problems concerning the doctrine of humanitarian intervention, I have therefore tried to avoid becoming involved in an overly juridical analysis, not only due to the constraints of time and space but also to concentrate more directly on the salient policy issues facing the

³ In any case, the majority of international scholars find the traditional response and language of international law inadequate to the occasion of external intervention in an internal conflict. See generally Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife* in 2 *The Vietnam War and International Law* 1089 (R. Falk ed. 1969); Moore, *Toward an Applied Theory for the Regulation of Intervention in Law and Civil War in the Modern World* 9 (J.N. Moore ed 1974); McDougal, "Law as a Process of Decision: A Policy-Orientated Approach to Legal Study" 1 *Natural Law Forum* 53, 59 (1956); Falk, *Janus Tormented: The International Law of Internal War in International Aspects of Civil Strife*. 185, 206-208 (J. Rosenau ed. 1964)

international community.

My overall hypothesis, is that the international community should adhere to the norms of sovereignty and non-intervention within a contemporary context, but not at the expense of humanitarian concerns. Whilst I realise the issue cannot be reduced to simple moral doctrine, I fail to see the sense in any so-called "humanitarian" intervention if it is not to protect human rights.

The thesis this paper intends to present is therefore simple. Not only are certain doctrinal concepts no longer tenable in contemporary international relations, traditional UN peacekeeping operations are also unable to resolve the wave of humanitarian crises of the post-Cold War world. As the number of candidates for humanitarian intervention proliferates, it is imperative that the United Nations establish a normative framework dictating both when and how it should intervene in a humanitarian crisis. While there would appear to be adequate theoretical justification to support the doctrine against massive human rights violations, the United Nations must fully develop this jurisprudence so that a coherent practice of humanitarian intervention will develop. This paper has thus been written with this aim in mind.

Part One. THE DOCTRINE OF HUMANITARIAN INTERVENTION

The doctrine of humanitarian intervention is not a new concept.¹ Military intervention by either a foreign power or an international body, into the internal affairs of a sovereign state, for allegedly humanitarian reasons, has always been controversial. Whether, or under what circumstances, coercive intervention is permitted by international law has been widely debated in international legal jurisprudence. At no period in international relations has it been easy to justify humanitarian intervention under positive international law.² Traditional discussion of humanitarian intervention focused on the legality of forcible unilateral action that one state undertakes to protect nationals of another country who suffer from large-scale atrocities.³ The end of the Cold War has however, brought the concept of humanitarian

¹See eg.L.Oppenheim, *International Law* (H.Lauterpacht (ed) 8th ed 1955) "Humanitarian intervention derives from the teachings of Grotius." at 312; J.D.Van der Vyver, *Statehood in International Law*, 5 Emory International Law Review, 9, 76 n.323 (1991)

²See Hugo Grotius, *De Jure Belli Esti Pacis* 288 (Whewell trans. 1853) The doctrine of humanitarian intervention following Grotius was largely a theoretical argument. Specific invocation of the doctrine arose mostly in the latter half of the 19th century. See eg.Thomas E.Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey," 79 Military Law Review 157, 160 (1978) Professor Fonteyne's in-depth analysis of the pre-World War II writings and state practices of humanitarian intervention led him to conclude that humanitarian intervention was legal before the UN Charter. See Jean-Pierre Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention - Current Validity Under the UN Charter," 4 California Western International Law Journal 203 (1974)"[W]hile divergences certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention, as well as to the manner in which such operations were to be conducted, the principle itself was widely, if not unanimously, accepted as an integral part of customary international law." But see H.Lauterpacht, *International Law & Human Rights*, 32 (1950)(describing the use of the doctrine as sporadic and infrequent and casting doubt on its recognition in international law) *Id.*

³ The legal literature on the concept of unilateral humanitarian intervention is too extensive to list in its entirety here, but a representative list would include Richard Lillich, "Forcible Self-Help by States to Protect Human Rights" 53 Iowa Law Review 325 (1967); Franck and Rodley, "After Bangladesh:The Law of Humanitarian Intervention by Military Force" [hereinafter *After Bangladesh*] 67 American Journal of International Law 275 (1973); Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Force:

intervention to the top of the global agenda, but now in the context of collective action under the auspices of the United Nations.⁴ Moreover, the United Nations authorized humanitarian interventions into Northern Iraq, Bosnia-Herzegovina and Somalia have brought the issue of humanitarian intervention to the forefront of international legal discourse.⁵

Any conclusions to be drawn from the following discussion must begin by recognizing that the jurisprudential debate concerning humanitarian intervention has changed.⁶ The

A Legal Survey" 79 *Military Law Review* 157 (1978); Jhabvala, "Unilateral Humanitarian Intervention and International Law" 21 *Indian Journal of International Law* 208 (1981); Verwey, "Humanitarian Intervention Under International Law" 32 *Netherlands International Law Review* 357 (1985); Bazlyer, "Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia" 23 *Stanford Journal of International Law* 547 (1987)

⁴See eg. Paul Lewis, "The Right to Intervene for a Humanitarian Cause," *The New York Times*, July 12, 1992 4 (Week in Review) at 22. The doctrine of humanitarian intervention is receiving widespread attention due to the end of the cold war and the hope that the United Nations might finally act in the fashion it was designed. *Id.* Before the collapse of the Soviet Union as a rival superpower to the United States, "[c]old war tensions virtually assured paralysis, with the rival superpowers fearing that humanitarian intervention would be directed against their interests..but with the cold war over, Western governments and humanitarian organizations began pressing for new action to defend vulnerable people." Since 1987, some UN members have tried to establish humanitarian intervention as a right under international law. There is evidence, however, that the United Nations is overburdened by the present crisis. *Id.* See eg. "Too Much Stress at the U.N", *The New York Times*, July 25, 1992 at A20. "The crisis switchboard at the United Nations is overloaded. Once paralysed by cold war rivalries, the world organization is nowadays asked to do too much: enforce peace in Sarajevo, face down a truculent Saddam Hussein and clean up messes in Cambodia, Central America, Afghanistan and South America." *Id.*

⁵ Arguably, the doctrine has always received considerable attention from legal theorists and thus, for this reason alone it is not a new concept. Having said that, it is one of the contentions of this thesis that humanitarian intervention only receives international attention in the aftermath of a humanitarian catastrophe or civil war which the UN or the international community failed to resolve. The current debate discussing the merits of humanitarian intervention merely reconsiders issues that have been discussed for years although now in a different political climate. For instance, in 1972, Professor Richard Lillich called for a reappraisal of the doctrine following months of inactivity by the United Nations and the world community in the face of gross human rights deprivations in Bangladesh. See *The International Protection of Human Rights by General International Law*, Second Interim Report of the Sub-Committee (R.Lillich, Rapporteur), in *Report of the International Committee on Human Rights Of the International Law Association*, 38 at 54, 1972. ("The doctrine of humanitarian intervention, whether unilateral or collective, surely deserves the most searching reassessment given the failure of the United Nations to take effective steps to curb the genocidal conduct and alleviate the mass suffering which took place in Bangladesh.") *Id.*

⁶ See Christopher Greenwood, "Is there a right of humanitarian intervention?" *The World Today*, 49:2 February 1993 p40 ("...the law on humanitarian intervention has changed both for the United Nations and for individual states.") *Id.*

international doctrine of humanitarian intervention has gained strength for a number of reasons, most of which focus on the United Nations.⁷ Moreover, the articulation of a substantial body of human rights law has led to the growing recognition of a right of starving civilians to receive international assistance and of international bodies to provide it.⁸ It is no longer tenable to assert that whenever a government massacres its own people or a state collapses into anarchy international law forbids military intervention altogether. While it remains undisputed that there have been significant developments in the law of humanitarian intervention, there is still no imminent prospect of a formal agreement in either legal discourse or in state practice as to exactly how this doctrine has changed or what it should be. As Adam Roberts points out:

Any attempt to devise a general justification for humanitarian intervention, even if such a doctrine were to limit intervention to very extreme circumstances, would run into difficulty. A blind humanitarianism, which fails to perceive the basic truth that different states perceive social and international problems very differently, can only lead into a blind alley. Indeed, advocacy of any general principle of humanitarian intervention could well make some states more nervous than before about international discussion of human rights, since they might see this as a stalking horse for intervention.⁹

The issue at the forefront of legal discourse is whether the protection of human rights can

⁷ See Gerald B.Helm & Steven R.Ratner, "Saving Failed States," *Foreign Policy*, No.89 Winter 1992-93 (citing civil strife, government breakdown and economic privation as some of the reasons why the international community is becoming more concerned with alleviating humanitarian suffering)

⁸ Certain aspects of this right can be traced back to the 1949 Geneva Convention and in a number of resolutions in the 1980's concerning assistance in response to disasters. See General Assembly Resolution 43/131 of 8 December 1988, adopted after the Armenian earthquake; see also "The evolution of the right to assistance," *International Review of the Red Cross* (Geneva) no 291 November-December 1992 p592-602 reporting the XVIIth Round Table of the Institute of Humanitarian Law, San Remo.

⁹ Adam Roberts, "Humanitarian War: Military Intervention and Human Rights" *International Affairs* 69,3:1993 at 429-449, 448

override inherent organizing principles of the international system. Accordingly, the purpose of this introductory section is to examine the attempts which have been made to reformulate the so-called classical doctrine of humanitarian intervention in a manner relevant to the present international climate. The conclusion is that although there has been substantial change in the norms of humanitarian intervention, further reappraisal is appropriate. More generally, it may also be considered whether any lessons are to be learned from historical practice and legal scholarship in this area.¹⁰

The starting point for an analysis of the doctrine of humanitarian intervention is an appreciation of its normative framework; namely, the principle of the non-use of force, and the doctrine of non-intervention, a notion which correlates to the fundamental principle of the sovereign equality of states.

Traditional norms of Humanitarian Intervention

The principles of equal sovereignty of all states and the correlative duty of non-intervention in domestic affairs are cornerstones of international relations.¹¹ The right of sovereign states to enjoy exclusive jurisdiction over all matters within their own boundaries, however aberrant in their human impact, is perhaps the most basic principle of international

¹⁰ Reiteration of the numerous instances where humanitarian interventions occurred during the nineteenth and early twentieth centuries has however, been considered superfluous to this paper. For an extensive survey. See generally, M.Ganji *International Protection of Human Rights* 22-24 (1962); David Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention" *University of Toledo Law Review*, Vol 23, Winter 1992 at 254, fn 4. Franck and Rodley, *supra* note 3, 275-305.

¹¹ See generally, Ian Brownlie, *Principles of Public International Law* 287 (4th edition, 1990); see also J.Brierly, *The Law of Nations* 7-16 (6th ed. 1963)

jurisprudence.¹² The extreme sensitiveness of governments to interference with their sovereign affairs is particularly acute in civil conflicts. Traditionally, it was the view that rebellions, internal strife and uprisings fell within the exclusive domain of a sovereign state. The fear was that an intervention, even if couched in humanitarian terms, would subvert the political, economic or military domain of the recipient country.

The norm of non-intervention in the internal affairs of states is articulated in Article 2(7) of the UN Charter. Article 2(7) provides that "Nothing...shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." This principle of "domestic jurisdiction" has constituted a perennial challenge to the competence of the United Nations to intervene in the affairs of states in pursuit of achieving greater respect for human rights. For decades the principle of non-interference in another state's domestic affairs has been crucial to the maintenance of world peace. While a detailed examination of this paradigm is outside the narrow ambit of this inquiry, the following discussion bears directly on the conclusions to be drawn from this paper as a whole and the central hypothesis advanced throughout it.

The doctrine of non-intervention developed from principles of self-determination, internal organization and independence.¹³ In order for states to develop their ideals of democracy, intervention not only had to be actively discouraged but prohibited altogether. Therefore,

¹² See eg. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law" 84 *American Journal of International Law*, 866-69 (1990) Malcolm.N.Shaw, *International Law* 276 (3d. ed. 1991). "International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person." *Id*

¹³ See eg. A.Thomas & J.Thomas Jr, *Non-intervention: The Law and its Import into the Americas* (1950) at 14.

members of the UN have traditionally interpreted the Charter in a manner based on the premise of non-interference in states's internal affairs. Article 2(4) for instance, requires states to refrain from the use of force against the territorial integrity or political independence of other states and in a manner inconsistent with the purposes of the UN.

(i). The non-use of force

The prohibition on the use of force was not part of customary international law prior to 1945 - at least, not in the form of an international instrument. Since its incorporation in Article 2(4) of the UN Charter, however, the principle of the non-use of force has been generally accepted as the cornerstone of international law concerning relations between states.¹⁴ Article 2(4) provides that member states must refrain "...in their international relations from the threat or use of force against the territorial integrity or political independence of any state."¹⁵ Similar prohibitions are contained in the Charters of regional organizations such as the Organization of American States, the Organization of African Unity and the League of Arab States.¹⁶

¹⁴ See eg. Ved P. Nanda, "Humanitarian Military Intervention" 23 World View (October 1980) (existing rules of international law generally prohibit military intervention) The status of the non-intervention principle lay at the heart of the ongoing debate between Professors Michael Reisman and Oscar Schacter. See eg. W. Michael Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)" 78 American Journal of International Law 642 (1984); Oscar Schacter, "The Legality of Pro-Democratic Invasion" 78 American Journal of International Law 645 (1984) and Oscar Schacter, "The Right of States to Use Armed Force" 12 Michigan Law Review 1620 (1984)

¹⁵ Article 2(4), UN Charter. It is commonly accepted that Article 2(4) has the character of a peremptory norm of international law. See eg. L. Henkin, R. Pugh, O. Schacter, H. Smit, *International Law* 677 (1987) The prohibition on the use of force in Article 2(4) was further clarified in 1974 with the passage of General Assembly Resolution 3314 on the Definition of Aggression.

¹⁶ See Organization of American States, art. 15, U.S.T. 2394; Organization of African Unity, May 25, 1963, art III 2 I.L.M. 766 ("non-interference in the internal affairs of States"); League of Arab States, Mar. 22, 1945, art 8, 70 U.N.T.S. 237 (each member "shall respect the form of government obtaining in the other states of the League...and shall pledge itself not to take any action tending to change that form"). See also Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact), May 14, 1955, art. 8, 219 U.N.T.S. 3

This provision is, accordingly, interpreted by numerous publicists as proscribing the use of aggressive force to include even military interventions for humanitarian purposes.¹⁷ For example:

Most authors interpret Article 2(4) as imposing a total ban on the use of force in international relations except when another provision of the Charter expressly recognizes or creates an exception to that ban. This broad interpretation of Article 2(4) is confirmed by the *travaux préparatoires* of the Charter, and in recent years has received the support of most of the member states of the United Nations.¹⁸

The prevailing view is that the use of force is illegal in international relations except in self-defence¹⁹ and when authorized by the Security Council under Chapter VII of the Charter.²⁰ The provisions banning the use of force are considered the most important

("principles of respect for each other's independence and sovereignty and of non-intervention in each other's domestic affairs.")

¹⁷Michael Akehurst for example, suggested that "the United Nations debates on Cambodia in 1979 provide some evidence that there is now a consensus among states in favour of treating humanitarian intervention as illegal." see Michael Akehurst, Humanitarian Intervention, in *Intervention in World Politics*, 95 (H.Bull ed.1984) Certainly, during UN debates in 1945, "not a single state spoke in favour of the existence of a right of humanitarian intervention." *Id* at 97. see also Ian Brownlie, *International law and the Non-use of force* (1963) at 342. [hereinafter *International law*] "[I]t is extremely doubtful if [humanitarian intervention] has survived the...general prohibition of resort to force to be found in the UN Charter." *Id* see also M.D.Verwey, "Humanitarian Intervention under International Law" 32 *Netherlands International Law Review* 364, 377 (1985). "The Charter bans the "use of force for any particular purpose, including a humanitarian one." *Id*

¹⁸ M.Akehurst, *ibid* at 106; see also Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law" 1979 *University of Illinois Law Review*. 609, 619 n 41 (Article 2(4)...outlaws the use of force except in very limited situations") *Id*.

¹⁹UN Charter art.51. Article 51 of the Charter provides that "[nothing] in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations".

²⁰Chapter VII of the Charter reserves to the Security Council the exclusive right to use military force against an aggressor. see Brownlie, *International law supra* note 17 at 33-34. "Chapter VII [of the Charter] conferred on the Security Council a broad competence to act on behalf of the international community with respect to varying characteristics of unlawful unilateral resorts to force: threats to the peace, breaches of the peace and acts of aggression." *Id*. see also Bazylar, *supra* note.3 at 575 ("[T]he...individual use of force has been superseded by the United Nations Charter and its emphasis upon collective state action through the Security

provisions of the Charter and have been authoritatively reaffirmed on numerous occasions.²¹ The obvious and unfortunate effect of this strict construction is that the UN appears to be prohibited, as is any other foreign power, from intervening to protect human rights.

(ii). Non-intervention into domestic affairs

The principle of non-intervention is premised on respect for sovereignty, territorial integrity and political independence and thus, is a correlation to the principle of the non-use of force embodied in Article 2(4) of the UN Charter.²² More importantly, Article 2(7) of the UN Charter specifically prohibits interference in the domestic affairs of another sovereign state although this disclaimer excludes the application of enforcement measures under Chapter VII.²³

Defining intervention, or humanitarian intervention, raises a variety of normative difficulties.²⁴ The concept of intervention, for example, has been defined as broad enough

Council") *Id.*

²¹ See Oscar Schacter, *The Right of States to use Armed Force* *supra* note 14 at 1620. On aggression under the UN Charter, see generally, Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary & Docs*, 2nd Ed. (Boston: World Peace Foundation, 1949), pp262-66

²² See eg Andrew Scott, "Non-intervention and Conditional Intervention" *Journal of International Affairs* Vol 22, No2 (1968) (Non-intervention is an obvious corollary of national sovereignty, for if national sovereignty is good, interference with a state's integrity must be bad.") *Id.* at 208

²³ Article 2(7) delineates the jurisdiction of UN authority: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

²⁴ See R. George Wright, "A Contemporary Theory of Humanitarian Intervention" *Florida International Law Journal*. Vol 4 1989 436

to include even the verbal remarks of government officials concerning another state's affairs.²⁵ In practice, however, the UN often involves itself in the peaceful resolution of internal affairs without objection *eg.* by way of committees and recommendations. The Permanent Court of International Justice aptly summarized the essential thrust of the notion of intervention in the *LOTUS* case in 1927 when it stated that

the first and foremost restriction imposed by international law on a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly *territorial* [emphasis added]; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.²⁶

More recently, the International Court of Justice noted in its decision on the merits in the case of *Nicaragua v. US* in 1986 that, "in view of the generally accepted formulations, the principle of non-intervention forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other states."²⁷

Numerous resolutions, declarations and conventions adopted by international organizations reflect state acceptance of the principle of non-intervention as pronounced by the World Court as customary international law. As part of the preparations for the San Francisco Conference in 1945, the Carnegie Endowments' Report on the International Law for the

²⁵ See *eg.* R. Vincent, *Non-intervention and the International Order* 3 (1974); Bazzyler, *supra* note 3 at 547 (citing authority)

²⁶ *The SS Lotus* (1927) PCIJ ser.A.No 9, 18-19

²⁷ See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic v USA)*, 1986 ICJ Rep 14, 106-110. Earlier in the *Corfu Channel* case the Court had made a similar pronouncement stating that "the alleged right of intervention as the manifestation of the policy of force, such as has, in the past, given rise to most serious abuses and such as cannot...find a place in international law..especially when it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself." ICJ Rep 1949, Rep 4 at 35

Future declared: "Each state has a legal duty to refrain from intervention in the internal affairs of any other state,"²⁸ the authors pointing out that the "principle would reaffirm a precept of the existing law."²⁹

Similarly, the 1928 Convention on the Duties and Rights of States in the Event of Civil Strife prohibited intervention even by nationals of one state in the affairs of another state.³⁰ Likewise, the Montevideo Convention on Rights and Duties of States of 1933³¹ explicitly stated that "no state has the right to intervene in the internal or external affairs of another."³²

The principle of non-intervention was unequivocally endorsed by the United Nations in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty³³ which stated that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign right or to secure from it advantages of any kind."³⁴ The UN General Assembly later

²⁸See *The International Law of the Future: Postulates, Principles and Proposals*, *Carnegie Endowment for International Peace*, 38 *American Journal of International Law*, Supp 41 at 76 (1944)

²⁹ *ibid*

³⁰ *Convention Concerning the Duties and Rights of States in the Event of Civil Strife*, 1948 February 20th, 46 Stat, 2749 Article 1.

³¹ *Convention on the Rights and Duties of States*, 1933, December 26th, 49 Stat 3097

³² *Ibid*, at Article 8

³³ GA Resolution 2131, (XX) UN GAOR, 20th Sess, Supp No.14, UN Doc A/Res/2131

³⁴ The Declaration reflected the General Assembly's deep concern at "the increasing threat to universal peace due to armed intervention and other direct or indirect forms of intervention threatening the sovereign personality and the political independence of states." and holds that "armed intervention is synonymous with aggression" and "a violation of the Charter of the United Nations." Thus, the resolution condemns armed

adopted a Declaration on Principles of Law Concerning Friendly Relations and Cooperation Among States, which approved the principles enunciated in the 1965 Declaration as the "basic principles" of international law. The 1970 Declaration stated that "the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security..³⁵

Although declarations such as the above "are not ordinary international treaties or conventions" there is authoritative evidence to suggest that these declarations actually established new rules of international law binding upon all states.³⁶

Several eminent legal scholars have contributed to the jurisprudential debate concerning the notion of non-intervention. Falk for instance, has reiterated that "non-intervention is a doctrinal mechanism to express the outer limits of permissible influence that one State may exert upon another,³⁷ while Teson interprets intervention to mean "proportionate transboundary help, including forcible help, provided by governments to individuals in

intervention "for any reason whatsoever" and makes no exceptions, not even for the protection of human rights." see GA Res 2131 (XX) Dec 21, 1965 20 GAOR, Supp 14 at 11-12 UN Doc. A/6014

³⁵ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, Res 2625 24th October 1970, 8th parag. There was a similar general condemnation of intervention in a 1974 UN document which classified the following as "aggression:" The invasion or attack by the armed forces of a state of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack..", Article 3(a) of the Definition of Aggression, approved by the UN General Assembly Res 3314 of December 14, 1974. However, Article 2 of the same document gave the Security Council some discretion in particular cases to "conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances.." *Id*

³⁶ Louis Sohn, "The Shaping of International Law" *Georgia Journal of International Law and Comparative Law*, 16 (1978) at 16. Similar arguments may be made to the effect that international treaties of sufficient scope may create customary law binding on non-signatories; see also Baxter, "Multilateral Treaties as Evidence of Customary International Law" 41 *British Year Book of International Law* 275 (1965-66)

³⁷ Richard Falk, *Legal Order in a Violent World* (1968) (Princeton University Press) 159

another state who themselves would be rationally willing to revolt against their oppressive government.³⁸

It has however, been stated that "...the essence of intervention is force, or the threat of force, in case the dictates of the intervening power are disregarded..There can be no intervention without on the one hand, the presence of force, naked or veiled, and on the other hand, the absence of consent on the part of the combatants."³⁹ Similarly, in Ellery Stowell's well-known treatise, humanitarian intervention is defined as "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."⁴⁰ Thus, although it is conceded that intervention may take various nuances,⁴¹ the use or threat of force remains paramount in state practice whenever the doctrine of humanitarian intervention has been invoked. It is this consideration that is presented in this paper.

(iii) State Sovereignty as a Barrier to Humanitarian Intervention

Sovereignty as a concept is crucial when considering whether or not to intervene to protect human rights. Intervention implies violation or intrusion upon authority and while authority,

³⁸ Fernando R.Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988) at 5; see also F.X.Lima, *Intervention in International Law* 53 (1971) "To intermeddle in the domestic affairs of another nation or to undertake to constrain its council is to do it an injury." (quoting Vattel) *Id* at 12

³⁹ T.Lawrence, *Principles of International Law*, 124,(5th edition 1913)

⁴⁰ E.Stowell, *Intervention in International Law* (1921)

⁴¹ See W.D.Verwey, "Humanitarian Intervention under International Law" 32 *Netherlands International Law Review*. 364 (1985) (quoting J.L Brierly, *The Law of Nations* 402 (1963) Intervention can refer to "almost any acts of interference by one State in the affairs of another." *Id*.

like sovereignty, is an abstraction, its concrete form consists of territorial boundaries.⁴²Traditionally, governments intent on repressing their people have used the notion of sovereignty to prevent life-saving assistance from the international community reaching the needy. As recently as 1990 it was the belief of some theorists that "[I]f offenses against humanity even to the point of genocide in a few cases have not been sufficient justification to override sovereign rights until now we probably should not expect it to be any different in the future."⁴³

The ethnically displaced, victims of human rights violations and civilians trapped in civil conflict have, for centuries, remained vulnerable to the very regimes that violated their human rights. To appreciate the significance of the dramatic turnaround in international attitudes, one has only to look at the emphatic deference to state sovereignty over the years. The concept of sovereignty was the distinguishing feature of a new order established by the Treaty of Westphalia which prevented the humanitarian intentions of earlier founders of international law becoming a reality.⁴⁴The origins of the doctrine can be found, however, in the Roman Empire. It was argued that the source of law must be above the law and hence, the emperor at the time was so regarded. This essential element of sovereignty

⁴² J.Chopra and T.Weiss, "Sovereignty is no longer Sacrosanct" *Ethics and International Affairs*, 1992 Vol 6 at 102

⁴³ Robert Jackson, *Quasi-States:Sovereignty, International Relations and the Third World* Cambridge:Cambridge University Press, 1990) at 192.

⁴⁴ See Theodor Meron, "Common Rights of Mankind in Gentili, Grotius and Suarez" *American Journal of International Law* 85 (1991) pp110-16; Hugo Grotius, *De Juri Belli Ac Pacis Libri Tres [The Law of War and Peace in Three Books]*, Prolegomena 14-15 (F.Kelsey trans.1925)(original 1625) It was Grotius who first provided a theoretical basis to modern international law. Accordingly, any critique of the concept of territorial sovereignty must in the final analysis address the Grotian theory; see eg H.Maine, *Ancient Law* 92-108 (1970) The writer demonstrates that Grotius derived his theory from the following postulates:

- (1) There is a determinable law of nature.*Id* at 92.
- (2) Each nation-state is sovereign.*Id* at 92.
- (3) Natural law is binding on nation-states inter se.*Id*

emerged at the end of the first century. However, the rebirth of sovereignty in the nation-state⁴⁵ is customarily dated from the end of the Thirty Years War in 1648.⁴⁶ Following three decades of war between Catholics and Protestants, the Peace of Westphalia separated the powers of church and state. In doing so, it transferred to nation-states the special features of church authority. Nation-states thus acquired the notion of sovereignty and became entities above the law that has since become frozen in the structure of international relations.⁴⁷ Modern re-statements of sovereignty derive their historical basis from the Grotian theory.⁴⁸

Traditionally defined, state sovereignty refers to a government's exclusive rights to manage its own affairs without external interference and to conduct foreign affairs with other sovereign entities. For example, it was once stated that "[T]he principles of sovereignty and self-determination relieve publics of worrying about how and by whom others are governed and, in any event, foreign authority structures are too far removed from the daily concerns of citizens to warrant their sustained advocacy of convention-breaking behaviour."⁴⁹

International esteem for the concept reached its zenith shortly after the end of the colonial

⁴⁵ The term "nation-state" is used to avoid any confusion between state as an international person and state as part of a federation. Hence, the term "nation-state" in this context refers to the international meaning.

⁴⁶ H. Grotius, *supra* note 44 For a thorough overview of the emergence of territorial sovereignty see generally Ali Khan "The Extinction of Nation-States" *American Journal of International Law and Policy* 1992 Vol 7 197-234

⁴⁷ see generally, F. Hinsley, *Sovereignty*, 2nd ed (Cambridge University Press, 1986) Chapter II

⁴⁸ H. Grotius, *supra* note 44 see also M. McDougal & W. Reisman, *International law in Contemporary Perspective* 1295 (1981)

⁴⁹ James N. Rosenau, "Intervention as a Scientific Concept" *Journal of Conflict Resolution* Vol 13, no2 (1969):166

era.⁵⁰ However, as detente took hold in the 1970's and the Cold War began to thaw, serious inroads were made to the doctrine of state sovereignty as the United Nations made human rights one of its main priorities.⁵¹ Proponents of human rights began to argue that the United Nations should no longer genuflect before the notion of sovereignty and that states should be made accountable to international standards concerning human rights.⁵² Accordingly, the issue at the forefront of legal discourse is whether the doctrine of non-intervention exists subject to certain exceptions where intervention may be justified "inter alia", on humanitarian grounds, or whether the exceptions themselves explain the scope of the doctrine.⁵³ In this context opponents of the doctrine believe that a "humanitarian intervention occurs when a state or group of states interferes, by the use of force in order to impose its will, in the internal or external affairs of another state, sovereign and independent, without its consent, for the purpose of maintaining or altering the conditions of things when the intervening state finds that the condition or its removal is contrary to the

⁵⁰ James Anderson, "New World Order and State Sovereignty: Implications for UN-Sponsored Intervention" Fletcher Forum of World Affairs, Summer 1992 at 130

⁵¹ For years, Cold War dynamics prevented human rights concerns from receiving much attention, despite the passing of the Universal Declaration of Human Rights.

⁵² See generally Goodwin-Gill, *The Refugee in International Law* (1985) See also James Anderson, *supra* note 50 at 130. Anderson posits a theory of moral absolutism vs. moral relativism to explain the emergence of human rights in international law and the tension between state sovereignty. Moral relativism dictates that each state be judged on its own terms, according to its own values, norms and customs. According to this paradigm, universal norms do not apply. In contrast, the absolutist model posits universal standards that apply equally across state borders. International opinion has shifted between moral relativism and moral absolutism with respect to human rights. Since the end of the Cold War however, moral absolutism would appear to have emerged as the dominant paradigm for judging internal state policies. *Id*

⁵³ The Thomases believe for instance that "intervention is the exception". *supra* note 13 Scott-Fairley likewise believes that any theory of humanitarian intervention must offer a legitimate exception from this stated norm in contemporary international law when he says "humanitarian intervention is a particular species of an exception to a rule" H.Scott Fairley, "State Actors and Humanitarian Intervention: Opening Pandora's Box" Georgia Journal of International and Comparative Law (1980) at 31

laws of humanity."⁵⁴ This doctrine warrants further examination.

Changing Views of the Doctrine of Humanitarian Intervention

(i). Classical School of Thought

Although its status has always been precarious, the doctrine of humanitarian intervention in its classical form was extensively invoked by numerous Western European States to justify their actions in the 18th and 19th centuries and has been well documented by various scholars.⁵⁵ The concept was just one of a number of theories that was used to "justify" the enslavement of uncivilised peoples. Although a genuine humanitarian intervention was not always guaranteed, a number of eminent publicists consistently maintained the legality of the doctrine even if their formulations were couched in moralistic overtones.⁵⁶ After World War I however, and the creation of the League of Nations, special limitations were imposed on the right of states to resort to intervention.

During the League of Nations, a new application of the doctrine was devised, largely due to the proliferation of international organizations providing opportunities for concerted

⁵⁴ Adapted from Thomas and Thomas's definition *supra* note 13. see also Franck and Rodley, *After Bangladesh supra* note 3 who believe in a different definition of humanitarian intervention as "limited to those instances in which a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces." *Id* at 277

⁵⁵ See generally E.Stowell *supra* note 40 for an annotated bibliography of authorities who recognize the doctrine, see also Fernando R.Teson, *supra* note 38.

⁵⁶ See Henry G. Hodges, *The Doctrine of Intervention and Morality* 5 (1988) quoting Hugo Grotius "Any Sovereign may justly take up arms to chastise nations which are guilty of enormous faults against the laws of nature." (90.n.29)

action.⁵⁷ The proponents of the doctrine during this period recognized that non-intervention in the affairs of another sovereign state was a generally accepted principle of international law.⁵⁸ Statements of the doctrine of humanitarian intervention therefore, usually consisted of general assertions of morality and lacked a sound legal basis.⁵⁹ Yet, even the moral legitimacy of the doctrine under general international law was denied by some commentators.⁶⁰ More importantly, the doctrine of humanitarian intervention is thought to have been proscribed or, at least severely restricted by the UN Charter in 1945.⁶¹

The doctrine of humanitarian intervention has always been a controversial concept. Many states for instance, characterize humanitarian intervention as a pretext designed to legitimize invasion of the weak by the strong.⁶² Some argue that humanitarian intervention is "simply a cloak of legality for the use of brute force by a powerful state against a weaker one,"⁶³ and that "experience has shown how readily more powerful states have used the pretext of

⁵⁷ See M.W.Graham, "Humanitarian Intervention" XXIII Michigan Law Review, 1923-4,p312 at 328.

⁵⁸*ibid*

⁵⁹ See *eg* the Marten's Clause in the Convention with Respect to the Laws and Customs of War on Land, which makes reference to the concept of "laws of humanity".

⁶⁰See authorities cited and discussed in E.Stowell, *supra* note 40.

⁶¹ Article 2(4), UN Charter

⁶²See Schacter *supra* note 14 at 1629 ("The reluctance of governments to legitimize foreign invasion in the interest of humanitarianism is understandable in the light of past abuses by powerful states")*Id*

⁶³ See *eg*. Hassan, "Realpolitik in International Law: After Tanzanian - Ugandan Conflict," Humanitarian Intervention" Reexamined" 17 Willamette Law Review 859, 890 (1981); see also Jost Delbruck, "A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations" 67 Indiana Law Journal 887, 891 (1992) ("[T]he door to purely arbitrary intervention, that is, acts of aggression in disguise, would be wide open.")*Id*

a higher good to impose their will and values on weaker states."⁶⁴ One commentator concluded that "humanitarian intervention is so blatantly open to spurious claims that it should not be countenanced."⁶⁵ Others have colourfully suggested that the doctrine lacks "a means that is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarianism from the herds of goats which can too easily slip through."⁶⁶

The argument need not be left at the level of the hypothetical. The Indian intervention in East Pakistan in 1971 and the Tanzanian intervention in Uganda in 1979, for instance, attracted criticism in the UN General Assembly and especially among certain legal scholars for allegedly using the doctrine of humanitarian intervention as a pretext for serving self-interests.⁶⁷

Other commentators such as Oscar Schachter have written that "governments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals

⁶⁴ Oscar Schachter, "The Lawful Resort To Unilateral Use of Force" Yale Journal of International Law 291 (1985)

⁶⁵ Clark, "Humanitarian intervention: Help to Your Friends and State Practice" 13 Georgia Journal of International Law 211, 213, (1983)

⁶⁶ Franck and Rodley, *After Bangladesh supra* note 3 at 284

⁶⁷ The legal status of these operations is somewhat dubious since the governments in each case based their claim on the right of self-defence as enunciated in Article 51 of the Charter rather than on the doctrine of humanitarian intervention. India did initially justify its military action in 1971 partly on the grounds of humanitarian intervention in the UN Security Council. These statements were however, deleted from the final record of the Security Council. Instead, India alleged that Pakistan had attacked India first and thus acted in self-defence, a much less persuasive claim. see Bazlyer *supra* note 3 at 588-92; see also Franck and Rodley, *After Bangladesh, supra* note 3 (motivating force behind the intervention was not humanitarian concern, but self-interest and thus India's intervention was not justifiable) Thus, "the Bangladesh case does not constitute the basis for a definable, workable or desirable new rule of law which, in the future, would make certain kinds of unilateral military intervention permissible) Compare to Teson, *supra* note 38. ("The case..is an almost perfect example of humanitarian intervention.") see also R.Lillich, Rapporteur, The International Protection of Human Rights by General International Law, Second Interim Report of the Sub-Committee, in *Report of the International Committee on Human Rights of the International Law Association*, 38, 54 (1972); see M.Akehurst "Humanitarian Intervention", *supra* note 17 at p96.

of another country from atrocities carried out in that country.⁶⁸ Tom Farer has also pointed out that even slaughters of near genocidal proportions do not consistently induce a substantial number of states to call for armed rescue, much less to attempt it themselves.⁶⁹ He submits that there is not a single case in the entire post-war era where one state has intervened in another for the exclusive purpose of halting mass murder, much less any other gross violation of human rights.⁷⁰ Accordingly, opponents of the doctrine of humanitarian intervention contend that the prohibition on the use of force, which is enshrined in Article 2(4) of the UN Charter, should be interpreted broadly and consistently with its plain language. They argue that there is no scope for considering humanitarian intervention as a valid exception to the Article 2(4) norm.⁷¹ Most scholars during the Cold War era therefore found that action taken in the name of humanitarian intervention rarely complied strictly with the norms of international law as enunciated in the UN Charter.⁷²

A recent British Foreign Policy document points out that to establish any semblance of legality of humanitarian intervention it would be necessary to demonstrate that Article 2(4)

⁶⁸ Oscar Schacter, *The Right of States to Use Armed Force*, *supra* note 14 at 1629.

⁶⁹ Tom Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention" in *Law and Force in the International Order* (Lori F. Damrosch and David Scheffer eds. 1992) 186 at 192 [hereinafter *Law and Force*]

⁷⁰ *Ibid* at 193, Similarly, Michael Walzer claims to have found no examples of pure humanitarian intervention..."States don't send their soldiers into other states, it seems, only in order to save lives. The lives of foreigners don't weigh that heavily in the scales of domestic decision-making." Michael Walzer, *Just and Unjust Wars* 101-108 (1977) at 102

⁷¹ See Ian Brownlie, *International law* *supra* note 17 for citations to the works of these publicists; and Brownlie "Humanitarian Intervention" in *Humanitarian Intervention and the United Nations*, [hereinafter *Humanitarian Intervention*] Lillich (ed 1970.) see also T.Franck and N. Rodley, *After Bangladesh* *supra* note 3 299-30

⁷² See *eg.* Franck and Rodley, *supra* note 3 Professors Franck and Rodley concluded that "[some past invocations of humanitarian intervention] are so clearly bogus as to be worth examining only to indicate the abuse to which the asserted right is so commonly subject." *Id*

does not apply to violations of human rights. The study however, concluded that

the overwhelming majority of contemporary legal opinion is against the existence of a right of humanitarian intervention, for three main 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, and 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.⁷³

There is however, a school of thought which posits a contradictory interpretation of the Charter.

(ii) Neo-classical school of thought

International law distinguishes between two categories of intervention related to humanitarian concerns: the protection of nationals and their property abroad by the intervening state; and humanitarian intervention per se, where the basis for intervention is not the link of nationality between the persons sought to be protected and the intervening state, but the protection of individuals or groups of individuals from their own state where the governing authority permits gross abuses of human rights or itself maltreats subjects in a manner which "shocks the conscience" of mankind.⁷⁴

Proponents of the doctrine of humanitarian intervention, accordingly, subscribe to the view

⁷³ Foreign And Commonwealth Office Foreign Policy Document No. 148, reprinted in 57 British Yearbook of International Law 614 (1986).

⁷⁴ It is the latter conception of humanitarian intervention that this thesis is concerned with. See Oppenheim who states "There is a substantial body of opinion and of practice in support of the view that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible." *International law*. (8th ed.1955); E.Stowell, *supra* note 40 at 51-52 "For it is a basic principle of every human society and the law which governs it that no manner may persist in conduct which is considered to violate the universally recognized principles of decency and humanity."

that if a state denies certain minimum basic rights to the people within its territory, any other state can remedy the situation by intervention. As one commentator attested, such intervention was, however, justified only "in extreme cases.. where great evils existed, great crimes were being perpetrated, or where there was danger of race extermination."⁷⁵ A similar conclusion was reached by another commentator at the turn of the century that intervention was permissible on the grounds of "tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution."⁷⁶ Another observer states that "while divergences certainly existed as to the circumstances in which resort could be had to the manner in which such operations were to be conducted, the principle itself was widely, if not unanimously, accepted as an integral part of customary international law."⁷⁷

There are numerous scholars who belong to the so-called neo-classical school of thought. Richard Lillich for example, strongly supports the thesis of humanitarian intervention on the basis of proportionality and of its limited duration in time. He believes that such intervention is legitimate not only when human rights are being violated, but also in the presence of a clear danger of such human rights violations.⁷⁸ Most proponents of the doctrine of humanitarian intervention refer to the Charter and internationally recognized principles of

⁷⁵ Stowell, *supra* note 40

⁷⁶ Hall, *International Law*, 302 (4th edition, 1895)

⁷⁷ Jean-Pierre L.Fonteyne, *supra* note 2 at 235

⁷⁸ Lillich, [*Humanitarian Intervention*] *supra* note 71 at 130; see also Lillich, "Forcible Self-Help by States to Protect Human Rights" 53 Iowa Law Review, 325 (1967) and "Intervention to Protect Human Rights" 15 McGill Law Journal (1969) at 205 for an invaluable insight into the doctrinal debate between Lillich and Brownlie.

international law rather than to customary law. For instance, Professors Reisman and McDougal of Yale Law School hold that the UN Charter not only confirmed the legitimacy of humanitarian intervention, but also "strengthened" it.⁷⁹ They cite the Preamble and Article I of the UN Charter and point out that these provisions confirm the legitimacy of the use of force for self-defence and humanitarian intervention.⁸⁰ Article 2(4) of the UN Charter, according to Reisman and McDougal, prohibits the use of force only for "illegitimate purposes" such as encroachments upon territorial integrity or political independence of states. Humanitarian intervention, in their opinion, does not violate the purposes of the Charter but rather corresponds fully to the mandatory provisions of the UN Charter.⁸¹

A similar thesis is supported by international policy makers. For instance, the report submitted by the Sub-Committee on Human Rights at the 54th Conference of the International Law Association (I.L.A) in 1970, stated that the "humanitarian intervention" doctrine is well-founded in international law, and it is not its existence but its limits that may constitute the subject matter of debates.⁸² Despite opposition from some ILA members on the grounds that the doctrine is contrary to the UN Charter, subsequent reports of the Association stated that the doctrine deserves to be treated most favourably and that intervention for "humane" purposes is legitimate only in cases where gross violations are

⁷⁹ M.Reisman and M.Mcdougal, Humanitarian Intervention to Protect the Ibos, in Lillich, [*Humanitarian Intervention*] *supra* note 71 at 167-195

⁸⁰ *Ibid*, at 172

⁸¹ *Ibid* at 175

⁸² The International Law Association, Report of the Fifty-Fourth Conference, London 1972 at 633-641

"inevitable" or "unavoidable".⁸³ The International Court of Justice however, has not directly ruled on the legality of humanitarian intervention. Certain decisions nonetheless, do reflect on the value of human rights and humanitarian intervention generally.⁸⁴

Aside from legal theorizing, is there a basic moral justification for humanitarian intervention? It is often argued that humanitarian intervention of a military sort is inherently self-defeating. Indeed, it has been colourfully suggested that "guns do not have...the gift of diminishing the number of corpses or of disinfecting the atmosphere corrupted by their smoke."⁸⁵ There is however, a strong moral argument in favour of the doctrine of humanitarian intervention.⁸⁶ Stowell at the turn of the century, theorized for instance, that human rights violations in one country do have a "moral effect on the neighbouring populations."⁸⁷

It is almost implausible at this juncture in international relations to suggest that any attempt to prevent the mass genocide of civilians by the national government can never be justified by moral suasion. Simply because atrocious violations of human rights take place overseas hardly seems sufficient to justify inaction. As one eminent legal critic asserted: "[S]urely to

⁸³The International Law Association, Report of the Fifty-Fifth Conference, London, 1974 at 608-624

⁸⁴ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S) Merits*, 1986 I.C.J 4 (June 27); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (June 21); *Barcelona Traction, Light and Power Company, Limited (Belg.v Spain)*, 1970 I.C.J 3. (Feb 5) (second phase); *South West Africa (Eth.v s.Africa.; Limber.v.s.Afr)*, 1966 I.C.J. 6 (July 18) (second phase); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J 15 (May 28). These decisions are however, inconclusive as to the legality of the doctrine. For a review of the above cases, see Nigel.S Rodley, "Human Rights and Humanitarian Intervention: The Case Law of the World Court" 38 International Law and Comparative Law Quarterly 321 (1989).

⁸⁵Tanoviceane, *Droit International de L'Intervention* 12-13 (1884) quoted in Hassan, *supra* note 63

⁸⁶Lillich, *supra* note 3 at 344. The doctrine of humanitarian intervention appeals to the average person's sense of morality and justice. *Id* The doctrine "is the expression of a profound and innate sense of justice corresponding to the natural feelings and reactions of the average person." *Id*.

⁸⁷ see Stowell *supra* note 40

require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress blackletter law at the expense of far more important values."⁸⁸

McDougal and Reisman have concluded that

in the contemporary world, international and peace and security and the protection of human rights are inescapably interdependent and that the impact of the flagrant deprivation of the most basic human rights of the great mass of the people of a community cannot possibly stop short within the territorial boundaries in which the physical manifestations of such deprivations first occur.⁸⁹

Even Michael Walzer who ironically presents one of the strongest moral arguments for adhering to traditional conceptions of the principle of non-intervention allows limited intervention in response to human rights violations that "shock the moral conscience of mankind."⁹⁰ Indeed, most legal critics of humanitarian intervention would appear to admit the moral attractions of the doctrine.⁹¹

Opponents to the concept of universal human rights consistently fail to consider the moral

⁸⁸Lillich, "Forcible Self-Help Under International Law" *Naval War College Review* 22 (1970) Lillich goes on to state that "it is a realistic assumption that no state with the capabilities to act will allow its own nationals and the national of other states to be killed or injured abroad." *Id* at 60-61 Similarly, Professor Arthur Leff succinctly summarized the position of many people who support the legalization of humanitarian intervention: "I don't much care about international law, Biafra or Nigeria. Babies are dying in Biafra...Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death." Arthur Leff, "Food for Biafrans," *The New York Times*, October 4, 1968 at A46.

⁸⁹ McDougal and Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern" 62 *American Journal of International Law* 15 (1968)

⁹⁰ Michael Walzer, "The Moral Standing of States", *Philosophy and Public Affairs* 9 (Spring 1980) 209-29

⁹¹ Even traditional opponents of the legal doctrine support, in principle, the moral premise of humanitarian intervention. "In theory, no moral person can take exception to a rule which, in the absence of an effective international system to secure human rights, permits disinterested states to intervene surgically to protect severely endangered human rights and lives, wherever the need may arise." See Franck and Rodley, *After Bangladesh*, *supra* note 3 at 278 For a sense of some of the moral issues involved in killing one person in order to save countless others under various moral circumstances, see *eg.* Thomson, *The Trolley Problem, in Rights, Restitution, and Risk* 94 (W. Parent ed. 1986)

premise on which the doctrine of humanitarian intervention is based. Their views may be criticized for offering what essentially amounts to an "arid textualist approach"⁹² to existing international law, without comprehending the need to adapt the law in order to meet the demands of contemporary international society.

R.George Wright expounds an interesting theory of contemporary moral relativism to support the doctrine of humanitarian intervention. He states that:

there is a sense in which moral and cultural relativism may actually pave the way for humanitarian intervention. The argument may be made that a potential intervenor should respect the popular institutional choice of a foreign people, however depraved or barbaric that choice may appear to some outsiders. This argument may itself depend upon some non-relativist premise which may conflict with other non-relativist moral principles. But equally importantly, why is the would-be intervenor morally required to defer to the value choices of the potentially intervened-upon state ? It may be said that mass killings are right for some societies, if wrong for others. It is not clear, however, why the intervening state might not equally demand the world's respect for its choice to intervene. Perhaps intervening in the largely internal affairs of other states is right for some states, if not for others. There may well be some relevant moral difference between what a society does internally, to itself, and what it does to unconsenting foreign states. Such a difference, however, takes on effective moral weight only when seen as a non-relativist moral consideration, and as only one such consideration among others.⁹³

Thus, although it is possible to conclude that the doctrine of humanitarian intervention has never received authoritative recognition in positive international law, in view of the conflicting ideals of the UN Charter,⁹⁴ its existence can nevertheless, be viewed as providing an indication of the importance of upholding certain higher principles of humanity.

⁹² See eg. Claydon, "Humanitarian International" *Law 1 Queens Intramural Law Journal*, 36 (1969) at 57

⁹³ R.George Wright, *supra* note 24 at 444

⁹⁴ See M.Mcdougal and F.Feliciano, *Law and Minimum World Public Order* 536 (1961) who speak of the "amorphous doctrines on "humanitarian intervention."

Humanitarian intervention may, therefore, generally be justified on a variety of human rights-based approaches.⁹⁵ It was once thought that "...foreign authority structures are too far removed from the daily concerns of citizens to warrant their sustained advocacy of convention-breaking behaviour."⁹⁶

There is however, a growing awareness that barbaric acts of aggression towards innocent civilians are no longer morally acceptable. An analogy may for example, be drawn from common law systems where an individual witnesses the perpetration of a violent crime. The psychological dynamics posed by this dilemma are essentially founded upon a basic notion of morality. It follows therefore that that individual is duty-bound under traditional conceptions of morality to intervene to put a stop to such violence, provided he can do so without physically imperilling himself. In some jurisdictions, it is a crime not to offer assistance.⁹⁷ Such an incident may be paralleled in the international context where it is submitted that states are duty-bound to intervene to put a stop to human rights atrocities.⁹⁸ Thus, the implementation of at least some of the fundamental human rights must be seen as the first precondition for the foundations of stable and enduring international organization

⁹⁵ See generally, Louis Henkin, *The Rights of Man Today* 108-09 (1978) Bilder, "Rethinking International Human Rights: Some Basic Questions", *Wisconsin Law Review* 1967, 171

⁹⁶ James N. Rosenau, *supra* note 49 at 166 A similar argument may be made that a child struck by a drunk driver arouses more attention than a thousand civilians massacred by their own government in a far-flung country. see generally James Anderson, *supra* note 50 at 34

⁹⁷ see generally the work of psychologists Latane and Darley, *Social Determinant of Bystander Intervention in Emergencies in Altruism and Helping Behaviour* 13-27 (J. Macauley and L. Berkowitz eds. 1970)

⁹⁸ For a philosophical consideration of this duty in the context of charity, as opposed to humanitarian intervention, see Singer, *Famine, Affluence and Morality in Philosophy, Politics and Society* 33 (P. Laslett and J. Fishkin, eds fifth series 1979) ("we ought to give until we reach the level...at which, by giving more, I would cause as much suffering to myself or my dependents as I would relieve by my gift") *Id.*

and law.⁹⁹

Humanitarian Intervention and the UN Charter

A cursory perusal of the normative logic of the UN Charter as a whole, and its allocation of coercive jurisdiction leads to the conclusion that its overriding goals are the maintenance of peace and the protection of human rights. There is a strong argument that the principles and purposes upon which the UN was founded, in particular the support and promotion of human rights throughout the international community, justifies humanitarian intervention. Indeed, some scholars argue that the two purposes are not inconsistent because the UN Charter's prohibition on intervention "per se" was never intended to apply to violations of human rights.¹⁰⁰ Moreover, by ratifying the UN Charter, member states took on inherent obligations in the area of human rights.¹⁰¹ Others subscribe to the view that the Charter must be accorded a contemporary interpretation in view of the present expectations of the international community which allows intervention to protect human rights.¹⁰² Indeed, a number of derivative resolutions passed since the inception of the UN Charter reaffirm the inviolability of human rights in international jurisprudence.¹⁰³ Yet, still, the promotion of

⁹⁹ See Falk, "The US and the Doctrine of Non-intervention in the Internal Affairs of Independent States" 5 Howard Law Journal 1959, p163 at pp166-167; Lauterpacht, "The Grotian Tradition in International Law" XXIII British Yearbook of International Law 1946 p1 at p46

¹⁰⁰ See Jean-Pierre.L.Fonteyne, "Forcible Self-Help by States to Protect Human Rights:Recent Views from the United Nations" in Lillich, [*Humanitarian Intervention*] *supra* note 71 at 206-09

¹⁰¹ *Ibid* at 200 (citing commentary of UN delegates as support for the theory)

¹⁰² Teson, *supra* note 38 at 134-47

¹⁰³ See e.g *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A.Res. 34/180, U.N GAOR 3d Comm, 34th Sess, Supp. No.46, at 193, U.N Doc A/34/830 (1979) (declaring equality of women and men);*International Convention on the Elimination of All Forms of Racial discrimination*, Mar.12, 1969, 660 U.N.T.S 195 (seeking to end government sponsored practice of racial discrimination);*International Conference on Human Rights (the "Proclamation of Tehran")*, 1968 U.N.Y.B 538, 539 (declaring that economic development

human rights ranks below the protection of state sovereignty and the maintenance of peace as the aims of the world organization.¹⁰⁴

Nevertheless, under a traditional interpretation, the provisions of the UN Charter are authority for the view that humanitarian intervention is permissible where necessary to protect human rights. Although Article 2(1) of the Charter, rests on the basic premise of sovereign equality for all member states, Article 2(4) prohibits the use of force and Article 2(7) protects sovereign states from UN intervention into "matters which are essentially within the domestic jurisdiction of any state", equally, the Preamble and first Article of the Charter make clear that the founders of the UN had as their intention a link between international peace and security with fundamental human rights. The Preamble to the United Nations Charter states that "We the Peoples of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women..¹⁰⁵ The Preamble also provides that armed force shall only be used

cannot come about without protection of human rights); *International Covenant on Economic, Social and Cultural Rights*, G.A.Res 2200, U.N GAOR 3d Comm, 21st Sess, 1496th plen mtg. at 49, UN Doc A/6316 (1966) (recognizing the right to self-determination as a fundamental right); *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan.12, 1951, 78 U.N.T.S 277 (outlawing all practices which intend to destroy a specific national, ethnic, racial or religious group); *Universal Declaration on Human Rights*, G.A.Res 217A, 3(1), U.N GAOR Res 71, U.N Doc A/810 (1948) (calling on all states to recognize and affirm general human rights for all peoples without limitation). For an overview of the UN responses to the protection of human rights, see Louis B.Sohn and Thomas B.Burgenthal, *International Protection of Human Rights* (1973); Louis Sohn, "The Universal Declaration of Human Rights", 8 J.Int'L Commission Jur 17, 23 (1967). "[T]he Universal Declaration of Human Rights was adopted unanimously, without a dissenting vote, [so] it was considered as an authoritative interpretation of the Charter of the highest order." *Id.*

¹⁰⁴ Human rights had only a tenuous place among the concerns of the founding members for when faced with a proposal to include a bill of rights in the new Charter, a majority of states rejected it. See generally P.Meyer, *The International Bill of Human Rights: A Brief History*, in *The International Bill of Human Rights* xxiii (P.Williams ed.1981)

¹⁰⁵ The preamble to the Universal Declaration of Human Rights also emphasizes the United Nations Charter's conceptualization of the indivisibility of human rights and international security.

if it is in the "common interest."¹⁰⁶ This phrase has been interpreted by some scholars to mean interests that are "common to all individuals on earth," as opposed to all recognized governments.¹⁰⁷

Article 1(3) further provides that "the Purposes of the United Nations are...to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights." Under Articles 55 and 56, members are committed "to take joint and separate action in cooperation with the Organization "for the promotion of "equal rights and self-determination of peoples," including "universal respect for, and observance of, human rights". In Article 68, the Economic and Social Council "shall set up commissions...for the protection of human rights" whereas Article 76(c) stipulates that a basic objective of the trusteeship system is "to encourage respect for fundamental freedoms for all...."

These provisions have led to claims that the furtherance of human rights is just as important within the normative framework of the United Nations as the principle of non-intervention set out in Articles 2(4) and 2(7). Although, the ICJ argued in the Nicaragua case that the protection of human rights "cannot be compatible" with military actions such as those carried out by the United States in Nicaragua, the Court concluded that "...humanitarian aid... cannot be regarded as unlawful intervention....".¹⁰⁸ Indeed, this view is further supported

¹⁰⁶ UN Charter preamble, article 1.

¹⁰⁷ Teson *supra* note 38 at 133; see also Reisman "A Humanitarian Intervention to Protect the Ibos," in Lillich, [*Humanitarian Intervention*] *supra* note 71 at 177.

¹⁰⁸ *Nicaragua v. United States*, 1986 I.C.J. 14, 134-35 (Merits) Not all scholars uphold this belief. Louis Henkin for example contends: "[c]learly it was the original intent of the Charter to forbid the use of force even to promote human rights...Human rights are indeed violated in every country...But the use of force remains itself a most serious violation of human rights." See Louis Henkin, *Use of Force: Law and US policy in Right*. ✓

by extensive UN work in the human rights field, the Universal Declaration of Human Rights being the key document.¹⁰⁹

While the Charter does not explicitly authorize unilateral or collective humanitarian intervention by states, neither does it specifically abolish the traditional doctrine.¹¹⁰ This theory concludes, upon an evaluation of the legislative history of the UN Charter, that because the drafters did not explicitly ban humanitarian intervention, it remains legal. An alternative proposition can be made that as law evolves over time, Article 2(4) should be accorded a contemporary interpretation in view of the present political and technological climate.¹¹¹ Some scholars would go as far to state that humanitarian intervention, far from

Might: International Law and the Use of Force, 2nd Ed (1991) 109 [hereinafter *Right v Might*] Opponents of humanitarian intervention claim that the prohibition on the use of force embodied in Article 2(4) should be interpreted consistently with its plain language, so that permitting an exception for humanitarian uses of force is impermissible. See Ian Brownlie, *International Law* *supra* note 17 at 342; Tom Farer, "Human Rights in Law's Empire: The Jurisprudence War" 85 *American Journal of International Law* 117, 121 (1991) (arguing that the original intent of the drafters of the Charter was to forbid any use of force, even for humanitarian purposes, and that state practice has not altered the contemporary meaning of the original text)

¹⁰⁹ G.A. Res. 217, UN GAOR, 3rd Sess, at 71, UN Doc A/810 (1948); see generally Richard Lillich, *International Human Rights Instruments* (2nd ed. 1988)

¹¹⁰ See Ian Brownlie *International Law* *supra* note 17 at 342; *Contra* to Reisman: "The advent of the United Nations has not excised this traditional customary right although it has set a structure of normative conditions about it." Reisman, "Humanitarian Intervention To Protect the Ibos" 167, Lillich *Humanitarian Intervention* *supra* note 71

¹¹¹ This argument rests on the basic premise that the UN Charter is only concerned with inter-state war and not intrastate conflicts. Accordingly, the Charter should be interpreted against the current backdrop of complex wars of ethnicity which have become the hallmark of the post-Cold War era. See eg. James Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990); Thomas M. Franck, "Who Killed Article 2(4)?" *American Journal of International Law* 64 (1970), p809. Professor Reisman for instance, has argued that

"[o]ne should not seek point-to-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and with appropriate regard for the factual constellation in the minds of the drafters... Article 2(4).. is premised on a political context and a technological environment that have been changing inexorably since the end of the 19th century."

W.M. Reisman, *supra* note 12 see also William Chip, "A UN Role in Ending Civil War", 19 *Columbia Journal of Transnational Law* (1981) ("External reaction to internal events may have supplanted classical aggression as the primary threat to world peace.") *Id.*

being inconsistent with the Charter's purposes, actually may further one of the world organization's major objectives.¹¹²

On a strict interpretative construction, Article 2(4) prohibits the use of force in three specific situations, none of which raise humanitarian concerns. Article 2(4) primarily prohibits force against the territorial integrity of the target state. Humanitarian intervention, by definition, does not impair the territorial integrity and is only concerned with the protection of people's rights.¹¹³ The use of force is also prohibited where it interferes with the political affairs of a state. Again, however, a truly altruistic act of humanitarian intervention is not concerned with the regime but only the rights of the individuals.¹¹⁴ Finally, force is not permitted where its ultimate objective is inconsistent with UN goals. As already stated, human rights are one of the primary goals of the UN and thus, the use of force for humanitarian purposes would not appear to frustrate the UN Charter.¹¹⁵

¹¹² Lillich, *Humanitarian Intervention* *supra* note 71 at 131 *see also* Teson *supra* note 38 at 131 "[T]he promotion of human rights is a main purpose of the United Nations...[T]he use of force to remedy serious human rights depravations, far from being "against the purposes" of the UN Charter, serves one of its main purposes." *Id.*

¹¹³ Teson *supra* note 38 at 131. Legitimate humanitarian intervention is motivated only by the international community's desire to end human suffering or restore human rights, not by a state's desire to conquer land area.*Id.*

¹¹⁴ It is questionable however, even in today's political climate whether the intervening power (the UN or otherwise) would not attempt to exercise some pressure on a recalcitrant government) Teson *ibid* at 131

¹¹⁵ This is the view shared by Professor Reisman and the Thomases *supra* note 13 based on a flexible and teleological interpretation of Article 2(4) of the Charter; Reisman says for example : "Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the Purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is distortion to argue that it is precluded by Article 2(4). Insofar as it is precipitated by intense human rights deprivations and conforms to the general international legal regulations governing the use of force-economy, timeliness, commensurance, lawfulness of purpose and so on-it represents a vindication of international law, and is, in fact, substitute or functional enforcement;" See "Humanitarian Intervention to Protect the Ibos" in Lillich *Humanitarian Intervention* *supra* note 71 at 177. Professor Julius Stone construes a similar interpretation of Articles 2(4) and Article 51, see "Book Review", 59 American Journal of International Law 396 (1965). Ian Brownlie, however, does not believe

Moreover, the two ideals are not inconsistent because the Charter's principle of non-intervention was never intended to apply to violations of human rights. By ratifying the UN Charter, states implicitly undertook certain obligations in the field of human rights.¹¹⁶ It has also been suggested that interpreting Article 2(7) to accommodate the new concern for human rights is legitimate.¹¹⁷ War in the name of "humanitarianism" would not therefore, appear to be the oxymoron as was once thought.

A New Doctrine of Humanitarian Intervention

Let us give the world cause to say: These were dedicated men. They did not pose and postpone but strove humbly and honestly to lighten the afflictions that weigh so heavily on mankind.

Ed Hambro, 25th Anniversary of the United Nations, October 14, 1970

It must be remembered that the "intervention" issue only arises if the matter is held to be

in such an "arid textualist approach" and would accordingly discredit this interpretation. He believes that if one has recourse to the preparatory materials of the San Francisco Conference the phrase "against the territorial integrity" was inserted at the "behest of small states wanting a stronger guarantee against intervention" and thus, cannot be accorded a teleological interpretation. See Brownlie, in Lillich, *Humanitarian Intervention* *supra* note 71 at 222. Farer, similarly discredits such an interpretation of the norm, calling it "doctrinal manipulation" T. Farer, "Law and War" in *The Future of the International Legal Order*, III Black & Falk, (eds) (1971) at 15, 55.

¹¹⁶ This assertion rests on a teleological interpretation of UN Charter Article 25.

¹¹⁷ See Jean-Pierre Fonteyne, *supra* note 2 at 241; see also Felix Ermacora, "Human Rights and Domestic Jurisdiction" (Article 2(7) of the Charter), 1224 Recueil Des Cours, bk.II, 371, 436 (1968) (concluding that egregious violations of human rights "are no longer essentially within the domestic jurisdiction of States, and therefore the principle of non-intervention is not applicable." *Id*

domestic. If it is not, then the prohibition in Article 2(7) does not apply. Thus, in order to show that the Charter is implicitly compatible with the doctrine of humanitarian intervention, it must first be established that egregious violations of human rights are not essentially matters of domestic jurisdiction. In other words Articles 2(4) and Article 2(7) must be shown not to apply.

Despite the emphatic language of Article 2(7), the United Nations has on several occasions held that the concept of "domestic jurisdiction" does not exempt everything that takes place within a state's borders.¹¹⁸ Indeed, the relevancy of this principle of non-intervention would appear to be rapidly diminishing in light of the current climate of intrastate ethnic conflict primarily because it is inconceivable that "though states founded for the sake of life and liberty, they cannot be challenged in the name of life and liberty."¹¹⁹

Internationally recognized human rights primarily address the way a state treats its own citizens and thus this would appear to amount to an essentially internal affair within the literal interpretation accorded to Article 2(7). Yet, on the other hand, concern for human rights around the world has become an integral part of many national policies and more significantly, has dominated the activities of international organizations in recent years.¹²⁰

¹¹⁸ Domestic jurisdiction has been held, for example, not to prevent UN action on de-colonization and apartheid. See *Declaration on the Granting of Independence to Colonial Countries*, G.A.Res 1514, 15 U.N GAOR Supp (No.16) at 66, UN Doc A/4684 (1960) see also SC Res 181 UN Doc 5/5386 (1963), SC Res 392 (S/Res/392) (1976) S.C.Res 418 S/Res/418 (1977) for the Security Council action against South Africa and its government policy of apartheid.

¹¹⁹ Teson *supra* note 38 quoting Michael Walzer, *Just and Unjust Wars* 61 (1977)

¹²⁰ Even Brownlie, a staunch opponent of humanitarian intervention whether by unilateral or multilateral means, concedes that as compared with the earlier part of the century, domestic jurisdiction in the context of human rights currently constitutes much less of a shelter against intervention. see generally Brownlie, *Humanitarian Intervention*, in *Law and Civil War in the Modern World* (J.N. Moore ed 1974)

At the University of Bordeaux in April 1991, and again in his annual report on the work of the United Nations in September 1991, the former Secretary General Javier Perez de Cuellar stated "[W]e are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents."¹²¹

He went on to say in his annual report that a balance must be struck between adherence to the doctrine of state sovereignty and the need to protect human rights:

I believe that the protection of human rights has now become one of the keystones in the arch of peace. I am also convinced that it now involves more a concerted exertion of international influence and pressure through timely appeal, admonition, remonstrance or condemnation and, in the last resort, an appropriate United Nations presence, than what was regarded as permissible under traditional international law....It is increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that, in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is also threatened. Omissions or failures due to a variety of contingent circumstances do not constitute a precedent. The case for not impinging on the sovereignty, territorial and political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection. With the heightened interest in universalizing a regime of human rights, there is a marked and most welcome shift in public attitudes. To try to resist it would be politically as unwise as it is morally indefensible. It should be perceived as not so much a new departure as a more focused awareness of one of the requirements of peace.¹²²

¹²¹ *Report on the Work of the Organization*, UN Doc A/46/1, September 6th, 1991, pp10-11; see also "Secretary-General's Address at the University of Bordeaux," UNDPI, Press Release SG/SM/4560 of April 24th, 1991

¹²² J.Perez de Cuellar, *ibid* at 12

Principles are indeed emerging that place the individual on an equal footing with the state in international law in support of the former Secretary General's claims.¹²³

For example, during Security Council debates concerning UN Resolution 688 in the Gulf crisis it was declared that Article 2(7) does not apply to matters which are not fundamentally domestic, such as human rights protection, with South Africa cited as an illustration.¹²⁴

The United Nations Relief Operation in East Pakistan (UNEPRO) assumes added precedential value in that neither the Secretary General nor the Government of Pakistan were prepared to permit the prohibition in Article 2(7) "to stand in the way of the relief of large-scale human suffering in a situation of internal conflict."¹²⁵ Furthermore, it was asserted that the Secretary General initiated the beginning of a body of law by relying explicitly upon the statement of fundamental purposes in the Charter and his responsibility as the executive of the organization, to insure that human well-being was protected and humanitarian principles upheld.¹²⁶ Moreover, there is growing evidence in legal discourse and state practice that severe violations of human rights are deemed to constitute a threat to international peace and thus, as they are not considered to be solely within a state's

¹²³ As one scholar predicted in 1950, "as the feeling of general interest in humanity increases, and with it a world-wide desire for something approaching justice and an international solidarity, interventions undertaken in the interests of humanity will also doubtless increase." Henry G Hodges *The Doctrine of Humanitarian Intervention* (1915) at 91

¹²⁴ See UN Doc S/PV 2982 at 58 (1991) (providing text of the Resolution debates.) The implications of Resolution 688 will be discussed further on in this section.

¹²⁵ Quoted from text of second Hague lecture delivered by B.Morse on the United Nations Relief Operation in Bangladesh, 9 August 1977

¹²⁶ *ibid.*

domestic jurisdiction, they are excluded from Article 2(7).¹²⁷ As the eminent scholar Louis Henkin once said "...that which is governed by international law or agreement is ipso facto and by definition not a matter of domestic jurisdiction."¹²⁸

It may therefore be concluded that conformity with essential human rights obligations is no longer encompassed within exclusive domestic jurisdiction but has developed into an issue justifying international concern.¹²⁹

(i) The Erosion of Absolute Sovereignty

The time of absolute and exclusive sovereignty has passed; it's theory was never matched by reality.

UN Secretary General Boutros Boutros Ghali, Agenda for Peace Report, 1992

The doctrine of absolute sovereignty is no longer sacrosanct.¹³⁰ The notion that states should stand silent and impotent to the gross mistreatment of individuals simply because the

¹²⁷ See Lillich, *Humanitarian Intervention*, *supra* note 71 (observing that as it becomes more apparent that international peace and security and the enforcement of human rights go hand in hand, member states can no longer claim protection from the domestic jurisdiction clause.) On human rights generally as an international concern beyond the domestic jurisdiction of states, see generally Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (London: Blackstone Press Ltd, 1991) p165. M.N. Shaw, *International Law* 3rd ed. (Cambridge: Grotius Publications) (1991), p196

¹²⁸ R. Myers, "A New Remedy for Northern Ireland: The Case For UN Peacekeeping Intervention in an Internal Conflict" 11 *New York University Journal of International and Comparative Law* (1990) 116 (quoting L. Henkin, "Human Rights and Domestic Jurisdiction" Paper presented at the American Society of International Law Conference June 1977)

¹²⁹ See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989); Terry L. Deibel "Internal Affairs and International Relations in the Post-Cold War" *The Washington Quarterly*, Summer 1993 pp13-33 (citing a variety of policy reasons why the principle of domestic jurisdiction is no longer inviolable. This concept will be further explored in Part Two of the thesis as a basis of UN competence in internal conflicts.

¹³⁰ See generally Chopra and Weiss *supra* 42

abuse comes from the people's own government is no longer tenable.¹³¹ The premise of national sovereignty is being challenged by the millions of displaced refugees fleeing their countries, ethnic groups struggling for self-determination and the proliferation of regional and international organizations which have jurisdiction across state borders.

Nation-states are no longer the only actors in international affairs.¹³² There is increased awareness of the individual in international law, which makes specifically targeted intervention possible, enabling society "...to fulfil the UN Charter's ambition of working to save succeeding generations from the scourge of war, to reaffirm...the dignity and worth of the human person, in the equal rights of men and women and nations large and small to promote social progress and better standard of life in larger freedom."¹³³

National sovereignty has also been diminished by the sheer volume of international treaties and conventions protecting individual human rights.¹³⁴ Moreover, developments in communications technologies mean that international public opinion can be quickly mobilized by the media making it increasingly difficult for regimes and insurgent forces to

¹³¹ See eg, "Landscape of Death" *TIME*, December 14, 1992 at 30. "The harrowing faces of starvation, the inert shapes of death. These are images that have finally brought the world to Somalia's rescue." *Id* Brian Urquhart, "Sovereignty vs Suffering" *The New York Times*, April 17, 1991

¹³² Numerous theories exist to expand the rights of individuals. It has been stated that a sovereign state derives its rights from its citizens and thus, has no separate identity. See Teson *supra* 38 note, at 16. People create a government for their own benefit and protection. *Id*. The theory continues that "[B]ecause the ultimate justification of the existence of state is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well. *Id* at 113.

¹³³ Former US President George Bush, UN General Assembly Address 46th Sess (September 23 (1991) New York City, in 27 Weekly Compilation of Presidential Documents 1324, 1325

¹³⁴ See eg Ali Khan, *supra* note 46 at 199. (The conditions of global life free individuals from the physical and psychological boundaries of the nation-state) *Id*.

persecute ethnic groups with impunity.¹³⁵ Public revulsion against the bloody struggles in the Sudan, Bosnia-Herzegovina, Somalia, Angola and Mozambique certainly contributed to the international action against such atrocities.¹³⁶

Economic interdependence has also created a global market which prevents the exercise of absolute territorial sovereignty.¹³⁷ The fact that the G-7 nations must act in concert on major economic policies also reflects increasing awareness of economic and financial globalisation. Moreover, the growth of international human rights doctrine, as already asserted, has had a significant impact on the notion of sovereignty.¹³⁸ Human rights are no longer the exclusive purview of states and national authorities are increasingly held to account for their human rights practices.¹³⁹ The implementation of various human rights measures through the United Nations¹⁴⁰ and regional organizations,¹⁴¹ for example,

¹³⁵ The Cable News Network (CNN), available in more than one hundred countries, demonstrated its technological prowess during the Gulf War in 1991. See James Anderson, *supra* note 50 at 135 (Foreign authority structures are no longer remote; they are at most a satellite dish away)

¹³⁶ See eg. Christine Ellerman, "Command of Sovereignty Gives Way to Concern for Humanity" *Vanderbilt Journal of Transnational Law* Vol 26: 1993 341-37 (noting that recent events have created an awareness that only force can stop some serious human rights violations) *Id.*

¹³⁷ See J.Jackson and W.Davey, *Legal Problems of International Economic Relations* 2-4 (2nd.ed.1986) (describing how the current state of international economic relations create an environment of interdependence.)

¹³⁸ See eg T.Burgenthal and Mahler, *Public International Law in a Nutshell* 116 (1990) (tracing the origins of the international law of human rights to the adoption of the Charter of the United Nations.

¹³⁹ In September 1991, George Bush made a speech to the UN praising international co-operation and aspiring to a "new world order". He also spoke of protecting human rights and enforcing state compliance with "standards of human decency". While he assured that no state would "surrender one iota of its own sovereignty," the underlying message suggested a legitimization of humanitarian intervention. See George Bush, Address to the 46th Sess of the UN General Assembly, *supra* note 133

¹⁴⁰ The *Universal Declaration of Human Rights* and other treaties such as the *International Covenant on Civil and Political Rights and its Optional Protocol* 16 Dec 1966, 999 UNTS 171; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948 78 UNTS 277 have all given form to the human rights principles enunciated in the Charter.

specifically include non-forcible measures such as monitoring of practices, observer missions¹⁴² and individual mechanisms. International organizations have also contributed to the erosion of the doctrine by prevailing over governments that block relief agencies. There is for instance, a plethora of private relief agencies in Bosnia-Herzegovina, that have carried out their own aid operations, without any assistance from their governments.

Whether in fact the power structure of nation-states ever accurately reflected classic formulations of the concept, clearly absolute sovereignty is no longer tenable. The emerging norm of "the common heritage of mankind" has made serious inroads into the exclusivity and inviolability of the concept of sovereignty.¹⁴³ Indeed, it would not be overly pessimistic to conclude at this juncture that the failure of the concept to adequately reflect contemporary international society has effectively relegated it to increasing conceptual and indeed, practical

¹⁴¹Economic cooperation or regional protection of human rights are often the primary goals of these organizations, the EC being the best example of this phenomenon. Article 2 of the Treaty of Rome declared the goal of the European Economic Community:

"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated rising of the standard of living and closer relations between the States belonging to it." *Id* See also the *European Convention For the Protection of Human Rights and Fundamental freedoms*, opened for signature Nov.4, 1950, 213 U.N.T.S 221, Europe.T.S No.5. (entered into force, Sept 3, 1953). Many parties to this Convention are not members of the European Community. All members of the European Community, however, are parties to the Convention. This convention is supplemented by seven protocols. See eg. B.Carter and P.Trimble, *International Law:Selected Documents* 429-50 (1991).

¹⁴² In August 1991, the United Nations Observer Mission in El Salvador (ONUSAL) became the first military civilian operation with the task of monitoring human rights abuses. For an overview of the human rights machinery see John Tessitore and Susan Woolfson, (eds) *Issues Before the 45th General Assembly of the United Nations* (Lexington:UNA-U.S.A/Lexington Books, 1991) (In the last decade, the United Nations "has developed an impressive array of new enforcement machinery-machinery that is not widely known but has fundamentally changed what the United Nations can and does accomplish to aid individual victims of human rights violations") *Id* pp119-120

¹⁴³ See particularly Antonio Cassese, *International Law in a Divided World* (Oxford:Clarendon Press, 1986) p391 ("[T]he common heritage of mankind enshrined in the 1979 *Convention on the Moon and Other Celestial Bodies* and the 1982 *Convention on the Law of the Sea*, marks the passage from the traditional postulate of sovereignty to that of cooperation") *Id*. On the concept of "the common heritage of mankind" generally, see Chapter 4 of Cassese.

insignificance. Professor Reisman has aptly summarized the position as follows:

The validity of humanitarian intervention is not based upon the nation-state-oriented theories of international law; these theories are little more than two centuries old. It is based upon an antinomic but equally vigorous principle, deriving from a long tradition of natural law and secular values: the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem categorical moral imperatives, and ultimately, the confirmation of the sanctity of human life, without reference to place or transient circumstances.¹⁴⁴

Reisman continues:

But why, we may ask, should the independence of state be more sacred than the law which gives it that independence? Why adopt a system which makes it necessary to gloss over constant violations of the very principles which are declared to be most worthy of respect from all? If, where such intolerable abuses do occur, it be excusable to violate at one and the same time the independence of a neighbour and the law of nations, can such a precedent of disrespect for law prove less dangerous to international security than the recognition of the right, when circumstances justify, to ignore that independence which is the ordinary rule of state life ?¹⁴⁵

The erosion of absolute sovereignty is not confined to theoretical debate in legal circles. At the UN Security Council Summit, in the aftermath of the Gulf crisis, the concept of sovereignty was at the forefront of international discourse.¹⁴⁶ Although the leaders of China and India stressed non-interference in their internal affairs, they were met by strong opposition from other world leaders who emphasized the fact that times have changed and that governments can no longer hide behind the shield of sovereignty.¹⁴⁷ While most of

¹⁴⁴ Reisman, *supra* note 12 at 642

¹⁴⁵ *Ibid*

¹⁴⁶ See generally, UN SC Summit meeting, Jan 31, 1992, 47th session, 3046th mtg. UN Doc S/23500

¹⁴⁷ For example, John Major, the British Prime Minister said "the opening line of our Charter, the Charter of the United Nations, doesn't talk about states or governments, it talks about people....I hope, like the founders of the United Nations themselves, that we can today renew the resolve enshrined in the Charter, the

the leaders spoke favourably of the need to protect human rights as a common global value, some suggested more directly that this value could be superior to even national sovereignty.¹⁴⁸ Boris Yeltsin, for instance, said that human rights "are not an internal matter of states, but rather obligations under the UN Charter," and maintained that the Security Council had a "collective responsibility for the protection of human rights and freedoms."¹⁴⁹ Although Germany was not represented at the summit, Foreign Minister Hans-Dietrich Genscher stated in a speech to the General Assembly in 1991 that "...sovereignty must meet its limits in the responsibility of states for mankind as a whole...When human rights are trampled underfoot, the family of nations is not confined to the role of spectator...It must intervene..."¹⁵⁰ The Chinese Prime Minister Li Peng was however, opposed to the idea of expanding the concept of greater intervention and insisted that China would consistently oppose all external interventions in the internal affairs of sovereign states "using human rights as an excuse."¹⁵¹

An important document issued by the UN Secretary General in July, 1992 has also a significant impact on the way the international community views sovereignty. At the UN Summit the UN Secretary General Dr Boutros Boutros Ghali stated that:

State sovereignty takes a new meaning in this context. Added to its dimension of rights is the dimension of responsibility, both internal and external.

resolve to combine our efforts to accomplish the aims of the Charter in the interests of all the people that we are privileged to represent. That is our role" *Ibid*

¹⁴⁸ See Paul Lewis, "Leaders Want to Enhance UN's Role" *The New York Times*, Jan 31, 1992 at A8; "World Leaders Pledge to Broaden Role of UN" *The New York Times* February 1, 1992

¹⁴⁹ *Ibid.*

¹⁵⁰ See Tad Daley, "Can the UN Stretch to Fit its Future ?" *Bulletin of Atomic Scientists* 1991 Vol 2 at 40

¹⁵¹ See Lewis *supra* note 148

Violation of state sovereignty is and will remain an offence against the global order, but its misuse also may undermine human rights and jeopardize a peaceful global life. Civil wars are no longer civil and the carnage they inflict will not let the world remain indifferent...¹⁵²

Following on from this, Security Council leaders issued a challenge to the Secretary General to produce a report within six months "on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping".¹⁵³

On July 17th, 1992, the UN Secretary General presented a comprehensive document to the Security Council aptly entitled "An Agenda for Peace", which reflects the growing need of the UN to adopt a more systematic and intrusive approach towards aggression and internal strife.¹⁵⁴

The Secretary General's approach to the issue of sovereignty is, however, disappointing and indeed, somewhat surprising, particularly as it is one of the central themes of Agenda for Peace. Dr Boutros Boutros Ghali recommends radical new measures designed to enhance the role of the United Nations in internal crises, yet would appear to adhere to traditional notions of absolute sovereignty. This is despite his claim that "the time of absolute and exclusive sovereignty...has passed; its theory was never matched by reality", and his call for "a balance between the needs of good internal governance and the requirements of an ever

¹⁵² UN Security Council Summit Opening Addresses, January 31, 1992 ILM 31 (1992)

¹⁵³ UN Security Council Summit Meeting Declaration UN Document S/23500 (1992). For full text of the declaration "New Risks for Stability and Security" *The New York Times*, February 1, 1992

¹⁵⁴ *An Agenda for Peace: "Preventive Diplomacy, Peacemaking and Peacekeeping."* June 17, 1992 31 ILM. 953 (1992) The Report identifies 4 important, interconnected UN security functions; preventive diplomacy; peacekeeping; peacemaking and post-conflict peace building

more interdependent world."¹⁵⁵ Dr Boutros Boutros Ghali's affirmation of conventional concepts is in sharp contrast with the views of his predecessor, Javier Perez de Cuellar who spoke of the limits of absolute sovereignty during his last term in office.¹⁵⁶ The Secretary General is also reticent in his report about international control over large - scale violations of human rights. Although the Report does recommend action for more coordinated UN assistance to "internally displaced persons, "if...assistance to displaced persons within a society is essential to a solution," this is couched in vague and ambiguous language, the Secretary General failing to specify what this would encompass.¹⁵⁷ Professor Reisman has interpreted this as implying that "a matter, hitherto within the general area of domestic jurisdiction, is now actionable by the Security Council."¹⁵⁸ However, this assertion would appear to go too far. The term "intervention" does not feature in the report at all in contradiction to the request of the UN Summit declaration which explicitly endorsed a greater role for the UN in the area of human rights.¹⁵⁹

Recently, the General Assmebly, passed a truly remarkable resolution on humanitarian aid which set forth some radical principles concerning current UN practice in overcoming the barrier of state sovereignty for humanitarian intervention. The resolution stated that humanitarian assistance "*should* be provided (not "*shall*") with the consent of the affected

¹⁵⁵ *ibid* at p959

¹⁵⁶ See eg *Annual Report of the Secretary General on the Work of the Organization*, September 13 1991 Doc A/46/1 at p4-5.

¹⁵⁷ *supra* note 154 at 965.

¹⁵⁸ Michael Reisman, "Peacemaking" *Yale Journal of International Law*. Vol 18: 415, 1993 at 417.

¹⁵⁹ *supra* note 153 for text of declaration

country (not "state" or "government") and in principle on the basis of an appeal by the affected country".¹⁶⁰ During the 1991 General Assembly debate on emergency assistance in wars, redefinitions of sovereignty were also apparent. The ICRC argued "[i]n terms of the existing right to assistance, humanitarian assistance cannot be regarded as interference. Far from infringing upon the sovereignty of states, humanitarian assistance in armed conflicts, as provided for by international law, is, rather, an expression of that sovereignty."¹⁶¹

Dr Boutros Ghali's handling of the sovereignty issue is out of line, therefore, with current thinking and practice.¹⁶² The rationale behind his affirmation of traditional ideologies seems to be driven more by political considerations and a desire to satisfy the criticisms of his opponents in the Third World. This may partly explain the extensive discussion in the report of what Dr Boutros Ghali has elsewhere called "the democratization of international relations."¹⁶³ Eliminating sovereignty altogether from the international forum is simply out of the question in the foreseeable future as member states are not likely to renounce their sovereignty to a world organization. The Third World is particularly sensitive to the whole issue of sovereignty for a number of historic. Although sovereignty as legal fiction continues to evolve, the widespread view among legal scholars is that it remains the best mechanism

¹⁶⁰ UN General Assembly A/Res/46/182 14 April 1992, concerning the *"Strengthening of the coordination of humanitarian emergency assistance of the United Nations."*

¹⁶¹ UN GAOR 46th Sess, UN Doc A/46 1991 Record of 42nd meeting at 60. At the same session, the Soviet Union noted that any reservation about "humanitarian intervention" can be addressed by reformulating the issue as "humanitarian solidarity."*Id.*

¹⁶² See eg. Thomas G. Weiss, "New Challenges for UN Military Operations: Implementing an Agenda For Peace" 16 Washington Quarterly 15 (1993). "As efforts in Bosnia, Somalia and Iraq illustrate, humanitarianism has made its appearance as the driving rationale behind new international military forces. The precedent of human rights is therefore critical in looking toward future UN military efforts."*Id.*

¹⁶³ Dr Boutros Boutros Ghali, "Empowering the United Nations" Foreign Affairs, Summer, 1992

for organizing international society.¹⁶⁴ It may be that over time, the criteria of statehood will evolve to include more complex subjective grounds, as opposed to the traditional objective standards of territory, population, government and sovereignty.¹⁶⁵ Is there, for instance a willingness to observe international law ? Was the regime in power elected democratically ? Are human rights standards being observed ?

It is not however, the intention of this thesis to indulge in an overly theoretical and jurisprudential analysis of the nation-state paradigm.¹⁶⁶ As the former UN Secretary General Javier Perez de Cuellar rightly concluded in his final report "[W]e need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights. The last thing the United Nations needs is a new ideological controversy. What is involved is not the right of intervention but the collective obligation of states to

¹⁶⁴ Only nation-states may become members of the United Nations. The principle organs of the United Nations, including the General Assembly, the Security Council and the Economic and Social Council, all consist of nation-states. Only nation-states may appear as litigants before the International Court of Justice. (Article 34, para 1 Statute of the International Court of Justice). Even specialized agencies in economic, social, cultural, educational, health and related fields are established by "intergovernmental" agreements among nation-states. Regional charters of America, Africa and Europe reaffirm similar principles that enshrine the nation-state as the cornerstone of international society; Charter of the Organization of American States, April 30, 1948, article 20, 2U.S.T 2394, T.I.A.A No 2361, 119 UNTS. 3 Charter of the Organization of African Unity, May 25, 1963, art III, para 3 479 U.N.T.S 39 reprinted in 2I.L.M 766 (1963); Conference on Security and Cooperation in Europe:Helsinki Final Act, August 1, 1975, art III, reprinted in ILM 1292, 1294 (1975)

¹⁶⁵ See generally, J.Crawford, "The Criteria for Statehood in International Law," British Yearbook of International Law 48 (1976-77) pp93-182.

¹⁶⁶ Some scholars have expounded various reformulations of the concept. see Ali Khan *supra* note 46 for a critique of the Grotian theory. Khan advocates the concept of free state to replace traditional conceptions of sovereignty in the field of human rights and economic activity, the right to be free from both external and internal subjugation being the main characteristic of his conceptualization of sovereignty. Khan would also discard the term "international law" since it emphasizes nations rather than people and would replace it with "global" law which is a more appropriate term because it includes the law of human rights and global markets. For a contemporary theory of what sovereignty has become see generally Chopra and Weiss *supra* note 42 at 106

bring relief and redress in human rights emergencies."¹⁶⁷

Conclusions on sovereignty and non-intervention in internal affairs

The rights of individuals would appear to be gradually displacing concerns for the protection of a state's sovereignty.¹⁶⁸ There has been a perceptible move away from the anachronistic principle of domestic jurisdiction in the area of human rights. While human needs do not yet override sovereignty in all instances, the latest pronouncements from the United Nations are a significant step along the path of establishing more rights for civilians of internal war.¹⁶⁹ Accordingly, the increased awareness of the role of individuals in international law and the direct application of international legal instruments to aggrieved persons has helped to permeate the wall of sovereignty.¹⁷⁰

Traditional notions of sovereignty must therefore adapt to meet the requirements of basic human rights and international order whilst the principle of non-intervention must become more flexible. Yet at the same time a balance must be struck between the competing norms of non-intervention and international human rights standards; sovereignty cannot be viewed

¹⁶⁷ United Nations Doc A/46/1 p10.

¹⁶⁸ See eg Lillich, "Forcible Self-Help" *supra* note 3 (affirming that the interdependence of international peace and security and the protection of human rights supports the argument that human rights no longer fall within exclusive domestic jurisdiction of a state.) *Id.* see also Cyril E. Black, Challenge to an Evolving Legal Order, *The Future of the International Legal Order*, in Black & Richard A. Polk, eds. Vol 1. (Princeton: Princeton University Press, 1969) pp 23-36; Wolfgang Freidman, *The Changing Structure of International Law* (New York: Columbia University Macmillan, 1964)

¹⁶⁹ This process is a continuation of the efforts by the ICRC to protect prisoners, the wounded and innocent civilians from states during wartime. See the Four Geneva Conventions of August 12, 1949 and the two Additional Protocols of December 12, 1977 (Geneva: ICRC, 1989)

¹⁷⁰ See generally, Jarat Chopra, "The New Subjects of International Law" *Brown Foreign Affairs Journal* (Spring 1991) p27-30

as an absolute legal fiction but as a flexible device. Likewise, the principle of non-intervention can be overridden by humanitarian concerns when atrocities rise to an unacceptable level, for example, which "shock the conscience of mankind". Intervention by the United Nations, in whatever capacity it sees fit would therefore be appropriate. Intervention, in this context, is not therefore confined to measures under Chapter VII of the UN Charter. It follows that if traditional conceptions of sovereignty are no longer applicable, the doctrine of humanitarian intervention does not violate this ancient principle. On the other hand, if humanitarian intervention is permitted as part of an expanded definition of sovereignty and humanitarian solidarity, then it does not conflict with what is left of traditional sovereignty. Humanitarian interventions, non-state actors, international organizations and human rights could all be included as exceptions to the anomaly of partially absolute sovereignty. Thus, rather than redefine sovereignty altogether which would only serve to perpetuate its significance, sovereignty can be circumvented by focusing on human rights as a legitimate justification for humanitarian intervention. This would surely be a more advantageous intellectual and practical exercise, than engage the UN in another ideological dilemma.

Collective Humanitarian Intervention

It has become increasingly evident that another emerging norm of the new doctrine of humanitarian intervention is the willingness of the international community to resort to the United Nations as an instrument of humanitarianism. Although it has been stated that "intervention does not gain in legality under customary international law by being collective

rather than individual"¹⁷¹the general consensus among legal publicists and states themselves is that humanitarian intervention is only legitimate if it is carried out under the auspices of the United Nations.¹⁷² In the post-Cold War era there is renewed opportunity for collective action within the United Nations.

It is thought that an intervention by a multilateral organization guarantees the strength of international support free from the pursuit of national interests or political goals. Collective action is also thought to decrease the ability of individual states to use humanitarian intervention as a pretext for interfering in another states' affairs. As Lori F.Damrosch states "...the proposals for internationalization of force seem to present an attractive alternative to accepting the contentions of those who would shake off the Charter's constraints or who would engage in far-fetched feats of "interpretation" to defend unilateral intervention."¹⁷³ Indeed, any humanitarian action performed or endorsed by an international organization, is preferable to unilateral action which carries with it the risk of abuse.¹⁷⁴ It has been

¹⁷¹ Quincy Wright, "Legality of Intervention under the UN Charter" 51 Proceedings of the American Society of International Law, 79,86 (1957)

¹⁷² Even Brownlie supports the view that humanitarian interventions by the United Nations are preferable to unilateral action. He says that "Under Chapter VII of the Charter, action may be taken in instances of violations of human rights which give rise to a threat to the peace" Brownlie *International law supra* note 17 at 226 Schwarz similarly contends that "In modern literature and practice, only intervention on behalf of the United Nations or assimilated organizations seems to be admitted as lawful." U Schwarz, *Confrontation and Intervention in the Modern World* 179 (1970). Kevin Ryan, "Human Rights, Intervention and Self-Determination" *Denver Journal of International Law and Policy*, Vol 20 1991 55-74 (Ryan says that it is essential that nations refer cases of human rights violations to international bodies, to seek to find as broadbased a consensus as possible on the facts that allegedly justify the use of force)

¹⁷³ Lori F.Damrosch, Comment on Collective Military Intervention to Enforce Human Rights in *Law and Force supra* note 69 at 216

¹⁷⁴ See Reisman, Humanitarian Intervention to Protect the Ibos in Lillich, *Humanitarian Intervention supra* note 71 see also, Farer, "Defending Human Rights in the Post-Reagan Era:Candor and Competence" 28 *Virginia Journal International Law*. 855 (1988) (ruling out consideration of unilateral military intervention for human rights purposes); Schachter, "The Lawful Resort to Unilateral Use of Force", 10 *Yale Journal of*

stated for example, that unilateral humanitarian intervention cannot achieve the same laudable objectives as an international collective action because "...in the absence of an international organization, solidly built upon one clear law, it is to be feared that the spirit of domination which finds itself in this noble institution, that of the desire to protect all human beings, would be a facile pretext for well camouflaged victories."¹⁷⁵

Indeed, *any* doctrine that allows a state to act unilaterally is subject to potential abuse.¹⁷⁶ Collective action on the other hand, is assured of broad support among all who respect basic human rights because "...it in no way affects the legality of intervention; it reinforces an intervention and does not serve to conceal an unwarranted incursion."¹⁷⁷

Action through an international organization such as the UN, or *multilateralism*, as it is often referred to by political scientists, is distinct from *multinational* action, which amounts to individual states independently cooperating in a particular venue, as a form of self-help. Collective action on the other hand is conducted according to standard operating procedures devised and agreed prior to a crisis, and which are consistently applied whatever the

International Law, 291 (1985) ("I would underline the importance of rejecting the contention that force may be used unilaterally to achieve such laudable ends as freedom, self-rule and human rights")

¹⁷⁵ Aroneanu, "La genre internationale d'intervention pour cause d'humanite", 19 Rev Int D.Pen. 173 (1948) In a similar vein, Brownlie has asserted: "A rule allowing [unilateral] humanitarian intervention...is a general license to vigilantes and opportunists to resort to hegemonical intervention." Brownlie, Thoughts on Kind-Hearted Gunmen, in Lillich, *Humanitarian Intervention supra* note 71. Similarly, human rights scholar Louis Henkin has observed: "A humanitarian reason for military interventions...easy to fabricate...every case of intervention I can think of ...[has been] justified on some kind of humanitarian ground..." Henkin, "Remarks on Biafra, Bengal and Beyond: International Responsibility and Genocidal Conflict" Proceedings of the American Society of International Law 1972 95, 96

¹⁷⁶ Some scholars disagree with this assertion, stating that the possibility of abuse does not necessarily render a doctrine illegal. See eg Myers McDougal and Florentino Feliciano, *Law and Minimum World Public Order* 416 (1960) ("A policy of permitting individual initiative is, of course, again like the policy of allowing self-defence, susceptible to perverting abuse; but this susceptibility is an attribute common to all legal policy, doctrine or rule") *Id.*

¹⁷⁷ Stowell, *supra* note 40 at 137

configuration of subjective interests of community members.¹⁷⁸

However, while collective decision-making removes national interests from truly humanitarian motives, it raises other problems. There should be no assumption that humanitarian intervention on a UN basis will be widely accepted by either the target state or its allies, or will always lead to capitulation. The concern is that the multiplicity of interests represented on the Security Council would not guarantee the predominance of community policies as opposed to the self-interest of states otherwise choosing to intervene unilaterally.

Many states are prepared to resist pressure from the United Nations, or those acting in its name.¹⁷⁹ It is a common illusion that if collective action is taken under the auspices of an international organization the state at whom it is aimed will voluntarily comply with its demands. The notion that collective decision-making by the United Nations Security Council automatically eliminates any legal deficiencies, is not necessarily a legitimate claim.¹⁸⁰

¹⁷⁸ For example, the procedure established under Chapter VII of the Charter.

¹⁷⁹ The United Nations is for instance considered to be an enemy in Somalia by the warring factions and in the former Yugoslavia the Serbs seem intent on defying international pressure from the UN.

¹⁸⁰ The following exchange between Professors Weston and Richard Falk elucidates these points:

Professor Weston "...one should try to exhaust the highest levels of multinational participation first of all-say, in terms of global organizational intervention - and thereafter to turn, after trying everything else in between, to unilateral intervention...What concerns me, however, is that if we are to limit humanitarian intervention to global organizational intervention or its equivalent, then we are not talking about a real world. I don't think that we can expect the United Nations to intervene actively through the use of force except in the most limited circumstances. And if we shift to a regional organization type of intervention, such as might be undertaken by the OAS, then are we not risking a rubber-stamp operation such as prevailed in the Dominican Republic?

"As I see it, then, the real problem is not one of multilateral versus unilateral, except in a policy preference sense, but rather one which requires us to grapple with the kinds of unilateral interventions we are going to allow, one which requires us to grapple with probabilities rather than possibilities."

"What I would like to see is a discussion that focuses on the real-world possibilities of humanitarian intervention, not on some "wouldn't-it-be-nice-if" kind of debate, and then to try to answer questions of a normative nature about those real-world possibilities. What are, in fact, the real possibilities of getting

Although the United States supremacy in the United Nations is no longer a foregone conclusion, the ability of the US to influence the General Assembly and dominate the Security Council is nevertheless, a significant factor when assessing collective humanitarian interventions. It is against this backdrop that recent expressions of discontent from various regions of the world have led to bitter attacks upon the legitimacy of Security Council decisions. Governments often hide under the fig-leaf of the United Nations as an excuse for inaction in a humanitarian crisis.

The Third World remains particularly sensitive about the revival of the UN as a forum for enforcing human rights as a possible "[t]rojan horse" for big-power intervention after the Cold War.¹⁸¹ This reluctance to revive the UN and also the whole issue of sovereignty is due in large part to numerous historical and contemporary political reasons. Many states believe that it is possible that the Security Council's involvement could also result in a global internationalization of a conflict that would otherwise have been confined not only to a particular region but to the territory of a single state.

Although these are legitimate fears, it is essential that the United Nations and the Security Council in particular, become more active in taking appropriate action to put a stop to mass violations of human rights.¹⁸² With the end of the Cold War, there exists a unique

multilateral interventionary activity going on? Are they real, or aren't they? If they aren't real, then let us start talking elsewhere..."

"Professor Falk: There is a tendency, I think, to become too much a prisoner of recent international history and to overly discount the potentialities for consensus to be crystallized within the United Nations." Conference Proceedings, in Lillich, *Humanitarian Intervention* *supra* note 71

¹⁸¹ For an articulation of Third World views and concerns, see Olga Pellicer, "Uniting or Dividing the United Nations" Occasional Paper no.10 (Providence RI Watson Institute 1992)

¹⁸² See Helman and Ratner, *supra* note 7 at 93 (calling for a more systematic and intrusive approach from

opportunity to implement fully the provisions of the UN Charter aimed at maintaining international peace and security and protecting the individual. This surely, is the most realistic and pragmatic way of ensuring peace and safeguarding fundamental rights and freedoms. Humanitarian intervention involves a number of legal, political and practical problems. No other organization than the United Nations is in a position to take diplomatic or military action required by most instances of humanitarian crises.¹⁸³ The distinction between such interventions and those tainted with political self-interests will always be difficult to delineate unless the action is initiated by a credible international organization.

A Conceptual Appraisal of Humanitarian Intervention in Practice

Legal theorizing concerning the ideology of intervention has, however, been swiftly overtaken by policy and practice. Since 1991 there have been several cases in which interventions with an element of UN support have had a fundamental humanitarian purpose. They illustrate some of the central difficulties of developing a new doctrine of humanitarian intervention, one that can be applied consistently and uniformly. Yet, at the same time, they provide evidence of an emerging contemporary doctrine of humanitarian intervention.

The recent humanitarian interventions in Iraq, Somalia and in the former Yugoslavia raise many awkward questions, two of which are considered here:

(1) Is humanitarian involvement in conflicts - in the form of the provision of food, shelter, and protection under the auspices of the United Nations becoming the norm ? Or, is

international organizations in dealing with "failed states") *Id.*

¹⁸³ See generally, B.De.Schutter, "Humanitarian Intervention:A United Nations Task" Californian Western International Law Journal Vol 3 1972 21-36

humanitarian intervention still likely to be carried out by a state acting unilaterally ?

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

Incident Studies

(i). Humanitarian intervention and the Kurds

The UN relief operation in Northern Iraq, following the Gulf war in 1990/91, resuscitated a conceptual reappraisal of the political and legal attributes of the doctrine of humanitarian intervention, the circumstances that warrant it, and how it should be authorized and enforced.¹⁸⁴ Resolution 688 was unprecedented in that it brought the whole issue of international human rights and the competing norm of non-intervention to the forefront of international concern and legal discourse.¹⁸⁵ The Kurdish crisis demonstrated that the norm of non-intervention is not impervious when it conflicts with gross violations of human rights. Moreover, the notion that Iraq could invoke absolute state sovereignty in the crisis was overridden by humanitarian concerns. To what extent the crisis establishes new norms of humanitarian intervention is considered in this context.

¹⁸⁴ A thorough examination of the historical and conceptual background to the crisis is not possible, although Part II of this thesis will explore in greater depth the expansion of the threat to the peace concept as a basis for UN competence. For a comprehensive overview of the events preceding the humanitarian intervention in 1991 See Howard Adelman "Humanitarian Intervention: The Case of the Kurds" International Journal of Refugee Law Vol 4 No.1 1992; Judy A. Gallant, "Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order" American University Journal of International Law and Policy Vol 7:1992 881; Michael E. Harrington, "Operation Provide Comfort: A Perspective in International Law" Connecticut Journal of International Law Vol 8:635 1993; Sarah E. Whitesell, "The Kurds: An International Incident Study" Denver Journal of International Law and Policy, Vol 21: 2 1993 454-479.

¹⁸⁵ For full text of this resolution see 30 ILM 858 (1991) see generally T. Weiss and K. Campbell, "Military Humanitarianism", Survival 33 (Sept/Oct 1991) pp451-64.

The Iraqi Kurds are traditionally an economically independent ethnic group living in Northern Iraq, historically linked by cultural, religious and linguistic ties for centuries.¹⁸⁶ The Kurdish population constitutes Iraq's second largest ethnic group, the country's largest ethnic minority.¹⁸⁷ The government of Sunni Arab and its leader, Saddam Hussein, have persecuted the Kurds for years in blatant disregard for human rights. Evidence of mass murders, chemical warfare and forced exodus from Kurdistan, [as it is commonly known], has been available, yet the international community has consistently failed to overcome the barrier of state sovereignty to put a stop to the atrocities.¹⁸⁸ The Kurds' struggle for autonomy from the Iraqi government has never resulted in any more than partial recognition from the international community. That is, until the events following the Gulf war in 1991. In the aftermath of the war against Iraq, Kurdish insurrections took place in Northern Iraq and Shia Muslims uprisings in the South. Iraqi authorities responded by relentlessly attacking the Kurdish population, forcing over 2 million refugees to flee their homes.¹⁸⁹ The media's portrayal of thousands of refugees, starving and exposed in freezing temperatures proved

¹⁸⁶ See generally David McDowell, *The Kurds: The Minority Rights Group Report*. No.23, 5-9 (1985).

¹⁸⁷ Although the Iraqi government refuses to provide population figures, one 1989 estimate places the Kurdish population at 21.6%. See eg. Simon Henderson, *Instant Empire: Saddam Hussein's Ambition for Iraq*, 26-27 (1991)

¹⁸⁸ See Patrick.E.Tyler, "The Kurds, The Horror at Sulalymaniyah" *The Economist*, June 1990; "In Town Iraqis Gassed, Kurds Now Breathe Free" *The New York Times*, Nov 18 1991 at A4.; Chris Hedges, "Kurds Unearthing New Evidence of Iraqi Killing" *The New York Times*, Dec 1991, at A1.

¹⁸⁹ See David Scheffer, Use of Force After the Cold War: Panama, Iraq and the New World Order, in *Right v. Might supra* note 108 at 144 (noting that the Iraqi government drove 2 million Kurds and Shiites into Turkey, Iran, and Southern Iraq)

intolerable to the international community.¹⁹⁰ The barbaric treatment of the Kurdish population by the Iraq regime demanded international action that transcended claims of state sovereignty and political interests. According to some estimates, starvation and exposure were claiming lives of over 1,000 Kurdish refugees daily.¹⁹¹ In response to intense public pressure, world leaders finally appealed to the UN Security Council to end the repression of the Kurds and Shia Muslims.

The UN Security Council subsequently passed Resolution 688 which "[condemned] the repression of the Iraq civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region."¹⁹² The resolution further "[insisted] that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations," and "[demanded] that Iraq cooperate with the Secretary-General to those ends."¹⁹³ Resolution 688 triggered a multinational operation to establish "safe havens" for the Kurds within the sovereign state of Iraq. It was explicitly stated that the proposed safe havens were a "humanitarian concept".¹⁹⁴

¹⁹⁰ See Judy Jones, "Parliament and Politics:MP's Demand More Action by West in Support of Kurds; Kurdish Refugee Crisis:Commons Statement" *The Independent*, April 16, 1991 at 9, Haberman, "Kurds Endure Mud and Cold and Fear the Worst" *The New York Times*, April 11th, 1991 at A1, col 3.

¹⁹¹ See Elaine Sciolino, "Kurds Will Die in Vast Numbers Without Swift Aid" *The New York Times*, April 10, 1991 at A1 col 4

¹⁹² UN.SC Res 688, 30 ILM 858 (1991)

¹⁹³ *Ibid.*

¹⁹⁴ Sir David Hannay, the British Ambassador to the UN, quoted on BBC World Service News, April 12th, 1991

By authorizing international intervention to protect the Kurds on April 5th, the UN Security Council approved for the first time "the right to interfere" on humanitarian grounds in the internal affairs of a member state. As one French jurist noted:

"[A]lthough cross-border humanitarian aid long has been tolerated if not legally binding activity by non-government organizations for moving food, medicines and other help to the needy, the Security Council vote marked for the first time governments openly gave their seal of approval to such practices."¹⁹⁵

This was despite the claims of the Iraqi government that Res 688 conflicted with the principle of non-intervention enshrined in Article 2(7) of the UN Charter.¹⁹⁶

The Security Council however, overcame the legal dilemma posed by Article 2(7) by characterizing the consequences of the Kurdish crisis, namely the massive outflow of refugees from Iraq to neighbouring countries, as a threat to international peace and security.¹⁹⁷ By focusing more on the imminent threat to regional security and interstate relations between Iran, Turkey and Saudi Arabia, the Security Council was able to characterize the crisis as a threat to international peace rather than confront Saddam Hussein's human rights

¹⁹⁵ Mario Bettati, "The Right to Interfere" *The Washington Post*, April 14th, 1991 at B7. The French were at the forefront of international support for a new concept of humanitarian intervention. Roland Dumas, the Foreign Minister of France, stated that he believed, "the Kurdish crisis could act as a detonator" for re-thinking of the concept of non-intervention. See "G-7 Backs Greater UN Role in Internal Conflicts", *Reuters (BCycle)*, July 16th, 1991

¹⁹⁶ "Iraqi UN Envoy says Res 688 is Unjust", *BBC Summary of World Broadcasts*, Part 4, The Middle East, April 9, 1991. Iraq also questioned the legitimacy of Res 688 stating that "it represents yet another example of the Council's use of double standards in dealing with Iraq, "basing their claim on the oppression of Kurds by Turkey, Iran, Syria and the USSR.*Id.*

¹⁹⁷ For a discussion of the legal arguments, See Paul Lewis, "Legal Scholars Debate Refugee Plan, Generally Backing US Stand" *The New York Times* April 19, 1991 at A8 (maintaining that Res 688 was the first time the Council found that huge exodus of refugees or displaced people in their own nation threatened international peace and security) Mario Bettati, *supra* note 195 at A25 (quoting United Nations High Commissioner for Refugees Sadako Ogata as stating that Res 688, which permitted humanitarian intervention by United Nations agencies in Iraq, marked the first time the Security Council recognized large population displacement as a threat to international peace and security).

violations. Both Iran and Turkey feared that the mass exodus of Kurdish refugees into their countries would result in civil and ethnic unrest.¹⁹⁸ The Turkish representative to the UN argued that the scale of human tragedy and its implications for international security meant that the crisis was no longer an "internal affair."¹⁹⁹ He went on to say that "[W]e are duty bound to take whatever measures we deem necessary to prevent the anarchy and chaos reigning on the Iraqi border from spilling over into our country."²⁰⁰ Likewise, the Iranian representative to the UN expressed his concern over the Iraqi shelling of Iranian border towns, in which three border guards were killed.²⁰¹

The primary purpose of the intervention in Northern Iraq was to provide relief to the Kurds and to protect them from the Iraqi army,²⁰² and consequently to ensure that relief operations were not at risk.²⁰³ The plans specifically embodied a limited purpose of securing a safe region for the Kurds so that they could receive humanitarian aid and return to their homes. Although the initiative was essentially unilateral the decision was taken to

¹⁹⁸ UN SCOR, 46th Sess, 2982nd mtg at 6-7, 13-15, UN Doc S/PV 2982 (1991) (comments of the Reps of Turkey and Iran respectively)

¹⁹⁹ *Ibid* at 6

²⁰⁰ *Ibid* at 7

²⁰¹ *Letter dated 3 April 1991 from the Permanent Rep of the Islamic Republic of Iran to the UN Addressed to the Secretary General*, UN SCOR, 46th Sess, UN Doc S/22436 (1991)

²⁰² Chris Hedges, "Kurds Unearthing New Evidence of Iraqi Killings" *The New York Times*, December 7, 1991, at A1; "Kurdish Refugees, by Thousands Flee Vengeance of Iraqi Army" *The New York Times*, April 4th, 1991 at A1 col 4.

²⁰³ See Elaine Sciolino, "New Activity by Military Purely Humanitarian, President Says." *The New York Times* April 12, 1991 at A1 col 3

place the operation under the auspices of the United Nations.²⁰⁴ Accordingly, it was decided in Security Council deliberations to establish a multinational force to provide the needed relief.²⁰⁵

Conceptual Appraisal

From a practical standpoint, the UN operation in Northern Iraq did restore some degree of order and saved numerous lives. Armed troops had never before offered military assistance to humanitarian aid agencies.²⁰⁶ Yet, it has been criticized among legal circles for its precedential value.²⁰⁷ There was also consternation in UN circles.²⁰⁸ Without denigrating the significant achievements of the operation, certainly in terms of its limited legal basis and in the special circumstances preceding the crisis, UN Security Council Resolution 688 would not appear to set an authoritative precedent for a new doctrine of

²⁰⁴ John Major, the British Prime Minister suggested a plan for safe havens which subsequently received EC approval. see W.Tuohy and R Tempest, "Europeans see Haven for Kurds; Refugees: Britain's Plan to Create a Shelter Zone in Northern Iraq wins EC Endorsement" *The LA Times*, April 9th, 1991 at A6; see W Drazdiak, "Europeans to Press Bush to Back Enclave Plan; EC Responds to Outrage Over Kurds Plight" *The Washington Post*, April 11th, 1991 at A34

²⁰⁵ W.Drozdiak and D.Ottaway, "US Allies Want Refugee Havens Established in Iraq; European Back Protective Zone for Kurds" *The Washington Post*, April 9th, 1991 at A1; Stanley Meisler, "UN Approves Dispatching of Peacekeepers," *The LA Times*, April 10th, 1991 at A4.

²⁰⁶ See Scheffer, How the UN Balances Concerns for Sovereignty and Suffering - (UNA) August 6th 1991 [hereinafter *UNA*] Address of the Annual Meeting of the Conference on Washington Representatives on the United Nations, American University Journal of International Law. (suggesting that relief agencies may now enjoy the right to protection) The Report concludes that Res 688 was significant in that it did not require aid agencies to obtain the consent of the Iraqi government before operating within its borders.*Id*

²⁰⁷ For example, James Mayall's overall conclusion at the time was that "it would be imprudent in practice, and wrong in theory, to generalize from the international obligations towards the Kurds in favour of an international enforcement mechanism for human rights wherever they are abused." See Mayall, "Non-intervention, Self-determination and the New World Order" *International Affairs* 67:3 July 1991 p428

²⁰⁸ See the views of Stephen Lewis, Clovis Maksud and Robert C. Johansen in "The United Nations After the Gulf War" *World Policy Journal* Vol 8, no 3, Summer 1991, pp537-74

humanitarian intervention as was once thought.²⁰⁹ Although the international intervention does create legal justification for similar action,²¹⁰ it does not compel states to act in such a way in future cases, largely due to the unique circumstances preceding the intervention. Oscar Schacter, for example, an eminent authority on humanitarian law, stops short of referring to Resolution 688 as an explicit authorization for humanitarian intervention "[I]t is unlikely that most governments would approve a broad right of the United Nations to introduce troops for humanitarian purposes against the wishes of the government."²¹¹

Likewise, David Scheffer concludes:

The allied deployment should not be regarded as a new type of lawful military intervention to stop a government's acts of repression and the consequent suffering of its own people. Indeed, the intervention was the right action but for the wrong reason. The Bush administration [which invoked Resolution 688 as grounds for its intervention] would have been more honest if it had invoked the broad view of humanitarian intervention- controversial though it may be-or had argued that the UN Charter's prohibition of interference in the internal affairs of member states, Article 2(7), is inapplicable, where member-states are continuing to take enforcement measures under Chapter VII.²¹²

Scheffer goes on to say that

Law here matters. The Kurdish exodus from Iraq demanded an immediate

²⁰⁹ It has been stated for instance that the Iraqi case was a poor example on which to base general principles; and more significantly, it illustrated that there is no mechanism in place to distinguish truly humanitarian motivations from biased national interests. See Chopra and Weiss, *supra* note 42 at 96

²¹⁰ By this assertion I am referring to the conceptualization of the outflow of refugees as a threat to international peace and security which I will explore in Part II of this thesis.

²¹¹ Oscar Schacter, "United Nations Law in the Gulf Conflict" *American Journal of International Law* 85 (1991) p469. Schacter goes on to say that additional factors in the Iraqi case included the mass exodus of Kurds and Shiites into Turkey and Iran, detracting from the purely internal character of the situation and the fact that the predicament of the minorities was partly a result of the Allied military action against Iraq itself, giving the coalition of an interest in protecting the refugees. Schacter concedes however, that the UN could override reluctant host governments by invoking enforcement procedures under Chapter VII of the UN Charter.

²¹² David Scheffer, *Right vs Might* *supra* note 108 at 146-47

response. The need for the American and European intervention was critical under the circumstances. But the reasons invoked to use military force overseas are important, for they establish precedents, affect the way other governments and the United Nations react and deeply influence the duration and magnitude of a nation's commitment.²¹³

Former US President Bush for example, repeatedly referred to "humanitarian concerns" and "humanitarian need" as the basis for United States military operation in Northern Iraq. The US President expressly stated that the effort was purely "humanitarian", and the operation would consist of temporary relief stations to encourage the Kurds to move to areas where they could be provided with food, clothing and medicine.²¹⁴ Similarly, the US Ambassador to the UN at the time, Thomas Pickering, spoke the following month of "a shift in world opinion toward a re-balancing of the claims of sovereignty and those of extreme humanitarian need."²¹⁵

The formal legal basis of the safe havens operation however, was by no means exclusively humanitarian. The tension between the competing norms of state sovereignty and international human rights doctrine was evident in political debate around the world. The British Foreign Secretary, when pressed on the legal basis of the humanitarian operation stated that "[W]e are vigorously pursuing this proposal for safe havens. Our aim is to create places and conditions in which the refugees can feel secure. We are not talking of a territorial enclave, a separate Kurdistan or a permanent UN presence. We support the

²¹³ *Ibid* at 47

²¹⁴ *ibid*

²¹⁵ Quoted in Richard Gardner, "International law and the Use of Force: Paper II," Annual Conference of the International Institute for Strategic Studies, *New Dimension in International Security*, Adelphi Paper 266 (London: IISS, Winter 1991/92) p68

territorial integrity of Iraq. But we have to get the refugees off the mountains."²¹⁶

Thus, it would appear that the UN authorization for the creation of safe havens was based more on the legal grounds of threats to international peace and security under Article 39 of the Charter, bearing in mind that the coalition had explicit authorization to restore international peace and security in the area under Resolution 678.²¹⁷

Furthermore, the action occurred in the immediate aftermath of an international war under circumstances for which the allies had considerable reason to feel responsible for the plight of the Kurds, not least because of the American's previous incitement to the Kurdish people to rebel.²¹⁸ It would not therefore, be unduly cynical to comment that the operation provided a welcome degree of comfort to the countries that contributed to it.²¹⁹

The government of Iraq protested officially that the UN action violated Article 2(7) of the UN Charter. Many of the Third World States expressed particular concern over Resolution 688 on the grounds that it could set a precedent for intervention into domestic affairs and

²¹⁶ House of Commons Debates, Vol 189, Col 21: April 1991 When questioned again in a radio interview about the legality of the imposition of the no-fly zone vis a vis Iraq's sovereignty, the Foreign Secretary replied "But we operate under international law. Not every action that a British government or an American government or a French government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognises extreme humanitarian need...We are on strong legal as well as humanitarian ground in setting up this "no fly" zone" Interview on BBC Radio 4 "Today" Programme, 19 August 1991. Transcript available from the Foreign and Commonwealth Office.

²¹⁷ UN SCOR Res 678, ILM 1991.

²¹⁸ See David Scheffer, [UNA] *supra* note 206 (noting that Res 688 was preceded by a war authorized by the United Nations, world opinion was united in condemnation of Saddam Hussein and Turkey refused to accept Kurdish refugees); Oscar Schacter, *supra* note 211 at 468-69 (explaining that additional factors in the Iraqi case included the mass exodus of Kurds and Shiites into Turkey and Iran, detracting from the purely internal character of the situation and the fact that the predicament of the Kurds was partly a result of the allied action against Iraq.)

²¹⁹ See Adam Roberts, *supra* note 9 (Certainly [it] led to some self-congratulation and perhaps to excessive trust in humanitarianism as a response to tragedy) *Id* at 438

as such was incompatible with the principle of non-intervention.²²⁰ The Soviet Union and China were concerned about the precedent of a blue-helmeted humanitarian force deployed without a host governments' consent; their fear being that the Baltic republics or Tibet might ask for the same type of UN assistance. The notion of sending in a UN force to replace Western troops in Iraq was rejected in favour of sending UN guards which would still be viable symbols of the UN's presence, although they would be supported militarily by Western soldiers and fire-power, leading some commentators to conclude that rather than constitute a reformulation of the doctrine of humanitarian intervention, the coalition's actions may instead be viewed in customary law terms as a variant of traditional conceptions of the right of a victor over the state concerned to determine the future of that country.²²¹ Moreover, while the operation was, in name, an international humanitarian intervention by the UN, the US, France and Britain played a key role in the decision-making and the course of action. From a conceptual perspective however, Res 688 is significant in that the UN Security Council explicitly recognized that the Iraqi government could not retreat behind the mantle of state sovereignty. The principle of non-intervention in the internal affairs of Iraq was thus inapplicable.²²² Iraq's barbaric aggression towards the Kurdish population could not be

²²⁰Resolution 688 received the least support of all of the Gulf War resolutions, only 10 out of the 15 Security Council members voted for its adoption, Cuba, Yemen and Zimbabwe opposed it, China and India predictably abstaining.

²²¹ Adam Roberts, *supra* note 9 at 437

²²²See Schacter *supra* note 211 at 468 (maintaining that Iraq's barbaric suppression of minorities significantly strained the principle of non-intervention in domestic affairs); Stanley Meisler and Norman Kempster, "World Leaders Urge UN to Safeguard Rights Everywhere; Summit:Chiefs of State Declare it is Time to Abandon the Tradition of Non-Interference in Nation's Affairs. Global Interdependence Cited by Boutros Ghali", *The L.A Times*, Feb 1, 1992 at A1 (stating that the leaders of the Security Council nations announced that the international community cannot permit the protection of human rights to stop at national frontiers and that the United Nations should discard the outdated principle of non-intervention in state's

categorised as a matter for domestic jurisdiction.

Although Resolution 688 was adopted under a unique set of circumstances²²³ its contribution to the development of a new conception of humanitarian intervention under the aegis of the United Nations is valuable.²²⁴ As the French Minister of Humanitarian Action, Bernad Kouchner stated, "Soon it will no longer be acceptable to cross a border to wage war but not to do the same to make peace and save lives."²²⁵ Although these remarks are perhaps overly optimistic on the basis of this one intervention, subsequent events on the international arena have demonstrated that the Kurdish crisis was not just an isolated incident.

Regardless of the conceptual debate concerning the precedential value of Resolution 688, the UN's intervention in Northern Iraq explicitly recognised that states can no longer invoke the doctrine of state sovereignty to evade international human rights obligations.²²⁶ For that reason alone, Resolution 688 was a watershed for humanity.

domestic affairs).

²²³ See James H. Anderson, *supra* note 50 at 129 (finding that not all future situations of serious human rights violations will be preceded by such unmitigated interstate belligerency)

²²⁴ See Scheffer, *U.N.A supra* note 208 at 9 (asserting that the creation of safe havens established a strong precedent in protecting relief workers) see also *Right V Might, supra* note 114 at 129 (stating that the precedents created by the Security Council during the Gulf War should reinforce the credibility of and confidence in collective procedures)

²²⁵ "Interview With Bernad Kouchner" *Le Monde*, 30 April 1991 p2. The French Minister went so far as to assert that the right of humanitarian intervention should be added to the Universal Declaration of Human Rights. *Id* In a similar vein, French Foreign Minister Roland Dumas suggested the conceptualization of a *duty to intervene*. Just as Nazi Germany's murder of the Jews brought about the concept of a "crime against humanity", Dumas stated that Saddam Hussein's mistreatment of Iraq's Kurdish population argues for recognition of a *"duty to intervene"* to prevent gross violations of human rights. See William Safire, "Duty To Intervene" *The New York Times* April 15 1991

²²⁶ See Greenwood, *supra* note 6 at 36 stating that "It is difficult to resist the conclusion that the intervening states were in practice asserting a right of humanitarian intervention of some kind". *Id*

(ii). The Former Yugoslavia

Humanitarianism has played a central role in the international response to the crisis in the former Yugoslavia. However, the difficulty of any analysis of the humanitarian role in the former Yugoslavia derives not so much from the fact that the events are still continuing but that the humanitarian considerations are just a small part of a much larger and inherently complex ethnic conflict.²²⁷ It is for these reasons that the United Nations humanitarian operation has been largely ineffective.²²⁸

Unlike the Gulf crisis, the Yugoslav conflict has tested the willingness of the international community to act in cases of less than vital interest, that is purely humanitarian issues. Although the UN was moderately successful in brokering a ceasefire between Serbia and Croatia for most of 1992, the UN has dismally failed to prevent the carving up of the state of Bosnia and the subsequent "ethnic cleansing" of the Muslim population.²²⁹

The limited role of the United Nations in Bosnia is to some extent understandable given the

²²⁷ For background to the conflict see generally, Norman Stone, *The Sunday Times*, August 9, 1992 at 9; Alan James, "The UN in Croatia: an exercise in futility ?" *The World Today*, May 1993 p93-96; J.Zametica, *The Yugoslav Conflict* (Adelphi Paper 270, 1992) see also the excellent article by M.Weller, "The International Response to the Dissolution of the Social Federal Republic of Yugoslavia" *American Journal of International Law* 1992 p569; see also Charles Lewis Nier III "The Yugoslavian Civil War" *Dickinson Journal of International Law* Vol 10:2 Winter 1992 304-331. For a political analysts' view see Josef Joffe "The New Europe: Yesterday's Ghosts" *Foreign Affairs* 1992 29-37; V.P.Gagnon, Jr "Yugoslavia: Prospects For Stability" *Foreign Affairs*, 1992 17-35; Sabrina Petra Ramet "War in the Balkans" *Foreign Affairs* 1992 79-98; Charles Gatti "From Sarajevo to Sarajevo" *Foreign Affairs* 1992 64-78 Christopher Cviic, "Yugoslavia I: New Shapes from Old" *The World Today* August/ September 1991 125-127; Michele Ledic "Yugoslavia II: the costs of divorce" *The World Today* August/ September 1991 127-129; James Gow "The use of coercion in the Yugoslav crisis" *The World Today* November 1992 198-202.

²²⁸ See James Bone, "When in Trouble Blame the UN" *The Times (London)* August 17 1993

²²⁹ See John F.Burns, "Serbs' Campaign for Ethnic Purity Divides Up a Busload of Orphans" *The New York Times*, August 3, 1992, at A1; Stephen Engleberg, "Bosnians Provide Accounts of Abuse in Serbian Camps" *The New York Times*, August 4, 1992, at A1.

complex circumstances.²³⁰ Various factors contributed to the UN's slow response. First, the UN hesitated because its members initially saw the Yugoslav crisis as primarily an internal affair within the meaning of Article 2(7) of the Charter. It is possible, however, to defeat the argument that the conflict amounted to a civil war and thus fell within the prohibition in Article 2(7). By recognizing Croatia as an independent state with borders protected by international law²³¹ the international community had transformed the conflict from an internal affair to one warranting international concern.²³² The fact that Croatia, Bosnia-Herzegovina and Slovenia were later admitted to the UN as fully fledged states strengthen this hypothesis.²³³

By November 1991, however, UN members recognized that mounting numbers of refugees and civilian casualties, as well as the dangers of escalation, had blurred the line separating domestic and international jurisdiction necessitating some global response. As the crisis worsened, however, humanitarian issues dominated Security Council resolutions and various

²³⁰ See generally, Jane M.O.Sharp, "Intervention in Bosnia-The Case for" *The World Today*, 1992, 29, 31 (citing various reasons, legal and political, why the international community initially hesitated to intervene.)see also Brian Wilson, "Bosnian plight is Europe's Shame" *The Glasgow Herald*, July 18, 1993

²³¹ See eg. Colin Warbrick, "Recognition of States" *International and Comparative Law Quarterly*, 1993 p479

²³² See *The Independent*, 14 February 1992; Chuck Sudetic, "Asserting Croatia Invaded, Bosnia Appeals to UN", *The New York Times*, Saturday January 28, 1992

²³³ XXIX UN Chronicle, 3 (September 1992) p78. see also Rosalyn Higgins, "The New United Nations and Former Yugoslavia" *International Affairs* 69, 3 (1993) 465-483, 470. Higgins posits the theory that if the crisis was essentially a civil war, within the meaning of Article 2(7), the international community would not be involved *at all*; See also Christopher Greenwood, *supra* note 6 at 38 for the supporting view that the situation ceased to be one of civil war within a single state and became instead a complicated mixture of international and internal conflicts. See also Marc Weller, "UN Puts Belgrade in a legal limbo" *The Times (London)* Sept 24 1992 for a discussion of the legal limitations of Serbia and Montenegro assuming the membership of the Former Yugoslavia at the UN

other international statements.²³⁴ The Security Council resolution of 21 February, 1992 setting up UNPROFOR said that the force was "to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis."²³⁵ By contrast, the mission of UNPROFOR in Bosnia has been from the outset in July 1992 narrowly humanitarian, "to ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance."²³⁶

Safe havens were created in Bosnia to protect Muslim enclaves similar to the Kurdish crisis although they were called UN Protected Areas (UNPA's.)²³⁷ This was presumably a diplomatic manoeuvre to allay fears that the sovereignty of Croatia was under threat.²³⁸

By Christmas 1992 the UN and the International Committee of the Red Cross (ICRC) had helped to deliver some \$750m worth of international assistance to starving refugees. This was facilitated in large measure by the expanded mandate of UNPROFOR into Bosnia, a decision taken mainly for humanitarian reasons and not to impose peace on the warring factions. However, the widespread feeling is that the humanitarian operation is merely a

²³⁴ See generally, "Embargo against Federal Republic of Yugoslavia tightened," *The UN Chronicle*, March 1993 4-12 for a discussion of the various resolutions. See also "Situation worsens as peace process continues" *UN Chronicle* June 1993 4-12

²³⁵ UN Security Council Res 743, 21 feb 1992 op para.5 see James Bone and Tim Judah, "UN Powers braced to send peace troops to Croatia" *The Times (London)* February 14, 1992

²³⁶ UN Security Council Res 764, 13 July 1992

²³⁷ See Josh Friedman, "UN Authorizes Use of Force in Bosnia Havens" *The LA Times* June 5 1993; Edward Luce, "Agreement for UN to run Sarajevo" *The Guardian* August 19th 1992

²³⁸ See generally Marc Weller, "UN Security Council Stumbles Over Safe Havens" *The Times (London)* April 21 1993 for an analysis of the legal premise for establishing safe havens. Weller accuses the UN of double standards by comparing the Iraqi precedent to Bosnia. He concludes that when it came to rescuing the Kurds the international community was less concerned with blackletter law than it is presently occupied with in Bosnia at the expense of the civilian population.

pretext for avoiding a more forceful military role, on the grounds that the peacekeepers involved in humanitarian relief could become embroiled in the fighting.²³⁹

Subsequent diplomatic talks have achieved little success despite the valiant efforts of the international negotiators Lord Owen and Cyrus Vance and the general pressure exerted on the Bosnian Serbs by the international community. At the time of writing, however, the international community has stepped up its action in Bosnia and has authorised the use of air-strikes, carried out by NATO but under the legal authority of UN resolutions.²⁴⁰ It remains to be seen just how successful this policy will be. Although tougher measures were clearly warranted against the Serbs, the fear is that bombing Serb positions will only lead to the UN becoming another party to the conflict and therefore compromise the UN's humanitarian relief efforts.²⁴¹

Conceptual Appraisal

The moral argument for humanitarian intervention in the former Yugoslavia is unambiguous. It has been stated that tolerating the doctrine of the "ethnically cleansed" state marks the end of civilisation.²⁴² War camps, murder, rape and torture are obvious infringements of humanitarian law whereas the practice of "ethnic cleansing" specifically contravenes the 1948 Genocide Convention.²⁴³ Moreover, the feeling in the international community that history

²³⁹ See Paul Koring "Safe Areas really Danger Zone for UN" *The Globe and Mail* June 8 1993

²⁴⁰ James Bone, "NATO agrees with the UN on joint control of air strikes" *The Times* August 10th 1993

²⁴¹ See "Playing with fire:Nato threats mean nothing to Bosnia's Serbs" *The Times* August 26th 1993

²⁴² George Soros, "Why Appeasement must not have another chance" *The Times* August 2, 1993

²⁴³ Principles of international humanitarian law have been consistently violated in the Bosnian conflict, leading one prominent member of the ICRC to conclude that "In this conflict international humanitarian law is a dead letter. Unacceptable practices are going on, including mass expulsions and the concentration of

was repeating itself on a scale comparable to the holocaust contributed to pressurize world leaders into taking action.²⁴⁴ As one journalist succinctly put it " Compassion, conscience, anger, passion itself are part of the equation...as our television screens show images of suffering etched in the faces of innumerable anonymous people, so many of them children."²⁴⁵

The response of the international community has been criticized for a variety of reasons, not least because of the "extraordinary and disturbing fragmentation in the locus of decision-making."²⁴⁶ The EC initially took a lead role in the crisis, relegating the UN to its Cold War function as a diplomatic talk-shop ²⁴⁷It was only when it became clear over time that the EC was unable to achieve any substantive peace on the ground that the task was passed to the United Nations.

Yet the costs of becoming involved in what amounts to essentially a quagmire have

people in camps based on their ethnic origin." Pierre-Andre Conod, Chief Delegate of the International Committee of the Red Cross (ICRC), see Tim Judah "Shades of the great dictators darken the Balkans" *The Times (London)* Wednesday April 20th 1993. Although a war crimes tribunal was established to deal with acts of genocide and violations of humanitarian law, its role has, to date, been largely ineffective. See James Bone, "Human Rights group presses for tribunal on Bosnia war crimes" *The Times* August 13 1992. There was however, an application for a declaratory judgement to the ICJ in 1992 on the issue of genocide as a war crime in the former Yugoslavia. See generally the introductory remarks by Paul Sasz on the Genocide Case, 31 ILM 1992

²⁴⁴ See Hella Pick, "Exiling our Empathy" *The Guardian*, November 18 1992 (proclaiming that it is intolerable for such a situation to be allowed to persist in Europe, not all that far from our comfortable homes). Paddy Ashdown "Bosnia:Heroism betrayed" *The Independent* August 5 1993 (calling for international military intervention to save Sarajevo)

²⁴⁵ Hella Pick, *Ibid.*

²⁴⁶ Higgins, *supra* note 233 at 472 (The fragmentation of decision-making on Yugoslavia has been remarkable. Much of it represents not a considered analysis as to what things are best done by the UN and by regional agencies, but a reflection of political considerations extraneous to the Yugoslav problem) *Id*

²⁴⁷ See Higgins *supra* note 233 at 474 for a discussion of the European initiative and the role of regional arrangements generally. Higgins concludes that the Yugoslav experience is not a desirable model for future humanitarian interventions. *Id.* See also Fareed Zakaria, "Yugoslavia is Europe's Business" *International Herald Tribune*, August 10, 1992

prevented the international community becoming more heavily involved.²⁴⁸ Although this can be partly explained by the inherent complexities of the conflict, the accusations of double standards at the UN are vociferous. Can international law be so senseless, that it permits a limited humanitarian intervention to rescue Kurdish refugees, yet can be invoked to prevent humanitarian intervention in Bosnia ? The argument that the Kurdish crisis was to some extent a man-made disaster which the international community could not wash its hands of is also applicable in the former Yugoslavia.²⁴⁹ As one BBC Journalist poignantly said. "To intervene will cost lives; not to intervene will cost more. It is fundamentally a question of whether we care."²⁵⁰ The legal position is also unsatisfactory. Although the grounds for UN jurisdiction in the conflict will be explored in greater detail in Part II, suffice to say at this juncture that rather than represent a renewed right of humanitarian intervention, the Bosnian crisis has served merely to reaffirm the inviolability of state sovereignty in the face of human rights violations on a scale the world has not witnessed since World War II. Despite overwhelming evidence of mass human rights violations the international community has instead sought to uphold the outdated principles of non-intervention and sovereignty.

²⁴⁸ See Part Three of this thesis for a discussion of the military operation and Michael Dewar, "Intervention in Bosnia-The Case Against" *The World Today*, 1992, 32, for the view that "when people are determined to fight each other, there is precious little we can do about it." *Id.* At the time of writing however, there is renewed pressure on the Serbs as NATO airstrikes continue to bombard Serb positions, a move which arguably has interfered with the humanitarian operation.

²⁴⁹ See Norman Stone, "West reaps a bitter harvest by ignoring the seeds of history" *The Times* June 8th, 1992

²⁵⁰ Martin Bell, BBC News February 8. 1993

(iii) Somalia - Operation Restore Hope

The crisis in Somalia represents a clear case in which a humanitarian relief effort led inexorably to a major military action. The UN authorized, US-led action in Somalia is widely perceived among legal scholars as a classic case of humanitarian intervention. Many commentators believe the Somalia case is a powerful example for intervention where the threat is to an existing humanitarian presence.

The consequences of Somalia's descent into anarchy were described in early 1992 as "the greatest humanitarian emergency in the world."²⁵¹ Initially, the international community was reluctant to intervene in Somalia, provoking bitter criticism from the UN Secretary General that a double standard was being applied by Security Council members more concerned with "the rich man's war" in the former Yugoslavia.²⁵² In January 1991, the rebels of the Hawiye clan's United Somali Congress closed in on Mogadishu, forcing General Mohammed to Nigeria where he received political asylum. Armed factions took over the country and as a two year drought worsened, armed men began to prey on civilians for sustenance and loot. Heightened media coverage and an emotional plea from the US ambassador in Kenya finally brought Somalia to the attention of the international community. By this late stage in the crisis, thousands of civilians had died of starvation and countless more remained in imminent peril.²⁵³ An estimated 300,000 people died from the effects of drought and the

²⁵¹ Statement by Andrew Natsios, Assistant Administrator for Food and Hunger, US Agency for International Development, before the House Select Committee on Hunger, January 30th, 1992

²⁵² See Trevor Rowe, "Aid to Somalia Stymied" *The Washington Post*, July 29th, 1992; Jane Perlez, "Somalia Self-Destructs and the World Looks On" *The New York Times*, December 29th, 1991

²⁵³ See Keith Richburg, "In Africa, Lost Lives, Lost Dollars: Incompetence, Negligence, Maladministration Among UN Woes" *The Washington Post*, September 21, 1992

accompanying political chaos, and one million Somalis fled to neighbouring countries. For all practical and legal purposes the state of Somalia had collapsed into anarchy.²⁵⁴

The Security Council's involvement in Somalia, was marked by the passing in 1992 of six resolutions, all of which placed great emphasis on humanitarian considerations.²⁵⁵ In April, it resolved to establish a peacekeeping force, the UN operation in Somalia (UNOSOM), with humanitarian aid as one of its principal concerns. The lengthy delays in getting it operational however, created the sense that the UN was not well-equipped to run such an operation.²⁵⁶

The stationing of a major, but largely ineffective international humanitarian operation in Somalia led to a deeper military involvement. International relief workers had themselves become part of the problem and were forced to pay ransom to gunmen in order that they could carry out their tasks.²⁵⁷ The UN Secretary General in various letters to the Security Council President in November, 1992 referred "...to the extortion, blackmail and robbery to which the international relief effort is subjected and to repeated attacks on the personnel

²⁵⁴ See generally, Edward R.F. Sheehan, "In the Heart of Somalia" *The New York Review of Books*, Vol XL No's 1 & 2, January 14, 1993 for an insight into the impact of the war on Somali people and society.

²⁵⁵ The first was Security Council Res 733, 23 Jan 1992 which called for a ceasefire and weapons embargo, and among its numerous references to humanitarian issues it requested "...the Secretary-General immediately to undertake the necessary actions to increase humanitarian assistance of the United Nations and its specialized agencies to the affected population in all parts of Somalia in liaison with the other international humanitarian organizations and to this end to appoint a coordinator to oversee the effective delivery of this assistance."

²⁵⁶ See Jane Perlez, "Deaths in Somalia Outpace Delivery of Food, New York Times" *The New York Times* July 19, 1992, at A1; Jeffrey Bartholet, "The Road to Hell" *Newsweek*, September 21, 1992, at 52. The United Nations belatedly began to send in troops to protect the relief supplies reaching Somalia. *Id* at 53

²⁵⁷ *Ibid.* Looting by armed gunmen, of previous supplies destined for those in need prevented proper distribution.

and equipment of the UN and other relief agencies.²⁵⁸ As the former US President George Bush stated a few days later, "...relief groups called for outside troops to provide security so they could feed people."²⁵⁹

Accordingly, the UN Security Council authorized military intervention on December 3 by unanimously adopting Security Council Resolution 794, which authorized member states to use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." UN Security Council Resolution 794 was the first UN resolution to authorize explicitly a massive military intervention by member states within a country without any invitation from the government. The concept of a threat to international peace and security is referred to in the resolution yet by contrast the term "humanitarian" occurs 18 times.

Conceptual Appraisal

Although the military intervention marked a significant step forward for the formulation of a new doctrine of humanitarian intervention, it took place in a country whose sovereignty was already questionable due to the absence of any viable government.²⁶⁰ One observer pointed out "[s]uch pushing and shoving was used, not for the first time, to make the awkward facts of a crisis fit the procrustean bed of the UN Charter. While this was not specious, it in no way concealed the centrality of the humanitarian rationale for the Somalia

²⁵⁸ See generally UN Secretary General Boutros Boutros Ghali's six page letter of 29 November, 1992 p1

²⁵⁹ President Bush, "Humanitarian mission to Somalia," Address to the Nation, Washington D.C. 4th December, 1992 US State Department Dispatch, 3:49, 7 December 1992 p865

²⁶⁰ Article 1 of the Montevideo Convention stipulates that the requirements for statehood are a viable government, a permanent population, a defined territory and the capacity to enter into relations with other states. Convention on the Rights and Duties of States. UNTS Num 881 26 December 1933

operation."²⁶¹

Yet, at the same time, the whole operation in Somalia demonstrates America's dominance in world affairs. The spectacle of US marines landing in Mogadishu, was unashamedly hyped by the media in the West, to the extent that it obscured the abject failure of the international response to the crisis prior to December, 1992.²⁶²

Moreover, from a legal standpoint, although "Operation Restore Hope" is likely to be viewed at least, as a successful demonstration of the American commitment to humanitarian principles "[it] exposes the acute dangers inherent in the collective failure to restructure international humanitarian assistance policies and multilateral relief and political organizations to meet the realities of the post-Cold War world."²⁶³

Thus, the military intervention in Somalia, while it undoubtedly saved countless lives, may not be regarded as a precedent likely to be repeated in future incidents. The UN was relegated to a backstage role while US politicians and marines orchestrated the entire multinational operation. The operation is unlikely to be seen as a vindication of humanitarian principles over concerns for sovereignty. The state of Somalia had dissolved into anarchy and, for all practical purposes, had no ruling government in command. The Somali conflict does not therefore constitute an authoritative precedent.

²⁶¹ Adam Roberts, *supra* note 9 at 440

²⁶² See Simon Jenkins, "Blackman's Burden" *The Times (London)* June 14th, 1993 commenting on how the intervention made good television in the West.)

²⁶³ Jeffrey Clark, "Debacle in Somalia" *Foreign Affairs*, Summer 1993

Conclusions on recent humanitarian interventions

Is it possible to conclude from the above considerations that there is a new consensus on a contemporary doctrine of humanitarian intervention ? Or, are these interventions merely another example of realpolitik ?

Some might ask why the international community under the auspices of the United Nations was willing to intervene in Somalia, yet was reluctant to become more involved in the former Yugoslavia. The common illusion in political circles is that Somalia was the doable war²⁶⁴ whereas Bosnia raised more complex issues of "nationalism" and "ethnicity".²⁶⁵ It has proved far easier to justify sending aid to relieve victims of famine in Somalia as opposed to dealing with a war of ancient ethnic and nationalist issues in Bosnia. Then, of course, there is the confusing religious melange in the Balkan war.²⁶⁶ The UN's reluctance to adopt a more forceful intervention in the former Yugoslavia is largely attributable to the role that religion has played in the conflict, whereas in Somalia relieving famine would appear to be the guiding principle. Moreover, there is little doubt that the issue of self-determination in international law has had a significant impact on the way the international community has perceived the crisis in the former Yugoslavia. The right to self-determination has been well-documented in international law, yet has always been a hotspot of controversy,

²⁶⁴ See Geoffrey York, "Why the US really cares about saving Somalia" *The Globe and Mail*, January 27, 1993 (citing reasons such as oil reserves, military instalments, Islamic fundamentalism and geopolitical location to explain the response for US intervention in Somalia)

²⁶⁵ Note that even the language employed in the two conflicts reveals the different approaches taken regarding the humanitarian dimension. The warring factions in Somalia are referred to as "clans" and the conflict has been described as "tribalism", connoting a certain primitive nature to the whole situation whereas "ethnicity" and "nationalism" are used in the Yugoslav conflict, words that have more relevance in Western parlance.

²⁶⁶ See Norman Stone *supra* note 227.

particularly when it arises in the context of a humanitarian intervention.²⁶⁷ Self-determination, however, raises issues that fall outside the parameters of this brief discussion. Suffice to say, the international community's desire to prevent the secession of the Federal Republic of Yugoslavia and preserve the territorial integrity and sovereignty of Yugoslavia triggered a tinderbox of fundamentalism and national fever.²⁶⁸ For this reason alone, neither the UN nor the big powers can wash their hands of the subsequent war.²⁶⁹

A military strategist might argue that the reluctance to conduct a more proactive "humanitarian intervention" in the Balkans is due, in large measure, to the logistics involved. Certainly, the mountainous terrain of the former Yugoslav republic is not conducive to a large-scale invasion as was the case in the Gulf crisis in 1991. Moreover, there is no identifiable enemy in the Yugoslav conflict. Despite the intense clan fighting in Somalia, the humanitarian mission there has proved easier due to the lack of effective government and the superior warfare of the US-command.²⁷⁰ With the exception of a few incidents, the humanitarian intervention in Somalia has proved relatively straightforward compared to the

²⁶⁷ See eg. General Assembly 1514 (XV), 14 December 1960. para 6 "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN." See also *Western Sahara Case*, ICJ Rep 1975 p12. For confirmation of the right of self-determination by the International Court.(per Judge Dillard sep opinion)

²⁶⁸ See "Baker Backing For United Yugoslavia" *The Financial Times (London)* June 22/23, 1991, p2; see also "Yugoslavia Breaks Apart, 2 Rebel Republics Secede" *International Herald Tribune*, June 26, 1991, p1.

²⁶⁹ Some theorists posit a different stance and argue that the West is not responsible for the humanitarian crisis. See Dr.N.J.Wheeler "Humanitarian Intervention" *Millennium*, Vol 21, No 3 (Winter 1992, p484)

²⁷⁰ Some commentators would disagree with the optimistic conclusions of the US Administration. For an overview of the crisis and US policy see eg Jonathan Stevenson, "Hope Restored in Somalia ?" *Foreign Policy*, Summer 1993 138-154 Stevenson is critical of the precedent set by Operation Restore Hope and does not believe it is a viable model for future humanitarian interventions.

potential quagmire in Bosnia.²⁷¹

Humanitarian intervention, as has been undertaken in the past, whether justified as such or not, has traditionally been a focused mission with a definite objective. The intervention in Northern Iraq, in 1991 for example, was against the oppressive regime of Saddam Hussein, and was of limited duration with a clearly defined strategy to provide humanitarian aid to the Kurds. In the former Yugoslavia, although there is little doubt that mass human rights violations are being systematically perpetrated in the conflict on all three sides, it is still not clear on whose side greater military intervention would be mounted. The Serbs have, however, been singled out as the main aggressors by the international community with NATO airstrikes being carried out over Serb positions in Bosnia.

From a strict legal perspective the above discussion has suggested so far that the traditional narrow circumscription of the doctrine of humanitarian intervention is no longer tenable given the changing political and legal climate. Yet, at the same time, it may be concluded from these brief case studies that there is still no general consensus concerning the doctrine of humanitarian intervention, but only an emerging, limited and fragile body of state and UN practice. More often than not, realpolitik would appear to dominate Security Council debate than the application of strict legal norms. There is, however, evidence that a law of universal human rights is gradually emerging and has reached a rudimentary stage of enforcement on the international plane under the guise of humanitarian intervention, albeit a limited model.

²⁷¹ See Patrick Glynn, "The Doable War" *The New Republic*, August 16th, 1993 15. At the time of the intervention senior US officials were quoted for their remarks on the Bush Administrations' doctrine of intervention. Colin Powell, the Chief of Staff Chairman, stated that the "operation was simply a matter of "the cavalry coming to the rescue, straightening things out for a while and then letting the marshals come back in to keep things under control." *Id* at 16

More importantly, the unilateral use of military force to enforce human rights or prevent inhumane activities would appear to have little support in contemporary practice, outside the scope of the United Nations framework. The UN Security Council has tentatively emerged as a key instrument of utility for providing a legal framework for decisions to intervene. Whether the resurgence of the United Nations has been the result of the post-Cold War climate or, less optimistically, that the organization offers a cloak of legitimacy for otherwise abusive unilateral interventions, is not clear. Nonetheless, collective humanitarianism would appear to be the hallmark of present and future interventions. Traditional notions of absolute sovereignty and non-intervention are also disintegrating with a new tentative doctrine emerging where the protection of human rights takes precedence. There is accordingly less emphasis on the inviolability of states, with the possible exception of the intervention in the former Yugoslavia. For human rights to transcend the dictates of sovereignty, there must be a clear legal justification for the UN to intervene. Humanitarianism cannot be invoked as a pretext for self-served intrusions. It is to this concern that this thesis now turns.

Part Two. THE BASIS OF UN JURISDICTION IN A CIVIL CONFLICT.

Older distinctions between internal and international wars seem to be melting away because of the direct or indirect involvement of other nations in internal conflicts. Just as human rights are now no longer a purely internal affair, it may be that internal wars must become a matter of concern to the community of nations because they so frequently affect the possibilities of organizing a durable peace.

Dean Rusk, former Secretary of State 1961-1969

Part I of this thesis has sought to emphasize the changing norms of humanitarian intervention. One of the more important conclusions to be drawn from the discussion so far is the emergence of the United Nations as the main forum for dealing with humanitarian crises. It follows that as the number of requests for intervention proliferates, the United Nations must also establish a concise normative framework dictating at what point it should intervene and on the basis of a distinct legal rationale. While the doctrine of humanitarian intervention itself evolves, the international community is presented with a unique opportunity to formulate a coherent normative structure for conducting humanitarian operations.

Although humanitarian interventions are often motivated by considerations of political self-interest, UN members often attempt to justify their actions in terms of generally accepted juridical conceptions and precedents compatible with these conceptions. This section will therefore examine some of these conceptions within a contemporary context.

The authority of the United Nations to conduct a humanitarian intervention is traditionally

subsumed under three jurisdictional bases.¹

(i) First, the UN Security Council has tended to characterise the events within a state as a threat to international peace and security under Article 39 of the UN Charter and has taken jurisdiction under Chapter VII.

(ii) Second, the UN has relied on the explicit or implicit consent of only one or some of the warring factions.

(iii) Finally, the UN has tried to settle disputes through regional organizations under the provisions of Chapter VIII.

More recently, the UN has sought to avoid the prohibition in Article 2(7) on intervention in cases calling for "humanitarian assistance." The Security Council has taken jurisdiction in these situations by determining that the humanitarian crisis does not fall "essentially within the domestic jurisdiction of a state" because it "shocks the conscience" of the international community. Due to the significance of this juridical development this section will focus on the expansion of the threat to the peace concept to encompass humanitarian concerns and the development of "human suffering" as a new ground for UN competence, while only briefly touching upon the issue of consent and the role of regional organizations.

Of all the rationales just mentioned, the final legal basis for UN authority is not only the

¹ It is important to note that in this context only forceful interventions are considered and thus, the jurisdictional bases for UN intervention in an internal crisis corresponds to this. Accordingly, only measures under Chapter VII and VIII of the UN Charter are considered. There are other measures the UN can take which essentially amount to intervention. For instance, under Article 34 of Chapter VI, the Security Council "may investigate any disputes or any situation which might lead to international friction "to determine whether international peace and security is likely to be endangered. If it is, the Security Council can "recommend appropriate procedures or methods of adjustment" as provided in fact-finding in the early stages of a conflict. The Security Council may be able to mobilize international pressure on the parties to exercise moderation and seek negotiated solutions. The role of the Secretary General and the General Assembly are also important when considering the jurisdiction of the United Nations in an internal conflict. See *infra* note 4.

most controversial in political circles, it also poses particular conceptual problems for the legal analyst. This premise turns on the phrase "matters which are essentially within the domestic jurisdiction of any state," in Article 2(7) of the UN Charter. This seemingly simple phrase creates numerous interpretational and conceptual difficulties, too many to mention in this context.²As one commentator has observed "[T]he Charter concentrates on the problem of international war, ignoring the issues of civil war except in cases where domestic strife appears likely to develop significant international ramifications."³

For instance, the difficulty in establishing UN competence in a humanitarian crisis does not lie in Article 2(7) of the UN Charter which prohibits any intervention by the United Nations "in matters which are essentially within the domestic jurisdiction of any state" as it is clear from state practice that violations of human rights no longer fall within the purview of domestic jurisdiction. The difficulty rather, lies in the fact that the UN Charter does not authorize the international community to use force against a sovereign state unless there is a "threat to the peace, a breach of the peace, or an act of aggression" under Article 39. A further complication arises in that if any of these three grounds is shown to exist, recourse to the doctrine of humanitarian intervention is not necessary to establish UN jurisdiction. Since the demise of the bipolar years the UN Security Council has emerged as a key figure

² For a more detailed discussion see generally Louis B.Sohn, *Cases on United Nations Law* (University Casebook Series) 1967; Linda B. Miller, *World Disorder and Local Disorder, The UN and Internal Conflicts* (Princeton University Press) (1967) *The Status of Domestic Jurisdiction*, Proceedings of the 4th Summer Conference on International Law, Cornell Law School June 18-20, 1962; James N. Rosneau *International Aspects of Internal Strife*, (Princeton University Press) 1964; R.Falk (eds) *Legal Order in a Violent World*, Princeton University Press (1968) R.Falk and S.Mendlovitz (eds) *The Strategy Of World Order Vol 3 United Nations*, (1966)

³ Inis Claude, "The United Nations and the use of force," *International Conciliation* No.532 (March, 1961) p326

for providing a legal safeguard to decisions characterized as a "threat to international peace."⁴ Many specific concerns have been cited as possible justifications for intervention, including the starvation of civilians and the protection of aid workers. Nevertheless, in recent interventions in Somalia and Bosnia the basic legal justification of international military intervention would appear to remain the concept of a "threat to the peace" under Article 39 of the UN Charter. The difficulty perceived by this approach is that it sets a precedent in international law and gives the UN Security Council a wide ambit in determining which situations constitute a threat to international peace and security despite the lack of discernable international effects. In the case of the Kurds, the cross-border consequences were considerable, yet in Somalia, the UN Security Council determined there was a threat to international peace under Chapter VII despite the absence of a significant impact on

⁴Although the past and more recent practice of the UN suggests that it is the Security Council that shoulders primary responsibility for international disputes involving human rights deprivations, the General Assembly also retains authority under the Uniting for Peace Resolution to exercise the plenary coercive powers of the Security Council under Chapter VII of the Charter should the Security Council be unable or unwilling to act. Any decisions taken by the General Assembly in this capacity will be binding upon all member states and non-members, insofar as the "maintenance of international peace and security is concerned," under Articles 25 and 2(6) of the Charter. Professor Reisman for example, cites Article 13 of the Charter as a legitimate ground for a humanitarian intervention where the General Assembly would be empowered to "initiate studies and make recommendations for the purpose of ...assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." He also cites the broad human rights jurisdiction of the UN as set out in the Preamble and Articles 1, 55 and 56 of the Charter, which are wholly general and not attached to any one UN organ. A further ground, but a more dubious ground for humanitarian intervention by the General Assembly is derived from international law. Reisman believes that as a general principle of law, activities which an entity may perform by itself, it may perform in collaboration with others. See Michael Reisman, Humanitarian Intervention to Protect the Ibos, in *Humanitarian Intervention and the United Nations*, R.Lillich, ed (1971)

Furthermore, the role of the UN Secretary General in a humanitarian intervention should not be underestimated. The Secretary General is authorized under the UN Charter to perform an initiating and promotive role for humanitarian intervention in cases where he believes international action is warranted. Under Article 99 of the Charter, "[t]he Secretary General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." It was, for example, the forceful leadership of Dr Boutros Boutros Ghali that brought the Somali crisis to the attention of the UN Security Council. Unfortunately, consideration of these important organs of the United Nations is not possible within the scope of this paper.

Somalia's immediate neighbours. Massive human rights violations which are not deemed to constitute such a threat are not considered a ground for jurisdiction. Moreover, the question of state consent for the interposition of an international force has become more nuanced and variable in recent times, than in many of the earlier applications of the doctrine. In his Agenda for Peace Report, the Secretary General went as far as to suggest that consent by the host state may not be an invariable requirement of peacekeeping operations. All of the above concerns will be dealt with in this section.

Humanitarian crises as a threat to the peace under Chapter VII

Forcible humanitarian intervention may be authorized under the collective security provisions of the UN Charter when the Security Council determines that a humanitarian crisis constitutes a threat to international peace and security.⁵ Gross human rights violations often precipitate transnational effects and, as such, may constitute a threat to international peace. The recent practice of the UN Security Council clearly supports the contention that egregious human rights deprivations may constitute a threat to peace and thus may activate Chapter VII enforcement measures.⁶

As the Turkish delegate stated in Security Council debate during the Kurdish crisis "[T]here is no way in which what is going on in Northern Iraq can be justified as an internal affair of that country. Given the scale of the human tragedy and its internal implications, this Council

⁵ Article 39, Chapter VII, UN Charter. In the case of the General Assembly, the authority to authorize military action to enforce human rights could be based on the power under Articles 10-14 of the Charter to make recommendations to the organization or to member states.

⁶ See Reisman, "Humanitarian Intervention to Protect the Ibos," in *Humanitarian Intervention and the United Nations*, 167, 187-191 (R.Lillich ed. 1973)

cannot allow itself to be relegated to the role of a mere spectator."⁷

Most major-post-war instances of genocidal violations of human rights have, however, met with inaction, for reasons ranging from "security interests" to simple lack of interest. Unless egregious human rights violations are presented in a way that will shock the public into action, political and economic interests will always take precedence. During the Cold War years the UN rarely authorized any enforcement measures, despite many instances in which serious violations of human rights were closely linked to breaches of international peace and security. The two precedents most relevant to the present issue are the Security Council's resolutions relating to Southern Rhodesia and South Africa, which in both instances included a determination by the Council that international peace and security were threatened as the predicate for the decisions to impose binding economic sanctions under the Council's enforcement authority.⁸ Although the United Nations as an organization did not attempt to put together a military force to act in these two situations, nonetheless, the Security Council determined that the crises constituted threats to the peace, thus paving the way for the application of coercive measures, which could legitimately have included forcible action. In the case of Rhodesia, for example, the resolutions called upon the United Kingdom to quell the rebellion of the racist minority regime, using all "appropriate measures which would

⁷UN Security Council debate, Resolution 688 1992

⁸ For Southern Rhodesia, see S/C Res/216 and 217/1965, SC Res/232/1966, SC Res/253/1968 Concerning South Africa, see SC Res 181/1963 and SC Res 282/1970. See generally M.McDougal and M.Reisman "Rhodesia and the UN- Lawfulness of International Concern" 62 American Journal of International Law (1969) 1.

prove effective."⁹ Indeed, several cases that are cited as instances of "humanitarian intervention" would likely have qualified as a threat or breach of the peace sufficient to warrant the involvement of the UN. The Security Council might for example, have become involved in the humanitarian crisis in Uganda in the 1970's, which was surely a situation that threatened international peace and security. The Security Council could have passed resolutions aimed at preserving the peace by sanctioning Uganda for its endemic lawlessness and also could have approved the action that Tanzania took unilaterally to remove Idi Amin from power.

On the other hand, violations of human rights, even on a massive scale, do not necessarily constitute threats to peace and security. There are, for example, numerous instances where massive human suffering occurs within a state's boundaries which does not pose an immediate threat to international peace and security. The General Assembly debates in late 1991¹⁰ and the UN Security Council Summit in January 1992¹¹ demonstrated the strong views concerning the limitations of Security Council action within a sovereign state. However, despite opposition to greater UN intervention, history demonstrates that mass violations of human rights or natural disasters within a country's borders inevitably have an impact on regional or international affairs. The very notion of "security" has been expanding in recent

⁹ See SC Res/217/1965, at para 5. The language used in this resolution was similar to the "necessary means" language of Res.678 concerning the Gulf crisis and may be read as an authorization by the UN Security Council to use force to prevent human rights violations.

¹⁰ See General Assembly Resolution A/Res/ 46/82, Annex No 3 (1991) (upholding territorial limits on intervention)

¹¹ See the UN Security Council Summit Opening Addresses by Members, January 31, 1992 (The Chinese and Indian speeches are particularly significant)

years to include ethnic and environmental problems.¹² At the UN Security Council Summit in January 1992, the UN Security Council specifically stated that "non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security."¹³

Merely because a particular humanitarian crisis does not display any evidence of serious transnational consequences at the outset should not prevent the UN Security Council from taking swift action to deal with the situation, which may pose a threat after a period of time. Situations will undoubtedly arise where the humanitarian crisis in itself is serious enough to warrant action even though international peace would not appear to be threatened. There is a certain irony in that force is permitted to preserve international peace and security, yet is illegal when it is massive human rights violations that are involved. However, realpolitik dictates that forcible humanitarian interventions will more likely be determined to be threats to the peace when the country in question is geo-politically significant. Refugees from these nation-states or oil-rich states are likely to receive attention, while poorer nations lose out because their complaints are not seen as being a threat to international peace. The UN could recognize that large-scale atrocities such as we are witnessing in Bosnia and Rwanda are an affront to the international community and constitutes an inherent threat to the peace, even where that threat is not apparent. The Security Council's resolutions over Somalia illustrate this development. For example, Security Council Resolution 794 was explicitly adopted under Chapter VII.

¹² Examples, include the radiation emissions from the nuclear plant explosion at Chernobyl, Ukraine in 1986 and atmospheric pollution from the burning of Kuwaiti oil wells in 1992.

¹³ UN Security Council Summit Declaration, UN Doc S/3046 New York, 31 January 1992

The Security Council...determining 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...Acting under Chapter VII of the Charter of the United Nations.."¹⁴

Thus, by categorising events within a state as a threat to international peace, Resolution 794 essentially expanded the concept of what amounts to a threat to international peace and security. While this in itself is a significant development, its precedential value must not be over-stated when one considers the anarchic circumstances within which this formulation occurred.¹⁵In recent months there has been growing evidence from Security Council members to attach certain restrictions to any possible expansion of the "threat to international peace" concept as a basis for UN competence. The US for instance, while broadening the concept to include military aggression, natural disasters and serious human rights violations, has also stipulated that US interests be involved.¹⁶ The British government has also questioned whether the conflicts in Somalia and Bosnia pose real "threats" as opposed to "tragedies".¹⁷

In view of this fact alternative legal rationales should therefore be explored.

¹⁴ Security Council Resolution 794, December 3, 1992

¹⁵ The preamble to the resolution itself draws attention to the state of affairs in Somalia, "Recognizing the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response.." *Ibid*

¹⁶ See *The New York Times* January 1994 and generally Part III for a discussion of US policy towards United Nations peacekeeping.

¹⁷ See Paul Lewis "Reluctant Peacekeepers: Many UN Members Reconsider Role in Conflicts", *The New York Times*, December 12, 1993 at A22

Issue of Consent

One significant emerging feature of the new doctrine of humanitarian intervention is its non-consensual character. Generally, the traditional consensual approach is relatively non-controversial and where a government consents to international assistance or humanitarian intervention such an action would usually be considered to be legitimate. Sometimes an entity such as the International Committee of the Red Cross ("ICRC") might work in conjunction with rebel powers which have control on the ground in order to obtain the necessary consent of the warring factions.¹⁸ The ICRC does have its own "right of initiative" under the four Geneva Conventions of August 12, 1949, to act in international armed conflicts and a narrower one in internal armed conflicts or other situations requiring humanitarian action.¹⁹ Where a government's consent is lacking however, the situation becomes more problematic. The crucial issue for international lawyers is whether the United Nations and concerned international agencies are authorized under international law to provide humanitarian assistance without the consent of the target state. This is an increasingly difficult conceptual and practical problem in a world characterized by civil war and ethnic strife. The question of consent is particularly pressing in situations where there is no national government, as in Somalia, or where a government is embroiled in a civil war,

¹⁸See "Somali Fighting Keeps Aid From a Suffering City," *The New York Times* (late ed, December 11, 1991 at A7, col.1; Examples of the ICRC's pragmatic approach would be its work alongside the Afghanistan-Pakistan border in the 1980's and more recently, Sudan and Somalia.

¹⁹ The 2 Protocols additional to the 1949 Geneva Conventions which were adopted on June 8, 1977 explicitly recognize the right of the ICRC to intervene for humanitarian relief work. See *Protocol Additional to the Geneva Conventions 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts Protocol I*) June 8 1977, Article 81, 1125 UNTS 3; *Protocol Additional to the Geneva Conventions 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) June 8 1977 Article 18, 1125 UNTS 609

such as the Sudan.²⁰ Some commentators believe that intervention without invitations from any government present the greatest challenge to the sovereignty of a state and thus should only be considered as a last resort when a humanitarian situation clearly threatens international peace and security, or there is evidence of mass starvation or genocide.²¹

Often an operation is undertaken without the consent of the host state for pragmatic reasons. In some instances for example, a credible government does not exist or has ceased to be viable and thus the question of consent is irrelevant.²² This was precisely the situation encountered in Somalia.

The Somalia affair is believed by many to be the first case where the requirement for consent was overridden by humanitarian concerns. However, closer analysis reveals that the legal basis for the UN intervention would not appear to be a classic case of humanitarian intervention against the will of the government, but rather of intervention where there is a significant absence of a viable government, thus throwing the country's sovereignty into

²⁰Various theories have been expounded to explain the requirement of consent or lack thereof as the case may be. One apt analogy for the use of force without the consent of the sovereign may be drawn from classical property law. In Anglo-American common law, commentators have often made reference to a landowners' absolute right to exclude physical intrusions. Yet, trespass has been permitted for reasons of both public and private necessity, such as avoiding imminent disaster or serious harm to another person. Thus, it is asserted that concepts of sovereignty, often invoked in absolutist terms, should be considered qualified in a similar manner by instances of vital humanitarian necessity.

²¹ See eg. Mary Ellen O'Connell "Continuing Limits on UN Intervention in Civil War" 67 Indiana Law Journal 903-04 (1992) (arguing that "the UN has not abandoned the Charter prohibition on intervention in civil war" in order to preserve self-determination and not exacerbate civil conflict). Thomas Weiss and Jarat Chopra, *United Nations Peacekeeping: An ACUNS Teaching Text* 31 (The Academic Council on the United Nations System, 1992-91) ("For traditionalists, no requirement of peacekeeping is clearer than the consent of parties in conflict") [hereinafter *ACUNS*]

²² *ACUNS Ibid* at 36 (noting that "[a]s fractured internal conflicts grow and parties proliferate, strict adherence to the requirement of the consent of the parties in conflict to peacekeeping forces appears less likely")

doubt. Security Council members such as Ecuador concluded that, "Somalia is a country without a government, without any responsible authority, without any valid national principles."²³ The Secretary-General himself categorized the intervention in the "legally safe" context of a response to a threat to the peace.

At present no government exists in Somalia that could request and allow such use of force. It would therefore be necessary for the Security Council to make a determination under Article 39 of the Charter that a threat to the peace exists, as a result of the repercussions of the Somali conflict on the entire region, and to decide what measures should be taken to maintain international peace and security.²⁴

Despite attempts to negotiate consent from the warring factions, the UN reluctantly decided to intervene in Somalia without the explicit consent of the host government.²⁵ Accordingly, the UN Security Council authorised Resolution 814 which specifically invoked Chapter VII measures with no reference to the requirement of consent.²⁶ Although the UN Security Council justified its actions by referring to the "general absence of the rule of law in Somalia,"²⁷ the overall conclusion of the Council was that consent was not obtainable where there was no government. Thus, due to the unique circumstances in Somalia, its precedential significance is dubious. This is particularly so, when one considers the subsequent events in Haiti, which, though outside the parameters of this brief analysis, clearly illustrate the UN's preference for obtaining consent from the official government even where the government

²³ UN Doc.S/PV 3145 (1992) at 13

²⁴ *Ibid*, p3

²⁵ UN Doc S/24868 at 3 (By the end of November 1992, the Secretary General concluded "that the Security Council now has no alternative but to decide to adopt more forceful measures") *Id*

²⁶ UN Doc S/Res/814 (1993)

²⁷ UN Doc, *ibid*

is essentially in exile.²⁸

However, on 17 December, 1991 the UN General Assembly passed a resolution to enhance the effectiveness of the United Nations to deal with humanitarian crises where access is denied. The resolution was intended to deal with two major problems:

- (1) coordinating international humanitarian assistance in emergencies and
- (2) pressuring governments to permit aid to people in need during civil wars and other internal conflicts.²⁹

An emergency relief coordinator was established with a wide range of powers aimed at coordinating the UN's response to humanitarian emergencies.

While the resolution affirms sovereignty and ensures the requirement of consent is obtained before intervention takes place, it is couched in sufficiently vague language to avoid the consensual requirement, thereby opening the door to non-consensual humanitarian interventions.³⁰ Thus, although the General Assembly did not explicitly endorse the idea of non-consensual humanitarian intervention, which emphasizes the determination of many countries to retain their right of consent to a UN humanitarian intervention, it is highly significant that the resolution states that the consent of the affected country "*should* be provided" rather than "*must* be provided". This ambiguous phrase leaves open the possibility that in exceptional circumstances intervention may occur in the absence of consent. In other

²⁸ See generally, *Crisis in Haiti: Seeking a Political Solution*, 1 (UNDPI, August 1993)

²⁹ UN General Assembly A/Res/46-182 17 December 1991

³⁰ "Sovereignty, territorial integrity and national unity of state must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country." *Ibid.*

words, it is inferred that the United Nations should seek consent from the targeted country but it may still intervene where it fails to obtain consent; this is particularly so where there is no explicit objection to the humanitarian assistance. It would not appear a coincidence that the language is imprecise. Accordingly, this important resolution strikes a subtle balance between state sovereignty and international humanitarian relief efforts, leaving the UN considerable scope to decide whether a situation requires humanitarian assistance even if the targeted state decides otherwise. As Paul Lewis wrote in the *New York Times*, the General Assembly resolution "marks another small but significant step toward establishing a right of humanitarian intervention in international law that would empower relief organizations to assist the afflicted wherever they are."³¹

Nevertheless, although this resolution represents a step towards more intrusive UN intervention, there remains a substantial body of opposition in the developing world against the trend towards non-consensual humanitarian intervention. Despite the Somali conflict, as yet there has not been a solid endorsement of non-consensual humanitarian intervention. Indeed, more recent UN practice in Haiti indicates that the requirement of consent from the target state, whether it be obtained from the government in exile, or the warring factions in control, is likely to remain a prominent feature of UN humanitarian interventions in the future. Ironically, the crises in Somalia and Haiti have also demonstrated the difficulty of retrieving consent from states embroiled in civil war. For this reason alone, the international community must seek alternative methods of establishing UN jurisdiction in an internal crisis.

³¹ Paul Lewis, "UN to Centralize its Relief Efforts, *The New York Times*, December 18, 1991 at A19 Col 1.

Regional Developments

It is not only developments on a collective UN basis that have attracted profound interest but also those at a regional level.³² Often the UN will authorize a regional organization to resolve a dispute either because the regional body is more suited to dealing with the peculiarities of the dispute or that the UN simply does not have the resources or the political will to deal with the crisis.³³ Regional actions may be able to achieve the objectives of humanitarian interventions with less risk of escalation and a greater tolerability to the international community than under the umbrella of the UN, which more often than not is dominated by the great powers.

Significantly, the latest crisis in Rwanda has resuscitated the debate concerning the role of regional organizations. The OAU is seeking to take a lead in resolving the conflict in Rwanda.³⁴ Although this is largely in response to the reluctance of the big powers to become involved in yet another resource draining and complex ethnic conflict, Kofi Annan,

³² Secretary General Boutros Boutros Ghali recently indicated his desire to rely more on regional organizations for resolving humanitarian crises. See *An Agenda For Peace*, UN Document A/47/277-S/24111 (1992) at 18-19 "[I]n this era of opportunity, regional arrangements or agencies can render great service...Today a new sense exists that they have contributions to make." *Id.* at 18. For an indepth study of the competence of regional organizations to deal with conflicts See Moore, "The Role of Regional Arrangements in the Maintenance of World Order," in 3 *The Future of the International Legal Order* 122, 143-150 (R.Falk & C.Black eds. 1971) and more specifically Tiewul, "Relations Between the United Nations Organization and the Organization of African Unity in the Settlement of Secessionist Conflicts," 16 *Harvard International Law Journal* 259, 286-302 passim (1975)

³³ UN Charter, article 53, (1) "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council..." *Id.* In the area of pacific settlement of disputes, participants in regional arrangements are instructed to appeal first to their regional organizations. Members "entering into [regional] arrangements shall make every effort to achieve pacific settlement of local disputes through regional arrangements before referring them to the Security Council. UN Charter article 52,(2)

³⁴ Kofi Annan, BBC World Service News, CBC Network, May 2nd, 1994 7.30pm

the Under-Secretary General for Peacekeeping Affairs has warned that the OAU may not be up to the job.³⁵

In the crisis in Liberia however, the UN has taken a backseat role, delegating jurisdiction to the regional organization comprising the Economic Community of West African States known as ECOWAS.³⁶ Nigeria and its African neighbours have spent an estimated half billion dollars on the Liberian operation, which is one of the largest peacekeeping efforts in the world and the only major one not run by the United Nations.³⁷ The legality of the ECOWAS intervention has, however, been criticized for failing to comply with the requirements of Chapter VII of the UN Charter.³⁸ Article 53 for instance, clearly states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." ECOWAS however, created a five-nation force (ECOMOG) and on August 26th, 1990 over 4,000 soldiers arrived in Monrovia. Although the Security Council initially declined to pass comment on the legal status of ECOWAS in March 1993, the Security Council issued the following statement:

Liberia represents a good example of systematic cooperation between the United Nations and a regional organization, as envisaged in Chapter VIII of the Charter. The role of the Security Council has been one of supporting the initiatives and endeavours of ECOWAS. I believe that it would be the wish of the Council to continue and expand, as appropriate, this cooperative

³⁵ *Ibid*

³⁶ For background to the civil war in 1990 see *Report of the Secretary General on the Question of Liberia*, UN Doc S/25402 (1993) at 4

³⁷ See Reed Kramer "West African Operations in Liberia" *Africa News Service*, May 11th, 1994

³⁸ See Georg Nolte, "International Legal Aspects of the Liberian Conflict," *Heidelberg Journal of International Law* 1993 at 10-13, 15-25

relationship between the United Nations and the concerned regional body.³⁹

To supplement its statement of support, the Security Council imposed a "general and complete embargo on all deliveries of weapons and military equipment to Liberia until the Security Council decides otherwise."⁴⁰ Thus, despite several legal loopholes, the operation in Liberia may be regarded as an example of just how successful regional organizations can be in confining disputes to the region.

Another clear example of the importance of regional organizations is perhaps the work of the Conference on Security and Cooperation in Europe ("CSCE"). At Copenhagen on June 29, 1990, representatives of the members of CSCE agreed on a large number of principles that may have a significant impact on how the organization deals with humanitarian crises in the future.⁴¹ The members expressed "their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe."⁴² Just over a year later, CSCE representatives met in Moscow to create an intrusive mechanism for the protection of human rights within member states.⁴³ Procedures were established to invite into a country a mission of CSCE - authorized experts to investigate and offer advisory

³⁹ *Secretary General's Report on Liberia supra* note 36 at 11

⁴⁰ Security Council 788 (November 19th, 1992 at 3)

⁴¹ See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 International Legal Materials 1305 (1990)

⁴² *Ibid* at 1307

⁴³ See Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 30 ILM 1670 (1991)

services to resolve a problem relating to human rights.⁴⁴ In the absence of an invitation, the CSCE would be able to establish a mission of rapporteurs that the target state must permit to enter its territory and investigate the facts.⁴⁵

The Copenhagen and Moscow declarations are important in that they replace the principle of non-interference in the internal affairs of states with a firm commitment to promote democratic pluralism, human rights and fundamental freedoms, a development which directly influences state responsibility for humanitarian crises.⁴⁶

The success of regional organizations should not be over-stated however. The OAS in the Dominican Republic crisis and the Organization of Eastern Caribbean States in the Grenada incidents did not add much in the way of legitimacy to the operations and arguably acted as "fig-leaves" to hide the true motivations. As regards "ad hoc" regional groups, the declarations of the General Assembly have made it clear that the legal status of "ad hoc" groupings is the same in international law as unilateral interventions.⁴⁷

Nonetheless, it is anticipated that as the number of candidates for intervention proliferates

⁴⁴ *Ibid* at 1674-75

⁴⁵ *Ibid* at 1675-76

⁴⁶ A similar commitment has been developed by the Organization of American States (OAS) which adopted a Resolution on June 5, 1991 establishing a rapid-response mechanism to any "sudden or irregular interruption of the democratic political institutional process or of any of the legitimate exercise of power by the democratically elected government in any of the Organization's member states" OAS, GA Resolution 1080, reprinted in *Dept of State Dispatch*, October 7 1991 at 750. This resolution became the basis of OAS action in Haiti in late September 1991 and, earlier, in Peru. See OAS P.C Res 567, reprinted in *Dept of State Dispatch*, October 7 1991 at 750.

⁴⁷ See generally *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*. G.A.Res 2131 (XX) (Dec 21 1965) (the term "States" is defined to cover "both individual states and groups of States") *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*. G.A Res 2625 (XXV) October 24, 1970 ("No State, or group of States, has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any other state")

which the UN seems ill-equipped to deal with, the role of regional organizations as a legal basis for humanitarian intervention is likely to increase.

Human Suffering as a Ground for UN Jurisdiction

We have reached a state in the ethical and psychological evolution of Western civilization in which the massive and deliberate violation of human rights will no longer be tolerated.

Former UN Secretary General Perez de Cuellar, October 11, 1991⁴⁸

The UN Charter contains conflicting ideals and norms. On the one hand it affirms human rights and self-determination, yet provides limited authority for actual enforcement of these fundamental rights against a sovereign nation. Moreover, the UN cannot authorize the use of force to protect human rights unless there is a Security Council determination that the violations amount to a threat to the peace. Without this determination, the Charter does not permit military intervention for humanitarian purposes.

The basic UN instruments on human rights are well documented and exhaustively discussed elsewhere.⁴⁹ Some of the more prominent instruments include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Prevention and

⁴⁸ See Stephen S. Rosenfeld, "As Borders Come Down," *The Washington Post*, October 11 1991 A27

⁴⁹ For a complete documentation of the UN resolutions, declarations and conventions in this field see L. Sohn and T. Buergenthal, 3 *International Protection of Human Rights, Cases and Materials: Basic Documents* (ed 1975) and the companion volume by the same authors, *Basic Documents on International Protection of Human Rights* (1973)

Punishment of Genocide, the Convention on the Political Rights of Women, and the Declaration on the Granting of Independence to Colonial Countries and Peoples. While some of these instruments provide for a limited degree of international surveillance, none of them provide for actual collective or unilateral enforcement action. Thus, the Security Council's role in the implementation of international human rights law, while important and necessary, up until recently has been limited by significant legal shortcomings.

Nevertheless, there are two ways in which violations of human rights fall outside the ban on intervention in Article 2(7) of the Charter. First by a Security Council determination of a situation which constitutes a threat to international peace and security; and second, by virtue of that particular state's violations of international legal obligations in the field of human rights. The principle of non-intervention in internal affairs would therefore be inapplicable where the Security Council has determined the matter is no longer one of internal concern.⁵⁰ In many contexts however, severe violations of human rights may be held to constitute a threat to the peace, particularly in light of the growing internationalization of human rights norms.⁵¹ In 1966 in the Rhodesian crisis, for example, the Security Council recognized that the human rights violations constituted a threat to international peace.⁵²

⁵⁰ See "Global Interdependence cited by Boutros Boutros Ghali" *The LA Times* February 1 1992 at A1 (stating that the Security Council leaders had announced that the international community cannot allow the protection of human rights to stop at national frontiers and that the United Nations should discard the outdated principle of non-intervention in domestic affairs)

⁵¹ See generally, Lori F. Damrosch, Commentary on Collective Military Intervention to Enforce Human Rights, in *Law and Force in the New International Order* 215 (Damrosch and Scheffer eds. 1991) (maintaining the view that when human rights violations constitute a threat to international peace and security, such violations override state sovereignty according to Article 2(7) and Article 39 of the UN Charter;) see also Vladimir Kartashkin, Human Rights and Humanitarian Intervention, *ibid* at 202 (affirming that Chapter VII measures may be triggered because several international documents define international crimes as encompassing serious violations of human rights which jeopardize international peace and security.)

⁵² See "Rhodesia and the United Nations: The Lawfulness of International concern," *supra* note 7 (both authors contended that the domestic jurisdiction requirement was irrelevant as the Security Council had deemed that the situation had escalated to a threat to international peace and security.)

Human rights have become increasingly internationalized as states have undertaken international commitments to human rights, either by treaty or custom.⁵³

Until the Gulf War, the actions of the Security Council with regard to violations of international human rights have been primarily of a declaratory and hortatory nature. Previously, the Council monitored developments in specific cases and even condemned them, but it did not resort to Chapter VII of the UN Charter until the invasion of Kuwait. UN Security Council Resolution 688 broke new ground by specifically stating that the repression of the Kurdish people and the subsequent mass displacement of thousands of refugees constituted a threat to international peace and security.⁵⁴ By linking human rights abuses with threats to international peace and security, the UN Security Council created a new rationale for forcible humanitarian intervention. Although alleviation of human suffering does not appear as an express purpose or principle in the UN Charter, it may be regarded as a variant of basic human rights, in particular the "right to life" or protection against genocide. This new legal basis, therefore, evolves from an interpretation of Article 2(7) to encompass matters that do not necessarily have transborder effects, yet clearly do not fall within a state's domestic jurisdiction. There are, however inherent conceptual and political difficulties involved with expanding the phrase "threats to international peace" to encompass human rights violations.

⁵³ It has been generally accepted among legal scholars that the term "human rights" as embodied in the Charter includes the Universal Declaration of Human Rights and other significant human rights documents in its definition.

⁵⁴ Resolution 688 states that the flow of refugees, "threaten(s) international peace and security, reflecting the language of Chapter VII." See Nafziger, James A.R. "Self-Determination and Humanitarian Intervention in a Community of Power" 20 *Denver Journal of International Law and Policy* (1991)

For instance, the following year the Under-Secretary General for Legal Affairs took a different legal position and stated that: "[T]his episode illustrates quite clearly that the organization cannot participate in humanitarian interventions that violate the territorial integrity of a state unless they are mandated under Chapter VII...or all the parties to the conflict and the Security Council gives their consent to UN involvement."⁵⁵

Although the Security Council determined that the exodus of the Kurds posed a threat to international peace because of the international effects on neighbouring countries, the UN's authorization to intervene in Somalia less than two years later in the absence of any such effects would appear to render the concept of a threat to international peace almost meaningless and has certainly undermined the legitimacy of the UN. A more credible approach would have been to interpret Article 2(7) as excluding serious violations of human rights, allowing the UN to intervene on the basis of pure humanitarian concerns in accordance with the purposes of the UN Charter.

These conceptual problems may be resolved by formulating a new premise for humanitarian intervention on the basis that an abuse "shocks the conscience" of mankind. Thus, as an alternative to the "threat to international peace" exception, another possible argument to justify UN intervention on a firm legal basis could be to create a "human suffering" provision. This could allow the Security Council to authorize humanitarian intervention regardless of whether the situation posed a threat to international peace. Obviously such an approach would demand intellectual integrity in identifying appropriate circumstances for

⁵⁵ Carl-August Fleischhauer (Under Secretary General for Legal Affairs and Legal Counsel of the United Nations), Proceedings of the 86th Annual Meeting of the American Society of International Law, Washington DC (April 4th, 1992)

intervention. The grounds for intervention could for instance, include genocide, large-scale atrocities, natural and man-made disasters. This formulation may seem less rigid than the criteria discussed above, yet may also appear too narrow in that it focuses only on the most barbaric acts of genocide. Although there are inherent weaknesses with the concept, it is a useful doctrine and should be further developed as a mechanism for overriding the defence of sovereignty. International law should recognize mass human suffering in its own right as a legitimate argument against sovereignty.

Creating a "pure humanitarian suffering" approach to humanitarian intervention would, however, require an amendment of the UN Charter which is unlikely to take place in the foreseeable future since there are a significant number of states which vehemently oppose any diminution of their sovereignty. The United Nations should, however, recognize that displaced individuals persecuted by their own country are as much a matter of international concern as refugees fleeing across borders.

Codifying Humanitarian Intervention

It may be stated that the law governing humanitarian intervention is fast degenerating to the point where its normative value is, indeed, questionable. If this is the case, as indeed it appears to be, the most pressing task confronting international scholars is not only to reappraise the doctrine but to clarify various criteria to enable the international community to judge when a humanitarian intervention should be authorized. As Professor John Norton Moore stated the problem "[S]urely the issue is whether we are able to develop a set of criteria for normative appraisal, so that we can determine when humanitarian intervention

is normatively permissible, and when it is not. That is, what kinds of governmental actions, in mistreating one's own population or in intervening, should be impermissible.⁵⁶

The foregoing discussion has illustrated that there is no one coherent rationale that has guided the international response in dealing with humanitarian crises nor is there a viable international mechanism which offers a suitable framework for decision-making and prompt action. Public outrage and moral arguments seem to be the only unifying theme that draws attention to these crises, often coming too late. The UN seems to drift aimlessly from crisis to crisis despite the end of Cold War politics. Yet, ironically, there has never been a more opportune time in international relations to reassess the doctrine of humanitarian intervention and formulate a coherent, consistent and humane system for dealing with victims of human rights violations or internally displaced persons.

The contradictory implications of the UN Charter concerning state sovereignty and international human rights, have thus far prevented any articulation of criteria for UN intervention in humanitarian crises. However, now that state sovereignty is no longer an absolute legal fiction and the UN has become a more acceptable forum for international cooperation, the formulation of coherent criteria may not be quite so unobtainable as was once thought. For the UN to conduct a humanitarian intervention in a way that is widely seen as legitimate, carefully drafted guidelines are needed. As one commentator urges "[T]he specific purposes of such intervention should be collectively discussed, approved and promulgated in advance, and not simply offered by those who carry them out, ex post facto,

⁵⁶John Norton Moore, in R.Lillich, *Humanitarian Intervention and the United Nations* supra note 6 at p38

in embarrassed self-justification."⁵⁷ On the other hand, Cyrus Vance warns that "a decision whether and how to act in the cause of human rights is a matter for informed and careful judgement. No mechanistic formula produces an automatic answer."⁵⁸

With these remarks in mind, it is nonetheless the contention of this paper that criteria must be developed for collective intervention under the auspices of the United Nations in disputes that start as an internal war and spread to become one of international concern. In his last annual "Report on the work of the organization", former UN Secretary General Javier Perez de Cuellar called for reinterpretation of the Charter principles of sovereignty and non-intervention in domestic affairs to allow for intervention on humanitarian grounds, as well as identification of the objective conditions under which it should be carried out.⁵⁹

Various criteria have been proposed by legal scholars to enable the legitimacy of humanitarian intervention to be evaluated.⁶⁰ For instance, it has been suggested that there must be an immediate and extensive threat to fundamental human rights; that the use of force must be no more than proportional to the original threat; that no greater destruction must result than would otherwise have been the case, and that prompt disengagement and

⁵⁷ See Alan Henrikson, "How Can The Vision of a New World Order be Realized ?" Fletcher Forum of World Affairs, Winter 1992 63, 70 Henrikson favours criteria to circumscribe interventionist collective action as well as to prescribe it. ("The UN Security Council may need, and indeed welcome, some restriction as well as permission in this new area") *Id.*

⁵⁸ See Cyrus R. Vance, "Law Day Address on Human Rights Policy," University of Georgia School of Law, 30 April 1977, quoted in Henrikson, *Ibid* at 71

⁵⁹ UN Doc. A/46/1, September 6, 1991, pp10-11

⁶⁰ See generally Larry Minear, Thomas G. Weiss and Kurt M. Campbell "Humanitarianism and War: Learning the Lessons from Recent Armed Conflicts" Occasional Paper, 1991, no 8 (Thomas J. Watson, Jr) for a discussion of the criteria to be employed in humanitarian crises. The authors cite for example the number of persons affected; the immediacy and severity of the threat to life; substantial flow of refugees or displaced persons; a pattern of significant human rights abuses; and the inability or unwillingness of the government to cope with the crisis.

immediate reporting to the Security Council must follow. Other criteria that have been stressed by adherents to the doctrine are the lack or exhaustion of other means of recourse, and the relative disinterestedness of the state taking the coercive remedial action.⁶¹

Lillich enumerates five similar conditions that would validate humanitarian intervention: immediacy of violation of human rights; extent of violation of human rights; invitation to use forcible self-help; degree of coercive measures employed (ie, proportionality) and relative disinterestedness of the acting states.⁶² Moore proposes five qualifications: an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life; a proportional use of force which does not threaten greater destruction of values than the human rights at stake; a minimal effect on authority structures; a prompt disengagement consistent with the purpose of the action; and immediate full reporting to the Security Council and appropriate regional organizations.⁶³ Another commentator suggested that in order to justify a humanitarian intervention, the human rights abuses must be systematic, widespread and pervasive,⁶⁴ or that the violations must be persistent.⁶⁵

Although the definition of "extreme" or "gross" violations of human rights is admittedly fluid,

⁶¹ See H.Scott Fairley, "State Actors, Humanitarian Intervention and International Law": Reopening Pandora's Box," 10 Georgia Journal of International and Comparative Law.

⁶² Lillich, "Forcible Self-Help" Iowa Law Review, p347-51;

⁶³ John Norton Moore, "Control of Foreign Intervention in Internal Conflict," 9 Virginia Journal of International Law 1969 p205 at pp338

⁶⁴ Fernando Teson *Humanitarian Intervention: an inquiry into law and morality* (Transnational Publishers)(1988)117

⁶⁵ Ellery Stowell *Intervention in International Law* (1921) 53

attempting to define each and every example of human rights violation in legal discourse is practically impossible. But it is useful to recall that this thesis argues not necessarily for substantially more frequent uses of the doctrine of humanitarian intervention. Rather, this thesis argues for clarifying or expanding the definition of gross human rights violations so that the UN is not discouraged from taking action arguably in violation of international principles. The distinction is crucial for the contemporary legitimacy of the doctrine in this context.

From a practical perspective, states generally agree that only the most severe cases justify armed intervention. How does one then determine what is meant by severity ? At one extreme, intervention would be permissible only in situations where genocide has either occurred or is imminent, and, at the other, intervention would be allowed whenever a basic civil or political right is violated.

Predictably, there are strong opinions against codifying the concept of humanitarian intervention.⁶⁶ The case against too broad an application of humanitarian intervention may be acutely summarized as follows. Even if the right to intervention is restricted to instances of mass flight, intervention may take place in countries on the pretext that peace and security of neighbouring states is threatened. The argument continues that codification would lead to further abuse as states could base their actions on interpretations of legal provisions, rather than mere rhetorical statements. Some commentators believe that any codified law would merely serve power politics and international law would no longer protect the weak

⁶⁶See T.M.Franck and Nigel.S.Rodley "After Bangladesh:The Law of Humanitarian Intervention by Military Force", 67 American Journal of International Law 275, 305 (1973) (concluding that "a workable general definition of "humanitarian intervention" would be extremely difficult to formulate and virtually impossible to apply rigorously")

from the strong.⁶⁷ It follows that whatever objective conditions are identified, it would still be impossible to distinguish between action based on purely humanitarian grounds and ulterior motives of self-interest. Furthermore, the value of codification would be minimal because the international legal system allows for mitigating circumstances as it is. The prohibition on the use of force and intervention under Article 2(4) is fragile enough and so often breached that codification of yet another exception would only erode it further.⁶⁸ How would the UN differentiate a case which alleges a threat and one which produces a real threat ? Or, that intervention on the grounds of "humanitarianism" is pretext ?

Although these are certainly valid concerns, it may be stated that the concept of humanitarian intervention has not been sufficiently tested in history precisely because there has been an absence of identifiable objective criteria. Rather than act as a fig-leaf for power politics, clearly defined parameters would inhibit states from characterizing their abusive actions as humanitarian-driven. Furthermore, as with any law, although it is an old adage codification would surely restrict abuse and not just affirm acceptable conduct. Clarification of the doctrine of humanitarian intervention in legal terms would act as a deterrent against further humanitarian crises.⁶⁹ As James Anderson concludes "[S]o long as the United

⁶⁷ J.Chopra and T.Weiss, "Sovereignty is No Longer Sacrosanct" *Ethics and International Affairs*, 1992 Vol 6 at 99

⁶⁸ *Ibid* at 100

⁶⁹ Professor Wright argues that a legal right of humanitarian intervention would decrease the number of human rights violations because the fear of intervention would deter states from committing such abuses. See R.George Wright, "A Contemporary Theory of Humanitarian Intervention," 4 *Florida International Law Journal* 435 (1989) Professor Wright states that "[A] broader theory of justified humanitarian intervention, to the extent that it tends to enhance either the probability of the severity of sanctions imposed on inhumane governments, may well reduce the incidence of human rights violations through a classic deterrence effect." He goes on to say that "[L]egalizing the doctrine of humanitarian intervention would lead to a strengthening of all international laws because it promotes the respect for basic moral values." *Id* at 454. "[H]umanitarian

Nations lacks carefully crafted guidelines, future intervention under its auspices will rely on ad hoc justifications. Further, if the past is any indication of the future, stronger states will have a disproportionate influence in determining the nature and scope of these interventions; an outcome at odds with hopes for a more equitable world order."⁷⁰

Certain qualifications are nevertheless warranted. For instance, the intervention must be necessary, proportionate and strictly limited to its humanitarian purposes.⁷¹ As Falk has reiterated: "[H]umanitarian intervention as distinct from war, seems to me to have something to do with the specificity of the objective and with its limitations on magnitude and duration of the undertaking."⁷² For example, an intervention under the guise of humanitarian motivations to overthrow a government would not be legal. This approach preserves the true humanitarian nature of the intervention and discourages the use of force as a pretext for political interference. Intervention could, for instance, be warranted in instances of genocide. Arguably, the legal basis for forcible humanitarian intervention in crises arising from the act of genocide is already established by the Genocide Convention. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as "[A]cts of killing, serious bodily or mental harm, prevention of births; forcible transfer of children or deliberate

intervention may...contribute to the sense of the basic equitableness of the system of laws in such a way as to strengthen the system of laws on balance." *Id* at 455 Although his remarks refer primarily to unilateral intervention, they equally apply to collective humanitarian intervention in this context.

⁷⁰ James Anderson "New World Order and State Sovereignty: Implications for UN-sponsored Intervention" Fletcher Forum of World Affairs Summer 1992 at 135. Anderson favours amendment of the UN Charter to allow for UN intervention on the grounds of human suffering.

⁷¹ For a definition of a threshold below which humanitarian intervention might be triggered, see Theodor Meron and Allan Rosas "A Declaration of Minimum Humanitarian Standards," 85 American Journal of International Law (1991) pp375-81

⁷² Falk in Lillich, *supra* note 4 at p27

infliction of conditions of life calculated to bring about the physical destruction of a group, if those acts are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."⁷³

It follows that the UN would be able to authorize a forcible intervention under Article VIII of the Convention which provides that: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."⁷⁴

Then there is always the consideration of whether a government should risk the lives of its own citizens to achieve a temporary cessation of a slaughter which is likely to be renewed. In cases where humanitarian intervention is likely to be attempted, international lawyers and legal scholars must take into consideration the political context within which the humanitarian intervention is to be conducted. When contemplating UN action to protect human rights, the issue is not so much the legal authority of the United Nations to act, but rather whether there will be sufficient political consensus among Security Council members in favour of action and whether agreement can be reached on the goals of such an action. Realism dictates that a state will always have more than one motivation for taking action in

⁷³ *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, UN Res 260 A (III), arts I,IV,V,VI,VIII, December 9, 1948. The Convention has attained the status of a *jus cogens* norm of international law and is generally accepted to be a crime against the international community.

⁷⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, Article VIII, 78 UNTS 277

any situation.⁷⁵ An altruistic humanitarian intervention is probably out of the question in today's international society as a state will invariably have motives apart from humanitarian concerns for intervening.⁷⁶

As asserted previously in this paper the right to intervene must be based on multinational, not unilateral action, under the legal authority of the United Nations. Furthermore, the right of humanitarian intervention must be based on the need to protect the rights of individuals and not just on the moral obligation to protect minorities who have begun to leave en masse to escape persecution. Moreover, it is submitted that categorically ruling out humanitarian intervention on the basis that the abuse is not "widespread" is not only morally suspect but insensitive to contemporary realities.

A humanitarian intervention based on objective, predetermined factors would remove the "ad hoc" nature of current UN policy and ensure that all victims of human rights violations would at least receive attention from the international community and possibly military assistance. International humanitarian aid should be provided on an equitable basis to geopolitically "insignificant" countries and resource-rich industrialized countries. Although these "guidelines" could also include cases of civil war where an outside power attempts to tip the

⁷⁵See Farooq Hassan "Realpolitik in International Law: After Tanzian-Uganda Conflict "Humanitarian Intervention" Reexamined," 17 Willamette Law Review 859 (1981) Professor Hassan concludes that the necessity for complete indifference before allowing humanitarian intervention is naive and absurd, and concludes that "if the predominant motive for the aggression is humanitarian, a limited degree of national interest should not conclusively preclude its validity." *Id* at 897.

⁷⁶See Lillich, *supra* note 62 at 350 ("The presence of [other] such motives does not invalidate the resort to forcible self-help if the overriding motive is the protection of human rights".) See also Wright, *supra* note 69 at 460 ("To insist on purity of motive is realistically, to essentially abolish the legal doctrine of humanitarian intervention") Bazzyler, "The Doctrine of Humanitarian Intervention following the Atrocities in Ethiopia and Kampuchea" Stanford Journal of International Law 1987, 547. ("...states will rarely intervene unless they have other interests in addition to the humanitarian intervention." *Id* at 601-602

scales in its favour or secessionist movements that embody aspirations to self-determination, the focus here is on humanitarian issues in keeping with the central hypothesis of this thesis. While every effort should be made to use non-forcible measures such as, "inter alia", diplomatic persuasion, arms embargoes and negotiation of relief corridors and cease-fire zones, the target-state should be made aware that if it does not comply with the will of the international community, further forcible measures will be taken.⁷⁷

The above observations must, however, be tempered by recognition of the inherent practical difficulties associated with the new ideas and practices of humanitarian intervention. Humanitarian intervention, even where justifiable, can never be a credible replacement for a well thought out policy to solve the underlying causes of the crisis. Nonetheless, an intervention limited to the provision of humanitarian aid raises ethical questions concerning the ultimate objective. Keeping victims alive in Bosnia in the interim without really addressing the root causes of the conflict is morally indefensible. As Tom Farer advocates "[r]escue, if there is to be any, will require elimination of the threat at its source...There must in other words, be direct and sustained involvement in the political process of the target state."⁷⁸

The approach of the international community in the former Yugoslavia and Somalia, for instance, largely ignores the issues at the root of the conflict and also leaves less publicized disasters untouched such as Angola and Rwanda. More often than not, self-interest and political opportunism remain key factors in how nations behave in the international arena and explain why humanitarian action is favoured in some crises and not in others. Moreover,

⁷⁷ See James Anderson, *supra* note 70 at 137

⁷⁸ Tom Farer "Intervention in Civil Wars: A modest proposal" 67 Columbia Law Review (1967) 266

binding international legal instruments have not been formulated to keep up with emerging ethics in international law, such as the right to receive international emergency assistance.⁷⁹ Formulating criteria for humanitarian interventions should therefore be put at the top of the global agenda.

Conclusions

The discussion so far has illustrated some of the conceptual difficulties inherent in an enquiry into the UN's jurisdictional competence in internal affairs. In large measure, the legal basis for this resurgence in UN intervention has always been present in the UN Charter. Consent, elimination of threats to international peace and security, and cooperation with regional organizations are themselves traditional sources of UN authority. However, emerging norms from recent UN practice in Northern Iraq, Somalia, and Bosnia shed new light on terms such as "threat to international peace" which would now appear to encompass human suffering without discernable international effects. The requirement of consent has also become more nuanced in recent times. The upshot of this is an expanded UN authority to make executive decisions over the governance of states, which was probably unforeseen by the founders in 1945. The quest for a law of humanitarian intervention is clearly not an easy task. Expanding the scope of the doctrine of humanitarian intervention is not completely devoid of possible abuse. Nevertheless, some risks are worth taking in view of their valued ends. Expanding the definition to include abuses which "shock mankind" is not only morally advantageous but is also attractive in terms of its practical benefits for deciding when to intervene. To reduce the danger of abuse, the best way would be to restrict humanitarian intervention to collective action in either Chapter VII of the UN Charter, or preferably on

⁷⁹ See T. Weiss and Larry Minear, "Do International Ethics Matter ?" *Humanitarian Politics in the Sudan* Ethics and International Affairs, Vol 5, 1991 p197-214

the basis of a new provision of "human suffering." Unfortunately, the contradictory implications concerning inviolable state sovereignty and universal human rights have precluded the formulation of coherent criteria to date. That is, however, no excuse for inaction now. If the United Nations does eventually articulate intervention criteria, it must ensure the criteria are not too narrow or too elastic; overly rigid requirements tend to justify inaction whereas criteria that are too elastic are susceptible to abuse. Yet it is crucial that any criteria that are formulated preserve the United Nations' scope for political manoeuvre. It is imperative that the Security Council has a range of policy options with forcible intervention as a last resort. Finally, the criteria must be drawn up in lucid language to avoid any interpretational difficulties which are often encountered with international agreements. The formulation of any criteria for intervention in a humanitarian crisis will undoubtedly be a long arduous process, requiring considerable energy and long-term commitment from the international community. Should agreement on any criteria continue to prove elusive, sustained attention on the moral attractions of the doctrine of humanitarian intervention will contribute to future discussions and hopefully pave the way for consensus at some point in the coming years.

Part Three. OPERATIONAL ASPECTS OF UN HUMANITARIAN INTERVENTIONS

The dilemma confronting all hopes of peaceful international change and settlement is that there can be no change and no settlement, not even peacefully, so long as struggle is avoided. You may count on the fingers of one hand the occasions on which agreements have been made and changes of sovereignty or transfers of territory have occurred in the modern world without the assistance of the possibility of a resort to force, if not of force itself.

F.H.Hinsley, *Power and the Pursuit of Peace*

As the foregoing discussion illustrates, it is no longer tenable to assert that when genocide is committed on a massive scale military intervention is prohibited under international law. While these developments have certainly increased the scope for a role for the UN in solving humanitarian crises, the use of UN forces to support humanitarian objectives raises a variety of complex legal and operational issues which demand careful consideration. The preceding discussion has indicated certain changes in the norms of humanitarian intervention. Thus, it follows that if our traditional notion of sovereignty has evolved, then so will the concept of collective security. Indeed, the present conceptual debate concerning the permissibility of humanitarian intervention, and on what grounds, is arguably a red herring for it ignores the immediate practical concern for adequate measures to prohibit states from invoking humanitarian issues as a pretext for political self-interests. Even supposing the ideological debate about the sanctity of the right of the international community were to be unequivocally resolved in favour of the doctrine of humanitarian intervention, operational capabilities would still be lacking at the international level.

It has been asserted, for instance, that:

The argument cannot be solved by dialectics; it will only finally be resolved by the actual course events take. The matter is not in the hands of the lawyers. The actual direction in which events turn will probably be relatively little affected by legal argument about the "right" meaning and interpretation of Articles 2(4) and 51. The problem is not one of drafting legal precepts controlling the use of force but one of devising international institutions through which the use of force in international relationships can be legally ordered and controlled on an international instead of a sovereignty basis.¹

Like the Gulf war itself, the Kurdish crisis demonstrated the growing potential for collective humanitarian action as well the normative and structural inadequacies of the United Nations itself. While the UN requires a more effective operational capacity for humanitarian interventions, Western military establishments are currently not prepared or trained to deal effectively with the diverse cultural and economic challenges associated with humanitarian operations in developing countries. Part III of this thesis therefore seeks to establish how the UN can conduct humanitarian military interventions in the 1990's. It should be noted from the outset that the term "peacekeeping" in this section is somewhat outdated, since recent operations would appear to go beyond the traditional concept of peacekeeping. Thus, when the term is used it does not purport to encompass traditional peacekeeping tasks such as election-monitoring and supervisory duties. The term "peacekeeping" has been subject to much obfuscation in recent crises and it would be folly for a legal scholar to fall into the same journalistic trap. Reference is therefore made to "UN forces" instead of peacekeepers to avoid any confusion. More generally, this section will consider the impact of the aforementioned developments in the area of logistics support and command and control. The question of funding for UN peacekeeping is only addressed to the extent that it impinges directly on the future direction of UN operations.

¹ Jennings, "General Course on Principles of International Law" *Recueil Des Coeurs*, 325, 584 (1967)

While clearly central to the future of peacekeeping in humanitarian crises, the UN's financial crisis is beyond the scope of this study.

The United Nations Charter and the use of force

There is renewed hope that the UN Charter will be taken seriously as a legal basis for international control of internal conflict. Under Chapter VII of the Charter, the UN has considerable authority to seize jurisdiction in an internal conflict. Should the UN Security Council determine that a threat to the peace, breach of the peace or act of aggression exists, it may make recommendation for, or, decide upon, economic or military sanctions under Articles 41 and 42 respectively. Article 42 of the UN Charter empowers the Security Council to "take such action by air, sea, or land forces as may be necessary to restore international peace and security".² Article 45 provides that airforce units be made available to the Security Council by the member states³ whereas Article 43 enables the UN to obtain military forces from the member states. Article 43 is therefore essential to the entire system of collective security under the UN Charter because it provides the main constitutional basis for UN military forces.⁴ Article 43 calls on the member states of the UN to make available to the Security Council the

² Article 42 reads in pertinent part: "Should the Security Council consider that measures provided for in Article 41 would be inadequate....it may take action by air, sea or land forces as may be necessary to maintain or restore international peace and security." UN Charter Article 42.

³ Article 45 orders member states to "hold immediately available national air -force contingents for combined international enforcement action so that the UN can "take urgent military measures"...UN Charter, Article 45. In 1942, US President Henry Wallace said of UN air corps: "When this war comes to an end, the UN will have such an overwhelming superiority in air power that we shall be able to "bomb the aggressor nations mercilessly until they ceased fighting." quoted in *Law and Force in the New International Order*. (Lori F. Damrosch and David J. Scheffer eds., 1991)[hereinafter *Law and Force*]

⁴ "Constitutional authority" means the legal authorization under the UN Charter to take action to maintain international peace and security. It is now commonplace to speak of the "constitutional law" of the United Nations.

armed forces necessary for the maintenance of international peace and security. Under Article 43, each member state would sign an agreement with the Security Council. This Article 43 agreement would govern the provision of armed forces by member states to the Security Council by requiring the member state to " earmark " a certain number and type of its own troops for future UN service. By signing an Article 43 special agreement, a member state would assume a legal obligation to provided military forces to the Security Council. Article 43 therefore establishes the overall framework and governing rules for all military forces contributed by member states. It was envisaged that these military contingents would serve under the direction of a Military Staff Committee, which would be comprised of representatives of the permanent five and would advise the Security Council on the strategic direction of military operations.⁵ Almost immediately from the date of its inception Article 43 was greeted with great distrust.⁶ The political antagonisms of the Cold War made implementation of any agreements under Article 43 an unrealistic goal.⁷ The Russians were particulary hostile to a standing UN force under Article 43 whereas the West preferred to concentrate its attention on the creation of forces for NATO.

⁵ UN Charter Articles 46-47. "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee." UN Charter Article 46. The MSC has never played an instrumental role in any UN conflict since its inception nor has it ever been formally disbanded. Interestingly, in the early stages of the Gulf crisis, prior to the resignation of Eduard Scheverdnardze as Soviet Foreign Minister, the USSR urged that a role be given to the MSC. For a discussion of the potential role of the MSC see Ralph M. Goldman *"Is it time to revive the UN Military Staff Committee?"* (1990)

⁶ On April 30th, 1947 the UN MSC issued a report to the Security Council in which it set forth general principles for implementing a UN force under Article 43. Although the Security Council provisionally adopted many of the articles, the five permanent members failed to agree on many aspects of the composition and organization of armed forces that would be committed under the agreements: problems that would likely be encountered today - see *Report from the MSC to the President of the Security Council*, Yearbook of the UN, 1945 at 403,

⁷ To this date, no UN member state has signed an Article 43 special agreement with the UN, despite the fact that the text of Article 43 asks member states to sign such special agreements "as soon as possible." UN Charter Article 43.

Because of the failure to reach agreement on creating Article 43 forces, the emphasis shifted from enforcement to peacekeeping. United Nations peacekeeping thus arose out of the need to seek an alternative method of restoring international peace and security and is conceptually distinct from the Security Council's limited power to recommend enforcement action under Article 39 of the Charter. Although it is common knowledge that neither the Charter of the UN nor the travaux préparatoires of the San Francisco Conference contemplate the creation of peacekeeping operations, it is possible to conclude that the peacekeeping forces have generally acquired universal acceptance in the international community.⁸

It would seem almost paradoxical to state, therefore, that peacekeeping is not defined or prescribed in the UN Charter. Instead, peacekeeping is an instrument that has largely been used in situations where application of Chapter VI of the Charter has either been inadequate or utilization of Chapter VII is impossible, leading to the conclusion by former UN Secretary General Dag Hammarskjöld that peacekeeping was based on Chapter "six and a half".

There is, however, no internationally agreed definition of peacekeeping. This is due largely to the lack of a clear international constitutional basis for peacekeeping in the UN Charter, which makes a consensus definition difficult. The present Under-Secretary General of the Department of Peacekeeping Operation, Marrack Goulding has, however, formulated a coherent and workable definition: "[U]nited Nations field operations in which international personnel civilian and/or military, are deployed with the consent of the parties and under UN command to help

⁸This was not always the case. China and the Former USSR have traditionally been opposed to the concept of peacekeeping. See *The Certain Expenses Case*, ICJ, Opinion of ONUC and UNICEF under Article 17 of the Charter. The support of the Soviet Union to peacekeeping, is however, unequivocal today which is largely attributable to the dramatic turnaround of Soviet Policy.; See generally Semenov, "The Charter of the UN and the Question of Peacekeeping Operations," Soviet Yearbook of International Law, 1968 at 64.

control and resolve actual or potential international conflicts or internal conflicts which have obvious international dimension."⁹

The question of the constitutionality of UN peacekeeping forces was, however, settled in the Advisory Opinion of the International Court of Justice on the Certain Expenses of the United Nations which may be cited in support of this position. The court concluded that as "the operations were undertaken to fulfil a prime purposes of the United Nations, that is, to promote and maintain a peaceful settlement of the situation," peacekeeping operations were lawful and consistent with the goals of the UN Charter.¹⁰ Peacekeeping operations have, therefore, occupied a useful niche in the international security system in the absence of Article 43 agreements.

The original functioning of peacekeeping was the monitoring by UN military observers of truces and cease-fire agreements.¹¹ The Suez crisis of 1956 however, prompted the introduction of actual forces for peacekeeping missions. The very first UN force (UNEF) was designed to fulfil the simplest of peacekeeping functions, interposition by separating the fighting parties and

⁹Marrack Goulding, "The Changing Role of the United Nations in Conflict Resolution and Peacekeeping", Speech given at the Singapore Institute of Policy Studies, March 13, 1991 p9. See also Rosalyn Higgins' definition: "Peacekeeping is the act of peaceful third party intervention where the practitioner remains wholly impartial and uninvolved in the dispute of the parties concerned where its term of reference are funded on negotiation and mediation and not on enforcement action" *UN Peacekeeping: Past Lessons and Future Prospects* David Davies Memorial Institute of International Studies, 25th November 1971.

¹⁰ *Certain Expenses of the United Nations Case*, I.C.J Reports, 1962, p151

¹¹ UNTSO (Middle East) UNMOGIP (Kashmir) were established 1948 as peace "observation" missions and thus can be distinguished from the peacekeeping force that was deployed in the Suez crisis. See text above. Recent observer missions have been deployed to areas such as the border between Iran and Iraq (UNIIMOG) and Central America (ONUCA). For an overview of UN Peacekeeping and an evaluation of the UN operation in the Lebanon (UNOGIL) see Ivan Pogany "Evaluation of UN Peacekeeping" British Yearbook of International Law (1987) E.Suy "Legal Aspects of UN Peacekeeping Operations" Netherlands International Law Review 1988 pp318-20 N.Sybesma-Knol "UN Peacekeeping: Why Not?" Netherlands International Law Review 1988 pp321-327; For an excellent insight into earlier UN experiences with peacekeeping, see R.Russell, *United Nations Experience with Military Forces: Political and Legal Aspects*, Brookings Staff Paper, August 1964.

providing buffer zones. Thus, through improvisation over the years, "peacekeeping" has been used to investigate and report on volatile situations, to monitor truces and ceasefires, to verify compliance with agreements, to establish buffer zones and more recently, to protect aid workers in the provision of humanitarian assistance to civilians caught up in civil war.

Over the years, a number of interconnected and essential basic norms have evolved for peacekeeping operations -

- (i) the consent of the parties involved in the conflict to the establishment of the operation, of its mandate, to its composition and to its appointed commanding officer;
- (ii) the continuing and strong support of the operation by the mandating authority, the Security Council;
- (iii) a clear and practicable mandate;
- (iv) the non-use of force except in the last resort in self-defense (self-defense in this context, however includes resistance to attempts by forceful means to prevent the peacekeepers from discharging their duties)
- (v) the willingness of troop-contributing countries to provide adequate numbers of capable military personnel and to accept the degree of risk which the mandate and the situation demand;
- (vi) the willingness of the member states to make available the necessary financial and logistical support.¹²

Only the Security Council may explicitly authorize such a force. However, where the Security Council is paralysed by a veto from one or more of its permanent members, then the General Assembly, acting under the Uniting for Peace Resolution of 3 November, 1950 may immediately

¹²See Brian Urquhart "The Sheriff's Posse" Survival May/June 1990 No.3 Vol XXXIII p200

consider the matter and make recommendations for collective measures, including, if necessary, the use of armed forces.¹³

The first ever UN Peacekeeping force - the United Nations Emergency Force (UNEF)- deployed to diffuse the Suez crisis in 1956 was created by a General Assembly resolution, the direct involvement of two of the permanent members of the Security Council (France and Britain) resulting in vetoes which rendered the Security Council impotent. UNEF established the legal principles of UN peacekeeping operations which have since become the hallmark of all subsequent operations. Nevertheless, by the late 1970's the effect of the Cold War on peacekeeping became so debilitating that no UN peacekeeping force was authorized by the United Nations between 1978 and 1988, when UNIFIL was emplaced and the UN Transition Group in Namibia (UNTAG) was created on paper.

The revival of UN forces

Peacekeeping operations prior to 1992 were little more than extensions of previous efforts, with the obvious exception of the force in the Congo. Although they demanded new tasks such as election monitoring, human rights verification and refugee repatriation, these were easily accommodated within the existing traditional peacekeeping structure. In most cases peacekeeping forces could rely on both a measure of effective cooperation by the principal parties involved and the continuous political support of the Security Council.

¹³ Res.377(V), November 3, 1950, General Assembly, 5th Sess, Official Records, Supp.Np.20, at 10-12 (U.N Doc.A/1775) (1950); 45 American Journal of International Law Supp 1 1951. It does not seem necessary to discuss here all the problems raised by the Uniting for Peace Resolution, as only some of its provisions are relevant to the subject of this paper. For a discussion of these problems see J.Andrassy "Uniting for Peace" 50 American Journal of International Law 563-582 (1956); Ruth B. Russell, *supra* note 11 pp9-10, p19-21.

Since 1988 over 14 new peacekeeping operations have been established, the number of UN soldiers increasing four-fold in the first half of 1992.¹⁴ Some of these operations involve traditional, largely military type activities such as the military observers deployed to the border between Iraq and Kuwait while others demand new tasks. Recent operations have been set up to help implement negotiated cease-fires between warring factions in Namibia, Angola, Cambodia, El Salvador and Mozambique. The former Yugoslavia has become the UN's largest peacekeeping commitment to date and has far-reaching implications for the way in which UN peacekeeping operations are organized and conducted in the future. The US-led operation in Somalia for example, flies directly in the face of established practices of UN peacekeeping, by which only minimal force is used in self-defence. Both operations have added a new dimension to the task of peacekeeping in the 1990's: the protection of the delivery of humanitarian supplies to civilians caught up in a civil war.

As the Secretary General Boutros Boutros Ghali stated: "[t]he 1990's have given peacekeeping another new task: the protection of the delivery of humanitarian supplies to civilians caught up in a continuing conflict..." He then went on to say that more force may have to be used in the former Yugoslavia "if the United Nations is to assert the Security Council's authority..."¹⁵

Traditional peacekeeping forces simply cannot deal with the demands of intrastate violence and the humanitarian crises that arise from them.¹⁶ Many of the peacekeeping operations deployed

¹⁴ Dr Boutros- Boutros Ghali "Empowering the United Nations" *Foreign Affairs*, 72:5 Winter 1992/93, p91

¹⁵ *Ibid*

¹⁶ The United Nations has been swamped by recent requests for peace-keeping operations to suppress civil strife. Rwanda is the latest casualty of the UN's recent approach to limited intervention. See Colum Lynch, "Overstretched"-UN lacks Will, Funds to Intervene, Official says," *The Boston Globe* November 7 1993 (noting that the Under-Secretary General admits that the UN is overwhelmed by requests for aid); Gretchen Lang, "Rwanda in Grip of Fear After Failed Coup: Thousands Die in Ethnic Strife as Others Flee Country; Officials are in Hiding"

between 1989 and 1992 were too small, too slow and ill-equipped for the task.¹⁷ As a result, UN troops in Bosnia have been unable to achieve their goal and instead have become embroiled in a situation where violence continues unabated around them.¹⁸ The experience of UN operations since and indeed, the principle military lesson from Bosnia is that any kind of peacekeeping operation in a civil war is exceptionally difficult.

From a legal perspective, the current status of recent operations is unsatisfactory. Up until recently, the conceptual distinction between peacekeeping on the one hand and enforcement action under Chapter VII of the Charter on the other, has been strictly maintained, with the partial exception of Katanga. Recent operations have, however, moved the whole concept of peacekeeping into the grey area of peace enforcement without actually defining the exact legal provision on which these operations are based. Reporting to the Security Council in late November 1992, the Secretary General noted that in protecting the delivery of humanitarian supplies, UN troops were "pioneering a new dimension of UN peacekeeping" but added that this did not require a "revision of the peacekeeping rules of engagement."¹⁹

The Boston Globe November 7, 1993 (noting that the situation in Rwanda and neighbouring Burundi is characterized by an exiled democratic leader, ethnic cleansing and fleeing refugees); see also UN Doc S/26631, 25th October 1993 and UN Doc A/48/L.16, 2 November 1993

¹⁷ See Julia Preston "UN Faces Crisis of Credibility" *The Washington Post*, February 7 1993 (noting the financial, practical and operational crisis concerning UN peacekeeping); Paul Lewis "UN is Finding its Plate Increasingly Full," *The New York Times*, 26th September 1993; Richard Bernstein "Sniping is Growing at the UN Over Weaknesses" *The New York Times*, June 21, 1993; Lynda Hossie "UN in Tatters, peace by bitter peace" *The Globe and Mail*, Tuesday June 8th 1993

¹⁸ See "Trapped Soldiers anger UN" *The Globe and Mail*, August 31, 1993 (noting the condemnation by the Security Council of the use of peacekeepers as pawns in the war); Eve Ann Prentice, "Peace for all nations may prove a goal beyond the UN" *The Times (London)* July 4th, 1993 (noting that the UN's campaign in Somalia and Bosnia are increasingly criticized as at best ineffective and at worst doing more harm than good)

¹⁹ *Further Report of the Secretary General Pursuant to Security Council Resolution 743 (1992) S/24848* 24th November 1992 p16

Moreover, the current crises in Somalia and Bosnia have fundamentally redrawn the parameters of UN peacekeeping. It would appear to be insufficient for peacekeepers to merely implement agreements or separate antagonists. The international community is now demanding that the UN demarcate boundaries, disarm warring factions and guarantee the delivery of humanitarian aid in war zones with or without the consent of the parties to the conflict. These are clearly tasks that call for more powerful peacekeepers to actually enforce the peace as opposed to the less tangible tasks previously sought in the past.²⁰

Accordingly, there is a growing body of opinion which supports the view that UN peacekeepers should be able to use armed force in contradiction to their basic character to implement their mandate. The rationale behind these proposals is largely in response to the growing frustrations over the inadequacies of current UN peacekeeping operations. The UN operation in Bosnia for instance, has been a classic case of how not to do it. The Secretary General's special mediator insisted from the start that a cease-fire be in place before deploying peacekeeping forces which allowed extremists on both sides to delay UN action by violating successive ceasefires. In addition, by requiring that the two sides agree where peacekeeping forces would be deployed, the UN forced them to bargain on the central issue of borders even as combat continued. This assured that the conflict would drag on until a military stalemate emerged. By early 1993, however, the UN and its member states belatedly began to acknowledge that not all parties were able or willing to agree fully to a peace plan and to keep their military forces and factions under control. Consequently, UN discussions began to focus on a "peace-enforcement" unit of UN forces that would go beyond the traditional UN peacekeeping role and be empowered to use

²⁰John Mackinlay, "Powerful Peacekeepers" *Survival*, No. 3 Vol XXXIII May/June 1990

preemptive force to prevent outbreaks of violence. This was largely in response to fierce criticism on the ground of the mandate of the UN peacekeepers. One French General Commander compared the UN force to a "goat tethered to a fence" while another declared that "there is a fantastic gap between the resolutions of the Security Council, the will to execute those resolutions and the means available to commanders."²¹

Notwithstanding these criticisms, by allowing so-called peacekeepers to use force to protect humanitarian relief ignores the fundamental premise on which peacekeeping was based and moves the whole concept of UN peacekeeping into the murky waters of peace-enforcement, an area hitherto uncharted by the United Nations. This section of the thesis, accordingly, takes the view that UN peacekeeping operations can be sufficiently strengthened without modifying their basic principles. It will, therefore, examine the concepts of peacekeeping and peace-enforcement in the light of recent crises in Bosnia and Somalia. The hypothesis this section seeks to illustrate is that peacekeeping is an inappropriate instrument of policy for dealing with internal ethnic warfare of the kind we are witnessing in Bosnia. It would almost seem pointless to reiterate the fact that not only are peacekeeping and peace-enforcement, legally distinct concepts under the UN Charter, they also perform entirely separate functions. Instead of theorizing over whether or not to arm peacekeepers, it is asserted that the UN should concentrate its efforts on creating a credible international enforcement mechanism under Article 43 of the UN Charter to deal specifically with humanitarian crises in which there is no peace to keep. A peacekeeping force should only be deployed in a conflict where there is an agreed ceasefire already in place. Only when the Security Council has determined that the chances of achieving a ceasefire are

²¹ See Roger Cohen "Dispute Grows Over UN's Troops in Bosnia" *The New York Times*, January 19th 1994

small and the situation warrants the use of force, would Chapter VII enforcement measures be activated and a UN peace-enforcement deployed under Article 43. This "two-tier" approach would remove the conceptual and legal ambiguities of current peacekeeping operations, thereby restoring the credibility of the United Nations.

The practical advantages of this approach are also enormous. UN peacekeepers would be retained for use in traditional peacekeeping situations such as monitoring ceasefires and verifying compliance with agreements, whereas a UN peace-enforcement army would have the military capability to implement Security Council resolutions on the ground. Such a force could have been deployed in Bosnia to break the Serbian stranglehold of Sarajevo and ensure the safe delivery of humanitarian aid. Thus, the question of the legal basis for United Nations armed forces is not only of conceptual importance but also of immense practical significance for the future effectiveness of the world organization in keeping the peace.

It would be instructive to articulate some of the traditional norms of peacekeeping to demonstrate how certain principles have become contentious in the light of recent peacekeeping operations.

Traditional Norms of UN Peacekeeping

(i) The non-use of force

The essence of peacekeeping is the use of soldiers as the catalyst for peace rather than as the instruments of war.²²

The principle of the non-use of force was established by Secretary General Dag Hammarskjöld

²² Brian Urquhart, "The Future of UN Peacekeeping" *Netherlands International Law Review*, 1989, p52

when he created the first UN peacekeeping force in 1956 (UNEF) to contain the Suez crisis.²³ The principle centred around the former Canadian Prime Minister, Lester B. Pearson's personal philosophy of peace and also the recognition that the UN Charter did not permit the use of force unless there was a Security Council determination under either Article 39 or Article 51 which permits individual or collective self-defence.²⁴ UNEF was accordingly based on consent and not coercion, thus Chapter VII did not apply. Hammarskjöld's definition of the use of force in self-defence was unequivocal in its legal analysis:

A reasonable definition seems to have been established in the case of UNEF, where the rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions.²⁵

The principle of the non-use of force for UN peacekeepers is accordingly based on practical as well as idealistic considerations.²⁶ The rationale behind this principle is that the parties

²³It was, however, Lester B. Pearson that received the Nobel Peace Prize in recognition of his efforts in UN Peacekeeping. For a full account of UNEF, see Gabriella Rosner, *The United Nations Emergency Force* (1963)

²⁴According to Hammarskjöld, the functions of the force would be "when a ceasefire is being established, to enter Egyptian territory with the consent of the Egyptian government, in order to maintain quiet during and after the withdrawal of non-Egyptian troops and to secure compliance with the other terms established in the resolution of November 2, 1956. The force obviously should have no rights other than those necessary for the execution of its function, in cooperation with local authorities. It would be more than an observer corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor moreover, should the force have military functions exceeding those necessary to secure peaceful conditions on the assumption that the Parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly." UN GA Doc A/3302 p21. It was on the basis of this report from the Secretary General that UNEF was established - Res 1001, GAOR, November 7 1956, Document A/3308. The right to use force later became a bitterly contested issue between the UN Secretary General, Egypt and Israel. See General Burns, Lt Gen E.L.M. *Between Arab and Israeli* (1963) p272.

²⁵General Assembly Document A/3943, para 178.

²⁶See F.T.Liu, "UN Peacekeeping and the Non-Use of Force" International Peace Academy, Occasional Paper Series, (1992).

concerned, by consenting to a UN peacekeeping operation, undertake to cooperate with the UN force and honour certain commitments. Any subsequent problems between the UN peacekeeping force and one of the host-factions can be resolved by diplomatic negotiation and suasion; the use of force therefore becomes not only unnecessary but counterproductive. As Professor Goodrich has correctly pointed out:

peacekeeping operations have invariably been undertaken, not for the purpose of influencing the conduct of states by coercive methods, but rather to assist in the implementation of agreements already reached and incidental thereto, to perform such functions as observe, report and assist in the settlement of minor differences and perform local police functions and in general to do those things that are thought to contribute to the ultimate goal of peaceful settlement or adjustment.²⁷

Consequently, it is thought the parties to a conflict will be more amenable to the interjection of a UN force if it is perceived to be impartial and non-combatant. In theory, therefore, this principle is deceptively simple. However, it encountered considerable practical difficulties in the Congo.

(a) The Congo Crisis

On June 30, 1960, the Congo gained independence from Belgium. Within two weeks, the Congolese army had begun to rebel, and the Katanga province declared its secession. At the urgent request of the Congolese government, the UN Security Council met to discuss the crisis and less than two months later, UN troops numbering 23,000 (ONUC) arrived in the Congo.²⁸

²⁷ Goodrich, *The UN in a Changing World*, (New York) 1974 at 149-150; See also Ruth Russell, *supra* note 11 at 6-7

²⁸ ONUC was deployed in response to a request by President Joseph Kasavubu of the Congolese government.; see Telegram from Congo, UN SCOR, 15th Sess, Supp for July-Sept 1960 at 11, UN Doc S/4382 (1960) Two days later the Security Council called upon Belgium to withdraw and authorized the Secretary General "to take the necessary steps" to assist the Congolese military in dealing with the crisis; Security Council Res 143 (1960) For an analysis of the legal issues in the Congo See E.M. Miller, "Legal Aspects of the Congo Crisis" *American Journal of International Law* 1971; King Gordon, *The UN in the Congo: A Quest for Peace* (1962), Catherine Hoskyns, *The Congo: A Chronology of Events*, Jan 1960-Dec (1961) which contains documentary appendices.

During most of its four year operation, operating in a complex internal crisis, the principle of non-use of force proved an exceptionally elusive norm to follow. Initially, the Secretary General articulated the non-use of force except in the last resort in his first report on ONUC, which specified that UN peacekeepers could not use force on their own initiative but only in response to an "attack with arms" in other words, deadly force.²⁹ Thus, if a UN soldier was subjected to actual gunfire he could legitimately fire back but not if the enemy merely aimed his gun in the direction of the peacekeeper.

However, political events swiftly overtook any legal theorizing over the legitimacy of force when the breakdown of law and order became absolute in November 1960. ONUC was urged to deal firmly with the military irregularities "by using force and disarming them of weaponry; the situation will certainly be hopeless unless something drastic is done to deal with the Force Publique." (ANC)³⁰ This proposal was however, strongly rejected by the United Nations, the argument being that "the UN force is in the Congo as a friend and partner, not as an army of occupation... Obviously, if the force began to use its arms to wound and kill Congolese, its doom would be quickly sealed, for it cannot long survive amidst a hostile public."³¹

Although no initial action was taken, ONUC was later authorized by the UN to use force beyond self-defence.³² This move ironically "sealed its fate". The harassment to which ONUC was

²⁹*First Report of the Secretary General*, para 5, UN SCOR, 15th Sess, Supp for Jul-Sept 1960 at 17.

³⁰British Major-General H.T.Alexander, Chief of the Ghanian defence staff, cited in F.T.Liu *supra* note 26 at p19

³¹Ralph J.Bunche, Special Representative of the Secretary General in the Congo, *Letter to the Secretary General*, SC Document, S/4451

³²Although the UN was authorized to "take all appropriate measures to prevent the occurrence of civil war in the Congo", the use of force was not undertaken on the basis of Articles 41 or 42 of Chapter VII. See Ruth Russell *supra* note 11 at 109

subsequently subjected to clearly demonstrates the complexities incurred by a traditional peacekeeping force which transcends the legal limits of self-defence and becomes part of the conflict.

(ii) Traditional norm of impartiality

The principle that a peacekeeper restrain from resorting to armed force unless absolutely necessary is related to the norm of impartiality. It is imperative to the success of UN peacekeeping, that the force does not take sides in a conflict. The correlation of these norms was evident during ONUC's deployment in the Congo which demanded the interposition of the force between the warring parties. The practical demands on the ground however, resulted in ONUC becoming a party to the conflict in violation of its mandate and the traditional norm of impartiality and non-engagement³³.

ONUC was deployed at the request of the newly independent Congolese government, headed by President Joseph Kasavubu and his rival Prime Minister Patrice Lumumba. Following the assassination of Lumumba,³⁴ the Security Council authorized the use of force to prevent civil war, stop all military operations and control the armed factions.³⁵ However, Katangese resistance to ONUC continued to mount and soon ONUC and Katangese forces were engaged

³³ The Secretary General earlier stated that "the force cannot be permitted to become a party to any internal conflict." *First Report of the Secretary General* para 7 UN SCOR, 15th Sess, Supp for July-sept, 1960 at 17 UN Doc S/4389 (1960); Oscar Schachter reaches a similar conclusion in, *Authorised Uses of Force by the UN and Regional Organizations*, in *Law and Force* in which he argues that "the self-defence principle was stretched far beyond its usual legal meaning."

³⁴ Reported in UN SCOR, 16th Sess, Supp for Jan-March 1961 at 95, UN Doc S/4688/Add.1 (1961) For a detailed account of Lumumba's arrest and death, see *Note by the Secretary General*, UN SCOR, 15th Sess, Supp for October-December, 1960 at 67, UN Document S/4571 and Add 1. (1960), *Report to the Secretary General*, UNSCOR, 16th Sess, Supp for Jan-March at 88 UN Doc S/4688

³⁵ Security Council Res 161 para A (1), B (2) (1961)

in battle across the province.³⁶ A subsequent Security Council resolution³⁷ was interpreted by the leader of the Katangese secession movement, Moïse Tschombe as a declaration of war, thus escalating in the harassment of ONUC in Katanga.

The principle of the non-use of force except in self-defence as enunciated in the Congo by Dag Hammarskjöld was also defined in the Secretary General's guiding principles for the operations of the United Nations force in Cyprus (UNFICYP) in 1964.³⁸ The document represented a step towards articulating legal guidelines for the precise circumstances in which UN forces could use force. The concept was broadened to encompass attempts to force withdrawal, attempts to disarm and violation of the premises. Troops were also authorised, in an important development, to use armed force in order to resist "attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders."³⁹

Notwithstanding an authorization by the Security Council, the use of force, no matter what context it is authorised is always restricted by the application of the customary legal norms requiring necessity and proportionality.⁴⁰ Thus, minimum force was authorized for UNFICYP's

³⁶ For an account of the various clashes, see *Report to the Secretary General*, UN SCOR, 16th Sess, Supp for April-June, 1961 at 22, UN Doc S/4791 (1961), & *Report of the ONUC O/C*, UNSCOR, 16th Sess, Supp for July-September 1961 at 99, UN Doc S/4940 & Adds 1-9 (1961).

³⁷ Security Council Res 169, para 1 (1961) "The Security Council strongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga, with the aid of external sources and manned for foreign mercenaries." *Id*

³⁸ *Aide Memoire, in Note concerning the function and operation of UNFICYP*, UNSCOR, 19th Sess, Supp for April-June, 1964 at 13, UN Doc S/5653 (1964)

³⁹ *Ibid*, *Aide Memoire*, para 18 (c). This turn of phrase later evolved into the UNEF II definition of self-defence to include "resistance to attempts by forceful means to prevent the force from discharging its duties under the mandate of the SC." - *Report of the Secretary General* para 4(d) UN Doc S/11052/Rev.

⁴⁰ *Nicaragua v. US Case* ICJ 1986 94 (June 27) (application of force in self-defence and necessary norms)

mandate and then only after "all necessary means of persuasion have failed."⁴¹

The application of customary norms of international law is all the more compelling when one considers that the UN Charter does not mention the rules of engagement for UN peacekeeping; emphasizing the entirely "ad hoc" nature of such operations. This assertion of course, rests on the premise that UN peacekeeping operations have, until very recently, not stemmed from Chapter VII which authorizes the use of force. Arguably, however, the legal authority for UN peacekeepers to use force in self-defence, rests not only on customary law but also Article 104 of the UN Charter which permits the UN "such legal capacity as may be necessary for the exercise of its functions."

Evolving norms of UN peacekeeping operations.

At no time since its inception has the nature or the concept of peacekeeping been as open to redefinition as it is at this juncture. As the number of operations proliferates, the essence of peacekeeping as a legal concept has begun to evolve.

Recent peacekeeping operations have demanded new tasks of UN peacekeepers, arguably inappropriate with their traditionally perceived image of mediators. The UN has become more and more involved in operations authorized under Chapter VII of the UN Charter, moving the concept of peacekeeping into a whole new grey area of peace-enforcement, which would no longer appear to require the consent of the host state.

The traditional concept of peacekeeping as mentioned relies entirely on the consent and cooperation of the parties to the conflict. This has proved elusive in situations like Bosnia and Somalia where peacekeeping has been unsuccessful in taking the forceful action required. While

⁴¹*Aide Memoire*, para 18, *supra* note 38

this is attributable to the fact that the Security Council has deployed peacekeeping operations in conflicts where, in fact, there is no peace to keep, the current tendency of the Security Council is to continue to give UN peacekeepers more room for manoeuvre.⁴²

As Marrack Goulding, the Under Secretary-General for Peacekeeping points out:

In political, legal and military terms, and in terms of the survival of one's own troops, there is all the difference in the world between being deployed with the consent and cooperation of the parties to help them carry out an agreement they have reached and, on the other hand, being deployed without their consent and with powers to use force to compel them to accept the decisions of the Security Council.⁴³

This is an controversial development which has tarnished the image of the United Nations as a credible peace-institution.⁴⁴ However, it should be noted that the original mandate of UNPROFOR was to secure the delivery of humanitarian aid, to deter breaches of undertakings and to mediate local disturbances. The UN peacekeepers have proved invaluable in helping to distribute humanitarian aid to innocent civilians caught up in the fighting. The crisis in the former Yugoslavia has, however, demonstrated that UN peacekeeping, conceived in its

⁴² See eg, Security Council resolutions on Haiti and Rwanda which, though too early for legal analysis, demonstrate the new proactive approach of the UN.

⁴³ Marrack Goulding "The evolution of United Nations peacekeeping" *International Affairs*, 69 (3) July 1993, at 461

⁴⁴ See Paul Lewis "Reluctant Peacekeepers: Many UN Members Reconsider Role in Conflicts" *The New York Times*, December 12, 1993, at A22 (noting that the UN does not have the staff, expertise or funding to engage in extensive peace-keeping operations. The Council is losing its credibility as its "unenforceable resolutions and statements from this year alone are ignored.) Michael Gordon "New Strength for UN peacekeepers: US Might," *The New York Times*, June 13, 1993 at A16 (questions UN's capacity to carry out extensive peace-keeping operations without US firepower in Somalia and calls into question impact this will have on the Organization's credibility); "Heart of Gold, Limbs of Clay," *The Economist*, June 12 1993 (argues that legitimacy of the Security Council is at stake because of its lack of democracy. Critics charge that the Council has become little more than an extra arm of Western foreign policy and that Boutros Ghali suffers from "imperial over-reach") "Open the Club," *The Economist*, August 29, 1992 at 14 (the South argues that "the Council is becoming a flag of convenience for old-time neo-imperialists"), Richard Bernstein "Sniping is Growing at the UN Over Weakness in Peacekeeping" *The New York Times*, June 21, 1993 at A6 ("noting that the UN is in a mess due to its lack of money, human resources and efficiency")

traditional form, cannot hope to achieve anything more than the tasks assigned to it for humanitarian purposes.

As the former UN Secretary General Dag Hammarskjöld concluded on the role of peacekeeping in a civil conflict: "It seems to me, on the basis of the Congo experience, that the only sound way to inject an international armed force into a situation of that kind is to ensure that it is for clearly defined and restricted purposes, is fully under the control of the UN and always maintains its primary posture of arms for defence."⁴⁵

(i) Departure from Impartiality as a Norm

Traditional UN peacekeeping operations require peacekeepers to be absolutely impartial.

However, in recent UN operations, for example, UNPROFOR and UNOSOM II, the UN has been unable to retain its image as an impartial mediator and as a result has favoured one party to the conflict more than another. In the former Yugoslavia, the Serbs have quite clearly acquired the reputation of the aggressor side by the UN and have been blamed for the systematic rape and massacre of thousands of Muslim and Croats.⁴⁶ Although it is difficult for UN peacekeepers to remain impartial to horrific atrocities such as the practice of "ethnic cleansing" there is evidence to suggest that atrocities have been committed on all three sides to the conflict. A similar situation occurred in Somalia when UNOSOM II announced a shift in mandate to target General Aideed personally. In the weeks following the attack on UN Pakistani troops in which 24 were killed, the *New York Times* reported numerous assaults by US Rangers against

⁴⁵ UN Doc S/5240 (February 4, 1963)

⁴⁶ See Roger Boyes "Frontline Peacekeepers stumble into Bosnian showdown" *The Times (London)* September 3 1992 (noting that the Serbs consider the UN to be just another party to the conflict and that aid workers helping predominantly Muslim enclaves reinforces the Serbs impression that the UN is no longer impartial)

General Aideed's home, command centre and forces. Although the US casualties that were sustained were not sanctioned by the UN, nor, in fact, ever notified to the UN, the US pressured the Security Council to pass a resolution ending the "manhunt".⁴⁷

Deploying a UN peace-force under Chapter VII would appear to obviate the requirement for impartiality in an ethnic conflict with the unfortunate consequence that the UN becomes embroiled in what is, essentially, a quagmire. It also becomes difficult for the UN to retain its credibility as a "broker of the peace" during diplomatic negotiations.⁴⁸ However, not even the UN Secretary General believes it is possible for a UN force operating under Chapter VII to remain impartial in a civil war.⁴⁹

In sharp contrast to the debacle of Somalia and Bosnia, the UN operation in Cambodia (UNTAC) remained strictly impartial, despite the frequent attacks on UNTAC by the PDK (a.k.a, the Khmer Rouge) and the NADK (National Army of Democratic Kampuchea). UNTAC was also refused access to areas under the control of the Khmer Rouge but chose not to enter them forcibly.⁵⁰ The circumstances were, however, notably different in Cambodia. The UN had been able to broker a peaceful settlement prior to the deployment of the peacekeeping force and

⁴⁷ Security Council Resolution 885, para 8 (1993)

⁴⁸For example, the UN is perceived by the Somalis as just another warring faction and thus cannot make any significant headway with negotiations with clan leaders. See eg Julian Hopkins, Director of Care (UK) *Letter to the Times (London)* July 14th 1992

⁴⁹See *Further Report of the Secretary General*, UN Document S/24848 (1992), para 49; "UN troops may have to move beyond the usual peacekeeping mode of impartiality between two parties to a conflict who have both agreed to the United Nations role. They themselves may become a party to a conflict with whoever tries to block, rob or destroy the convoy which they are protecting." See also the Secretary General's *Agenda for Peace*, *infra* note 118

⁵⁰"Somalia: Learn from Cambodia", *The New York Times*, September 29th, 1993 (noting the difference between peacekeeping and partisan engagement.) While the Khmer Rouge murdered their political opponents in front of UN peacekeepers, the UN did not try to disarm the Khmer Rouge forcibly and relied mainly on diplomatic pressure to curb human rights abuses. UN resolutions in Somalia by explicitly calling for disarming warlords in Somalia have denied scope for diplomatic flexibility and focused on military confrontation instead.

thus proactive measures were not necessary. Nevertheless, the operation in Cambodia has been considered a success resulting in free and fair elections in 1992⁵¹ while UNPROFOR and UNOSOM remain unable to fulfil their mandate.

The traditional norm of impartiality would therefore appear to have been replaced by a greater intolerance towards warring factions or states which either attack UN troops directly or commit gross violations of international human rights. While it is salutary that the UN is attempting to deal with such flagrant acts of violence against human rights, it is open to conjecture whether UN peacekeepers should engage in areas of inherent complexities.

(ii) Problems in UN Command and Control of Peacekeeping

In addition to theoretical tensions surrounding UN peacekeeping there are also growing signs of discontent among national contingents of the traditional UN approach to command and control of its peacekeeping operations.⁵² This problem became acute in Somalia, where Italian and Pakistani troops refused to be stationed in certain areas on the instructions of their national governments on the grounds that the deployment was too dangerous. The Americans recently indicated their withdrawal from UNSOM II unless the UN guaranteed that US troops would not be used on patrol in volatile situations.⁵³

⁵¹ *Report of the Secretary General*, paras 2 and 15, UN Document S/25913 (1993) see also William Shawcross, "The Nightmare is Over" *The New York Times* October, 12th 1993 (noting that the UN Peacekeeping action in Cambodia was a success) *Report of the Secretary General*, paras 2 and 15, UN Document S/25913 (1993)

⁵² Donatella Lorch, "Disunity Hampering UN Somalia Effort," *The New York Times*, July 12, 1993, at A8. The Italians went so far as to mount a unilateral weapons search operation, in which 3 Italian soldiers were killed; see "Italy threatens to pull UN troops out of Somalia," *The Glasgow Herald*, July 14 1993 (noting fierce Italian criticism of a UN military strike led by American helicopters); Alan Cowell, "Italy in UN Rift, Threatens Recall of Somali troops." *The New York Times*, July 16 1993,

⁵³ Elaine Sciolino, "US Asks UN Not to Use American Troops on Patrol" *The New York Times*, September 26, 1993 (noting that the UN operation in Somalia had become an American one yet pointing out that unless the American troops helped the UN peacekeepers, "it will limit the flexibility of the peacekeeping force and ultimately

In addition to the unwillingness of the Italian government to the possible deployment of Italian troops patrolling dangerous areas, there was the perception from Rome that the UN operation was being run exclusively by US command.⁵⁴ The feud culminated in the sacking of the Italian general in Somalia in July 1993.⁵⁵ The Americans remained adamant that the military operation should focus its efforts on arresting or even killing General Aideed whereas the Italians and several other contingents demanded that the UN should get back to its original mandate of protecting humanitarian relief.⁵⁶

While the use of force in Somalia was authorised by the international community, the overall conclusion is that it was an American operation, under US command and control. While the delegation of the command and control of the UN force to the US military was a pragmatic decision in recognition of the general reluctance of the US to place troops under UN command, the subsequent feuding is indicative of the inherent problems that can result from such a move.⁵⁷

affect the mission"; "UN Chief sees a Disaster in Somalia if US Withdraws Its Troops", *The New York Times*, September 30th, 1993 Boutros Ghali was quoted as saying "Actual withdrawal of the force would lead to the rapid decomposition of the whole UNOSOM operation". *Id*

⁵⁴ Richard Dowden "UN Somalia Effort Crumbles Amid Raids and Bickering," *The Guardian*, July 1993, (highlighting the complaints of aid agencies that US policy had made it too dangerous to work in Mogadishu and that resentment of the American-led operation was running high)

⁵⁵"UN Tries to Clear Up Somalia Mess", *The Guardian*, July 14 1993 (noting the UN was considering the legal implications of sacking the commander of a peacekeeping contingent)

⁵⁶"Italy seeks halt to peacekeeper's fighting" *The Globe and Mail*, July 12, 1993 (noting parliamentary and public opposition in Italy to "warlike" operations); "Long among most obliging allies, Italy challenges Washington, UN" *The Globe and Mail*, July 16, 1993; "Infighting Hampers UN in Somalia" *The Guardian*, July 23, 1993 (noting that even Pakistan, close allies of the US, was calling for a fundamental review of the US-led operation in Mogadishu stating that Pakistani troops were paying the price for earlier mistakes in the operation.)

⁵⁷See Elaine Sciolino, "UN Secretary General has to direct his peace efforts at Washington too" *The New York Times*, October 16th 1993 (noting bitter feuding between the Secretary General and the US Admin over Somalia)

Other criticisms may be made of the UN force in Bosnia. A report from a UN fact-finding team following the killing on January 8th 1993 of the Bosnian Deputy Prime Minister found "...many of the freshly arrived units in the area had no experience or training for peacekeeping operations. Systematic procedures had fallen by the wayside....while commanders attempted to solve operational dilemmas between overreaction and underreaction with limited military capability."⁵⁸

In a scathing attack on UN peacekeeping operations Lewis Mackenzie, drawing from his experience as a UN commander in the former Yugoslavia stated that:

Over the past years, the numbers of UN peacekeepers deployed around the world has grown from fewer than 5,000 to well over 60,000 and yet...there is still no military style command centre at the UN: no-one on duty 24 hours a day, 7 days a week, no communications room with maps of the various operational areas on the wall, and mission-knowledgeable duty officers manning the radios and keeping a log of all the information and requests coming in from the field. No army in the world would deploy its troops with so little direct control over what they were doing. The UN shouldn't either.⁵⁹

Within UNPROFOR for example, there were 6 different Head-Quarters and no concerted, overall plan to meet the logistical needs of these groups. Part of the problem is due to the absence of a central coordinating committee at the United Nations in New York to oversee its military operations. As one French Government Official asserted "[t]he fact is that United Nations command is proving too cumbersome for a military mission. Everything takes too much

⁵⁸*The Washington Post*, February 7th 1993; "US Troops Reinforcements in Somalia Delayed 9 Hours" *The New York Times*, October 6th, 1993

⁵⁹ Lewis Mackenzie *"Peacekeepers: The Road to Sarajevo,"* 1993 at 331.

time, and there is considerable [restrictiveness] among our soldiers."⁶⁰

These criticisms illustrate the inadequacies of current UN policy to civil conflicts, adding support for the need to develop alternative approaches, not only in terms of new principles but also for the role of UN forces on the ground. Given the US-led coalition's prosecution of the Gulf War and the lack of reporting once the decision to authorize "all necessary means" was taken, the nature of centralized command and control has assumed a greater importance."

UN Troops and the Use of Force

Clearly, UN forces have already assumed a more activist role in conflicts requiring the use of force. While UN troops traditionally cannot use force except in the last resort as self-defence, there is evidence to suggest that this norm is also evolving. It may for example, be argued that the insertion of the clause requiring "all necessary means" in the Security Council resolution concerning Bosnia and Somalia⁶¹ has compelled international lawyers to re-examine the conceptual debate over the use of force for UN peacekeepers. The creation of the "no-fly zone" over Bosnia⁶² and the subsequent shooting down of Serbian planes invoke similar arguments. Ironically, this activist role was also evident in Cambodia which has been cited as an example of a successful peacekeeping operation, where UNTAC was authorized to arrest and prosecute persons for committing acts of political violence; a role which arguably goes beyond the parameters of the concept of self-defence. The UN had the authority to take pro-active measures

⁶⁰ The literal translation may be incorrect. See Roger Cohen "Dispute Grows over UN's Troops in Bosnia" *The New York Times* January 20, 1994

⁶¹ See eg. SC.Res 770 (1992) and SC Res 836 (1993) for Bosnia, and SC Res 781, para 1 (1992) for Somalia

⁶² Security Council Res 781, para 1 (1992) and Security Council Res 816, para 4 (1993)

against a party whose violence was directed at someone than the UN.⁶³

Some legal commentators have called for a revision of the rules of engagement, their belief being that if the UN is to continue to receive requests for intervention in ethnic disputes, UN peacekeepers on the ground should be given the military resources and proper mandate to enforce UN resolutions.⁶⁴ The need to arm peacekeepers with weaponry to face their adversaries is long overdue according to some experts. John Mackinlay argues, for instance, for the use of force for peacekeepers which must be expressed in broad terms to span most contingencies.⁶⁵ It is possible to defeat the arguments from scholars and politicians for expanding the role of peacekeepers to include the preemptive use of force. The exponents of this argument appear to overlook the experience in the Congo in 1961 where fire-power was used to prevent civil war and deal with mercenary forces. ONUC became the subject of intense criticism and African disaffection while in Beirut in 1983-4, the Multi-National Force, particularly the French and American contingents lost 10% casualties and left behind a city more engulfed in strife than when they arrived. The argument against revising the rules of engagement for UN peacekeepers is further strengthened when one considers the more successful operations in El Salvador, Cambodia, Angola and to a certain extent Cyprus and Sinai in which the norms of impartiality and peaceful mediation were up-held.

The idea of a peacekeeping force using preemptive force contradicts the fundamental

⁶³See the *Agreements on A Comprehensive Political Settlement of the Cambodian Conflict* ("Paris Agreement") October 23, 1991, 31 ILM, 183 (Article 16) The Special Representative at the UNTAC Office had such powers in January 1993 and arrest and prosecutions of offenders commenced shortly thereafter; *Report of the Secretary General*, para 15, UN Doc S/25289 (1993)

⁶⁴ See John Mackinlay, *supra* note 20

⁶⁵ *Ibid* at p248 Mackinlay cites for example, unforeseen acts of violence by unrepresentative minorities .

assumptions on which peacekeeping is based. For the UN soldier caught in the midst of ethnic warfare there is all the difference in the world between traditional peacekeeping and full-scale war. There does not exist a conceptual device in the UN Charter for the progressive escalation from the passive role of peacekeeping to conventional warfare, which demands much more from UN forces. Indeed, one of the great virtues of peacekeeping operations is their non-combatant, and therefore neutral stance. The use of force would likely destroy this characteristic and along with it, the vital co-operation of at least one of the parties in conflict.⁶⁶ That does not mean, however, that UN troops cannot use preemptive force under the legal authority of Article 43 of the UN Charter. This concept will be explored further on in this section.

A peacekeeping force which descends into the conflict may well become another party to the conflict instead of providing a solution.⁶⁷ As Brian Urquhart, an ardent supporter of UN peacekeeping urges, "[T]here is an important difference between the show of strength and the use of force."⁶⁸ Moreover, as already stated "successful" peacekeeping operations are often "buffer zone" peace forces sent in to well-defined areas of operation with an agreed ceasefire in place. Current crises of the intrastate variety would no longer appear amenable to the use of buffer zones. Often the warring factions in civil conflicts are so numerous and unaccountable that identifying the potential enemies becomes extremely difficult and any diplomatic negotiation

⁶⁶ This is one of the criticisms of the Somalian operations where UN troops have been criticised for their "warlike" approach. Concentrating on arresting or killing General Aideed have hampered diplomatic efforts and relief work.

⁶⁷ The Congo affair in 1961-3 demonstrates this problem - the authorization to use force was expanded to include preventing civil war and dealing with mercenaries although the consequent efforts to implement this mandate illustrates the difficulties this involves. The experience of the non-UN Multinational force in Beirut in the 1980's is also an example of this problem.

⁶⁸*supra* note 22 at p202

a major problem.⁶⁹ On a more practical level there are also widespread doubts that the UN has the military experience to command and administer an enhanced peace-keeping force operating in this proactive manner.⁷⁰

An enhancement of UN peacekeeping operations is not necessarily opposed. Peacekeeping, conceived in its traditional form, properly directed and financed is a vital component of UN efforts to maintain international peace and security. Peacekeeping as an instrument of war, however, is inappropriate and any move to revise the rules of engagement should be resisted. Peace-enforcement is an entirely different concept and requires an approach that contradicts many of the basic assumptions of peacekeeping.

(i) The Former Yugoslavia - Peacekeeping or Peace-enforcement?

The two tier model can best be illustrated by applying it to the crisis in the former Yugoslavia and Somalia where peacekeepers have come under increasing fire on the ground, yet have neither the mandate nor the legal authority from the Security Council to use force except in self-defence. The crisis in the former Yugoslavia is a microcosm of all of the issues discussed so far; peacekeeping or peace-enforcement, arming peacekeepers or maintaining their impartial and neutral role. Unfortunately, the UN experience highlights the inadequacies of the UN peacekeeping force and demonstrates the need to formulate new ways of dealing with intrastate conflicts under Chapter VII.

From the outset the UN chose to deploy a traditional peacekeeping force instead of a peace-enforcement army to ensure the delivery of humanitarian aid and the protection of relief

⁶⁹See John Mackinlay, *supra* note 20 at 243. This is precisely the problem encountered in Somalia and Bosnia.

⁷⁰ Lewis Mackenzie *supra* note 59 at 131

workers. This was a fatal decision and one destined to fail, as clearly there was no peace to keep. The UN later sought to remedy the situation by increasing the mandate of the peacekeeping force, (UNPROFOR) thus moving the peacekeeping force into the murky waters of peace-enforcement. From a conceptual point of view the legal status of the UN operation in the former Yugoslavia is therefore wholly unsatisfactory and inadequate in terms of its mandate.

(a) Original Deployment and Mandate of UNPROFOR

The United Nations initially became involved in Yugoslavia⁷¹ in November, 1991 when the Secretary General's Personal Envoy for Yugoslavia met with Yugoslav leaders, including the Presidents of Serbia and Croatia, to attempt a peaceful settlement to the Yugoslav conflict.⁷²

⁷¹Details of the background to the crisis are beyond the purview of this brief analysis which confines itself to an examination of some of the legal issues and resulting practical dilemmas facing the UN force. For a thorough delineation of the events comprising Yugoslavia's dissolution through mid-1992 see Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *American Journal of International Law*, 569 (1992) Alan James, "The UN in Croatia: an exercise in futility?" *The World Today*, May 1993 p93-96; J. Zametica, *The Yugoslav Conflict* (Adelphi Paper 270, 1992) see also the excellent article by Charles Lewis Nier III, "The Yugoslavian Civil War" *Dickinson Journal of International Law* Vol 10:2 Winter 1992 304-331; Josef Joffe, "The New Europe: Yesterday's Ghosts" *Foreign Affairs* 1992 29-37; V.P. Gagnon, Jr "Yugoslavia: Prospects For Stability" *Foreign Affairs*, 1992 17-35; Sabrina Petra Ramet, *War in the Balkans* *Foreign Affairs* 1992 79-98; Charles Gatti "From Sarajevo to Sarajevo" *Foreign Affairs* 1992 64-78; Christopher Cviic, "Yugoslavia I: New Shapes from Old" *The World Today* August/September 1991 125-127; Michele Ledic, "Yugoslavia II: the costs of divorce" *The World Today* August/September 1991 127-129; James Gow, "The use of coercion in the Yugoslav crisis" *The World Today* November 1992 198-202. Rosalyn Higgins, "The New United Nations and Former Yugoslavia" *International Affairs* 69, 3 (1993) 465-483, 470.

⁷²The EC took the initiative in the crisis, assuming a monitoring and negotiating role in an effort to bring peace to the region and prevent all-out war; see *The United Nations Yearbook 1991*, 214 (describing the EC's introduction into the conflict and peacekeeping efforts thereafter) An EC Ministerial Troika mission (ECMM) dispatched to Yugoslavia to facilitate a truce and the return of all forces to their previous positions, worked out a ceasefire agreement on July 31, 1991 with the aid of the Conference on Security and Cooperation in Europe (CSCE). However, in response to letters from the international community requesting that the United Nations reinforce EC efforts due to the rapidly deteriorating situation in Yugoslavia, a meeting of the UN Security Council was convened on September 25, 1991. See *Letter of September 19, 1991* UN Doc S/22903 (Austria); *Letter of September 19, 1991* UN Doc S/23053 (Canada); *Letter of September 19, 1991* UN Doc S/2305 (Hungary); *Letter of Sept 19, 1991*, UN Doc S/23069 (Yugoslavia)

The Security Council, at its first meeting, unanimously adopted Resolution 713 expressing "deep concern" over the fighting in Yugoslavia, the heavy loss of life, and in particular, the consequences for the border areas of neighbouring countries.⁷³ A peacekeeping operation was not considered however, until all parties had fully complied with the November ceasefire agreement. In the meantime, an arms embargo was imposed in Security Council Resolution 724, 1991 which further concluded that the conditions were still not right for the deployment of a peacekeeping operation.⁷⁴ However, the Permanent Representative of Yugoslavia later requested the Security Council to establish a peacekeeping force⁷⁵ and a small group of UN personnel were sent into the region to promote the maintenance of the ceasefire. The establishment of a UN Protection Force (UNPROFOR) was subsequently approved by the Security Council⁷⁶ and the full deployment was eventually authorized.⁷⁷ Its mission was "to create the conditions for peace and security required for the negotiation of an overall settlement of the Yugoslav crisis." UNPROFOR was originally designed to be deployed in three "United Nations Protected Areas" (UNPA'S) in Croatia, where there were large Serb populations, to oversee the withdrawal of the

⁷³ Security Council Res 713, UN SCOR, 3009th mtg. UN Doc S/23067 (1991)

⁷⁴ Security Council Resolution 724 UN SCOR, 3023rd mtg, para 3, UN Doc S/Res/724 (1991) By this the Security Council presumably meant that there was no ceasefire in place for the peacekeeping force to monitor.

⁷⁵ *Letter from Yugoslavia*, UN Document S/23240 (1991)

⁷⁶ Security Council Res 743 (Feb 21, 1992)

⁷⁷ Security Council Resolution 749 (April 7, 1992) Although the Security Council recalled its primary responsibility under the Charter..for the maintenance of international peace and security..." The initial UN force (UNPROFOR) was not explicitly deployed under Chapter VII. By April of 1992, 8,300 members of UNPROFOR were deployed, and by July 23 of that year, almost all of the 14,000 members were in place. This established the second largest peacekeeping force in the history of the UN, behind that of the UN Transitional Authority in Cambodia (UNTAC). Troops were deployed to four sectors in three United Nations protected areas (UNPA's) in Croatia, despite the continuing tension and reports of daily breaches of the January ceasefire; see "Security Council Establishes Force to Handle Yugoslav Crisis" *The UN Chronicle*, June 1992 at 16,

Yugoslav People's Army (JNA), the demilitarization of the areas, and to ensure that the JNA did not return.⁷⁸ Thus, in addition to overseeing the maintenance of a cease-fire, the original mandate of UNPROFOR was to demilitarize the conflict areas in Croatia, ease ethnic tensions, and to facilitate the return of refugees and displaced persons.⁷⁹

The original mandate can, therefore, generally be considered to be a traditional peacekeeping mandate since the warring parties had essentially "invited" the UN to become involved, had agreed in theory to a cease-fire, and because the Security Council did not specifically authorize the initial deployment of UNPROFOR under Chapter VII.⁸⁰ It was further established that the "normal rules in United Nations peacekeeping operations for the bearing and use of arms would apply."⁸¹

(b) Expanded Mandate of UNPROFOR

Fighting soon spread to Bosnia-Herzegovina⁸² despite the ceasefire agreement reached in April, 1991.⁸³ The UN Security Council therefore authorized the deployment of UNPROFOR in Bosnia

⁷⁸*Report of the Secretary General*, UN Doc S/23592 (1992), Annex III

⁷⁹Felice D.Gaer, "The former Yugoslavia, in A Global Agenda" Issues before the 48th General Assembly of the UN, 6-41

⁸⁰Some Serbian communities within Krajina, however, objected to UN intervention; see *Further Report of the Secretary General*, para 8. UN Document S/23592 (1992)

⁸¹*Further Report of the Secretary General Pursuant to Security Council Res 721* (1991)

⁸²For a description of the early outbreak of hostilities and their toll on Bosnia, see *Further Report of the Secretary General* paras 3-6, UN Doc S/23900 (1992)

⁸³ *Report of the Secretary General Pursuant to Security Council 749*, Annex II (providing in pertinent part that the three parties agree: to declare an immediate and total ceasefire on all territory in Bosnia-Herzegovina, "to stop all activities that can provoke fear and instability among the population," "to suspend all mobilization and remove all artillery," and "to disband all irregular armed forces, in accordance with an agreed timetable") The impossibility of implementing this ceasefire agreement was shortly realized.

to protect Sarajevo airport and humanitarian deliveries in the country.⁸⁴ However, the Security Council initially decided not to give UNPROFOR a mandate under Chapter VII of the UN Charter.⁸⁵ It was not until the humanitarian mission of the UN was severely impeded in May 1993 by fierce military fighting and increasing civilian casualties that the UN Security Council expanded the mandate of UNPROFOR into Bosnia under Chapter VII.⁸⁶ The language of UNSC Res 836 was purposively unambiguous and called upon states under Chapter VII to take "all necessary measures, including the use of force, to facilitate...the delivery...of humanitarian assistance".⁸⁷

Thus, the UN initially sought to adhere to traditional norms of peacekeeping by deploying UNPROFOR to monitor ceasefires and generally report on the crisis. Accordingly, Chapter VII was not invoked. It was only when peacekeepers were prevented from carrying out their humanitarian tasks that the UN Security Council, acted to increase their mandate and authorized UNPROFOR to use "all necessary means" to deliver the aid. This phrase is not only conceptually ambiguous, it does not clarify in what circumstances the soldier on the ground can

⁸⁴Security Council Res 758 (June 8, 1992); Security Council Resolution 757 para 17 (1992) had demanded conditions for unimpeded delivery of humanitarian supplies. UNPROFOR made negotiations to reopen Sarajevo airport for delivery of the supplies, but the agreement was regularly violated. For an account of the implementation of the agreement, see *Further Report of the Secretary General*, UN Document S/24263 (1992)

⁸⁵Chapter VII does not seem to be implied in this case, as evidenced by the fact that Resolution 758 specifically notes that there was an "agreement of all parties in Bosnia to the reopening of the Sarajevo airport for humanitarian purposes, under the exclusive authority of the United Nations, and with the assistance of UNPROFOR," thus showing that the UN was attempting to solve the problem with cooperation as opposed to with force.

⁸⁶UNPROFOR'S mandate was increased "in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia-Herzegovina and to occupy some keypoints on the ground, in addition to participating in the delivery of humanitarian relief to the population." Security Council Res 836, June 4, 1993

⁸⁷*Ibid.* It is thought that the language was suitably vague to secure the Russian vote.

use force beyond the parameters of self-defence. Several criticisms may therefore be made of the decision to deploy a peacekeeping force in the former Yugoslavia.

(c) Critical Appraisal of UNPROFOR

The deployment of a peacekeeping force to Yugoslavia was quite clearly an inappropriate selection of instrumentality. Moreover, the status of the subsequent force was legally unsound. UNPROFOR is being asked to engage in activities, ancillary to the basic nature of peacekeeping. While this in itself is not necessarily fatal to its status as a peacekeeping force, it is nevertheless futile to establish a UN operation with the objective of providing humanitarian aid, without a ceasefire in place.

UNPROFOR's mandate is also unrealistic. The only truly peacekeeping function assigned to UNPROFOR was the request in Security Council Resolution 781 to monitor compliance with the ban on military flights in the airspace of Bosnia-Herzegovina.⁸⁸

Every aspect of the crisis in the Former Yugoslavia has thus made it unsuitable for peacekeeping and appropriate for enforcement action. By allowing the violence to continue without seeking to ensure a ceasefire was in place hampered UNPROFOR's ability to implement its peacekeeping mandate. The UN Secretary General's special mediator insisted from the start that a ceasefire be in place before deploying peacekeeping forces which allowed extremists on both sides to delay UN action by violating successive ceasefires. In addition, by requiring that the two sides agree where peacekeeping forces would be deployed, the UN forced them to bargain on the central issue of borders even as combat continued. This assured that the conflict would drag on until the warring parties reached a military stalemate.

⁸⁸Security Council Res 781, October, 9 1992

Application of the "two-tier" model as advocated in this discussion to the crisis would have avoided the conceptual and practical difficulties encountered with UNPROFOR. If the Security Council, acting within its mandate to maintain international peace and security, had determined that the situation was unsuitable for peacekeeping on the basis that there was no peace to keep, Chapter VII enforcement measures could have instead been invoked to authorize an entirely different enforcement army. The chances of diffusing the civil war would have been so much greater had such a force been deployed as a preventive measure along the borders of Bosnia and Croatia.⁸⁹

The present calls for arming the peacekeepers in Bosnia, and thus converting them to peace-enforcers, are unrealistic and too late to achieve any military or political gains. A UN force of this nature can only be successful if it is deployed early in the crisis. This inevitably calls for a political judgement and the necessary will to carry out any Security Council resolution. The inevitable conclusion from the Yugoslavian crisis is that the negotiations over the future of seceding republics might have been more successful had the UN entered the crisis at an earlier date with a full-scale peace-enforcement unit to use preemptive force to prevent outbreaks of violence. Sadly, the history books will record the UN action in Yugoslavia as a missed opportunity to implement a viable institutional mechanism for destabilizing humanitarian crises. Similar conclusions may be deduced from the experience in Somalia.

⁸⁹In mid-1991, the parties to the conflict had yet to mobilize troops, the republics were internally torn over what the future of the country would, or should be, the federal army was fragmentized and no-one seemed to be in charge; see Jill Smolowe, "Out of Control: In a Country Where All Sides are consumed by Ancient Animosities, Even the Army Seems Incapable of Halting the Drive for Secession" *TIME*, July, 15 1991, at 26

(ii) Somalia - Deployment and Mandate of UNOSOM

In March, 1992, the UN finally seized jurisdiction in the civil war in Somalia when the two main warring factions, Ali Mahdi Mohamed and General Mohamed Farah Aideed, signed a cease-fire agreement which provided for a UN monitoring mission.⁹⁰ In response to this, the Security Council established the United Nations Operation in Somalia (UNOSOM).⁹¹ The original conception of UNOSOM comprised only 500 security personnel and were deployed with the consent of the principal factions, as there was no Somali government for the UN to negotiate consent with.⁹²

By November, however, the position of the UN force became untenable and, consequently, the UN Secretary General recommended that the Security Council invoke Chapter VII measures in order to secure the safe delivery of humanitarian aid to starving civilians.⁹³

The Security Council subsequently concluded 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" and duly authorized the use of "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations."⁹⁴ Thus, it was clear that the legal basis of the UN operation had moved from a traditional peacekeeping action under Chapter "Six and a half" to enforcement

⁹⁰*The Situation in Somalia: Report of the Secretary General*, paras 6-8, UN Document S/23829 (1992)

⁹¹Security Council Res 751 para 2. (1992) April 24,

⁹²*Report of the Secretary General*, UN Doc S/24451 (1992). Thus, UNOSOM was not a Chapter VII operation originally.

⁹³*Letter from the Secretary General*, p6, UN Document S/24868 (1992) - reporting that cooperation with UNOSOM was almost non-existent, p2.

⁹⁴Security Council Resolution 794 (December 3, 1992) para 10.

action under Chapter VII of the Charter.

The result of the new mandate under Chapter VII was the Unified Task Force (UNITAF) which comprised troops from over 20 nations under a US-unified command. The primary objective of UNITAF was to establish a secure environment for urgent humanitarian assistance, with the military command to be transferred back to the UN once the mission was accomplished.⁹⁵ In addition to easing the tremendous human suffering caused by famine and civil war, proponents hoped the mission would provide a model for handling future international crises. As one US Representative stated, "[T]he United Nations must restore order to Somalia.... Somalia represents the type of problem the international community will face in this new world. I believe it is appropriate that these problems be solved collectively by the community of nations rather than by an individual country."⁹⁶

UNITAF later evolved into UNOSOM II which possessed similar enforcement powers under Chapter VII although with a wider mandate of general security functions covering all of Somalia.⁹⁷ Thus, like UNPROFOR in the former Yugoslavia, the UN Security Council increased the mandate of UNOSOM to enforcement action under Chapter VII when it became

⁹⁵UN Doc S/24976 (1992)

⁹⁶John Lewis, "A Short-Term Commitment is Not Enough," *The Washington Post*, December 5, 1992. James Jonah, UN Under-Secretary General for political affairs, *The Guardian*, July 12, 1993 (quoted as saying "If we fail in Somalia the repercussions will be devastating because it will show the UN cannot sustain such an operation.")

⁹⁷*Further Report of the Secretary General Submitted in Pursuance of parags 18 and 19 of Resolution 794* (1992), UN Document S/25354 (1993) at 12-18. For example, the mandate was designed to protect UN and non-governmental personnel, equipment, and facilities, monitor compliance with cease-fires, respond with force if necessary to violations of agreements, seize small arms, assist in repatriation activities and the removal of landmines. It also empowers UNOSOM II to provide help to Somalis in rebuilding their political, social and economic life..and recreating a country based on democratic governance." Security Council Resolution 814 March 26, 1993

apparent that something other than a peacekeeping force was required. The UN force has, however, come under intense criticism for its "warlike" operation.

(a) Critical Appraisal of UNOSOM

The UN Secretary General concluded that "the Security Council now has no alternative but to decide to adopt more forceful measures to secure the humanitarian operations in Somalia." Although this was certainly true due to the sheer scale of civil violence the subsequent deployment of thousands of US troops under US command (UNOSOM) was not the only alternative under the UN Charter.

From a legal perspective, again the position is also unsatisfactory. The status of the UN force in Somalia is unclear leaving several possibilities open to conjecture. The UN force in Somalia (UNITAF) would appear to have been authorised under Chapter VII of the UN Charter, the first occasion in which "peacekeeping" has been based on enforcement measures. However, the initial UN force (UNOSOM) that was sent into Somalia was not under a Chapter VII mandate. Consequently, in attempting to secure humanitarian relief and monitor a cease-fire, UNOSOM was inadequate to deal with the violence of a highly volatile and dangerous environment. Moreover, the UN proved exceptionally slow in deploying peacekeepers to the areas of trouble in Somalia and, as a result, lost vital time in providing humanitarian aid to millions of starving Somalis.

The situation not only demonstrates the ineffectiveness of sending in a peacekeeping force with a restricted mandate, but also highlights the need to establish at the outset the legal status of the force and the mandate it is to be given. As the UN Secretary General himself admitted: "UNOSOM II will not be able to implement the ...mandate unless it is endowed with

enforcement powers under Chapter VII of the Charter..⁹⁸

Although the situation warranted more forceful measures to deal with the clan warfare the decision to send US troops under the guise of a UN peacekeeping force was flawed. In keeping with the central hypothesis of this paper a peacekeeping force should not have been authorized under Chapter VII of the UN Charter. The "two-tier" approach would have been more appropriate in these circumstances enabling the Security Council to bypass the use of peacekeeping altogether once it had made the appropriate determination of jurisdiction⁹⁹ and, instead, focus on the authorization of a peace-enforcement unit under Article 43 of Chapter VII. Thus, for the third time in the history of the UN, the task of military action has been delegated to the US rather than the UN. Even in a case of humanitarian intervention, an absence of specific national or strategic interests and against low-level military opposition, the authorization of the use of force by the UN has still to be carried out by a few powerful sovereign states.

A Legal Basis for UN Peacekeeping

The juridical debate concerning the status of UN peacekeeping has been at the forefront of legal discourse and political analysis for many years.¹⁰⁰ Thus, to indulge in a theoretical analysis of the constitutional basis for UN peacekeepers would appear to be a frivolous exercise.

However, as it is central to the hypothesis of this discussion that UN peacekeeping be distinct

⁹⁸*Further Report of the Secretary General Submitted in Pursuance of Paras. 18 and 19 of Res. 794 (1992)* at 13.

⁹⁹See *eg* Part Two of this thesis for a discussion of the jurisdictional bases of UN intervention.

¹⁰⁰See *eg*, the ICJ's advisory opinion in the *Certain Expenses of the UN*, 1962 ICJ, 151, 166 July 20th, where the court concluded "obiter" that "peacekeeping operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and maintain a peaceful settlement of the situation," peacekeeping operations were lawful and consistent with the goals of the UN Charter, p151

from that of peace-enforcement, the argument would be strengthened if a legal basis can be found on which to place the concept of peacekeeping. While the ad hoc nature of peacekeeping is one of its main characteristics, a certain degree of codification is nevertheless desirable when dealing with the complexities of humanitarian crises.

It has been argued for instance, that peacekeeping falls within the broad ambit of Chapter VI concerning the pacific settlement of disputes. In the case concerning the Certain Expenses of the United Nations, the representative of Norway submitted that "[W]ith regard to the ONUC action, it has been amply demonstrated that the authority to undertake these steps falls under the express or implied authority conferred upon the Security Council under Chapter VI of the Charter."¹⁰¹ Professor Tunkin in the same case, however, concluded that it is not possible to find the constitutional basis for such operations in Chapter VI of the Charter.¹⁰² This submission rests on the basic assumption that peacekeeping cannot fall within the ambit of peaceful measures in Chapter VI because it envisages the use of force in *self-defence*. Accordingly, Dag Hammarskjöld devised the theory that peacekeeping were authorized under "Chapter VI and a half", since peacekeeping falls outside Chapter VI yet does not constitute an enforcement action under Chapter VII. This would appear to be a correct analysis and one that has generally been accepted; (that is until recent military operations in Somalia and the former Yugoslavia.) Legal scholars continue to theorize, however, on the application of Chapter VII measures to peacekeeping.

There is, for example, a respected body of opinion that posits Article 41 of the Charter as the

¹⁰¹ICJ Pleadings, Oral Arguments, Docs, 1962 at 370. See also the Oral Statement by M.Cadiex, the representative of Canada, *id.*, at 304-305.

¹⁰²*Ibid* at 401

constitutional basis for peacekeeping operations since they could be characterized as "measures not involving the use of armed force."¹⁰³ Professor Schwarzenberger states "...the emphasis is then put on the primary function of such a body which can be fulfilled without any resort to armed force. On this assumption, the fact that the force may use its weapons in self-defence affects its status as little as does a civilian's exercise of his right of self-defence under municipal law."¹⁰⁴

An argument in the alternative and one that has attracted a large body of opinion is that Article 40 provides the legal basis for UN peacekeeping.¹⁰⁵ Article 40 of the UN Charter allows the Security Council to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable..." Ironically, this view was supported by Dag Hammarskjöld who stated that the legal nature and constitutional basis of ONUC "may be considered as implicitly taken under Article 40 and in that sense, as based on an implicit finding under Article 39."¹⁰⁶ The theory that Article 40 may provide the legal basis for peacekeeping, however, is not only untenable, it is politically inadvisable. The establishment of a peacekeeping force under

¹⁰³ See Professor Schwarzenberger "Report on Problems of A UN Force" 49 International Law Association Conference (Hamburg:1960) at 138; See also "Problems of a UN Force" 9 Current Legal Problems (1956) at 253 by Schwarzenberger.

¹⁰⁴ *Ibid* at 137. There is, of course, the argument that peacekeeping operations do not purport to exclude the use of force as they in fact envisage force in self-defence and thus cannot fall within the ambit of Article 41 for the same reasons as they are excluded from Chapter VI.

¹⁰⁵ See Oscar Schacter, "Legal Aspects of the UN Action in the Congo" American Journal of International Law 1961 at 6; Riad, "The UN Action in the Congo and its Legal Basis" Egyptian Review of International Law 1961 at 21; Louis B.Sohn, "The Authority Of the UN to Establish and Maintain a Permanent UN Force" American Journal of International Law 1958 at 230; D.W.Bowett, "UN Forces: A Legal Study (1967) at 283.

¹⁰⁶ 15 UN SCOR, 884th mtg, at 4 (1960). This was the status of ONUC in the Congo according to Oscar Schacter, "Legal Aspects of the UN Action in the Congo" American Journal of International Law 4-6 1961 and possibly also of UNIPOM, the constitutional basis for which is not precisely specified; See Rosalyn Higgins, *UN Peacekeeping Vol II* at 429.

Article 40 is tantamount to a subsequent pronouncement of enforcement measures indicated in the remaining legal provisions of Chapter VII.¹⁰⁷ As has already been reiterated, Chapter VII enforcement provisions should be avoided as a legal basis for UN peacekeeping¹⁰⁸ to avoid the peacekeeping force becoming part of the hostilities. There is also the assertion that Article 29 and Article 48 of the Charter constitute the legal basis for peacekeeping. However, these provisions are normatively ambiguous and merely call upon UN members to implement Security Council decisions.¹⁰⁹

The above considerations merely confirm that there is no one provision in either Chapter VI or Chapter VII on which to base the legal status of UN forces. Recognizing this problem, several legal scholars have developed various theories concerning the "implied", "general" and

¹⁰⁷The Security Council could confine itself to making recommendations under Article 39; in such cases the provisional measures, (Peacekeeping, for instance) would not be preliminary steps to enforcement action. However, although Article 40 of the Charter explicitly requires the Security Council to recommend provisional measures before making any pronouncements under Article 39, an examination of Security Council practice leads the writer to the conclusion that this is a circular argument. For instance, UNEF II was created by Resolution 340 (1973) two days after the Security Council had made recommendations for the settlement of the dispute. Similar pronouncements are evident from an examination of Security Council resolutions in recent conflicts in Somalia and Bosnia. For a comprehensive legal analysis of the relationship between the provisions of Chapter VII with particular reference to Article 40, see Hans Kelsen, "Sanctions in International Law under the Charter of the United Nations" Iowa Law Review, Vol 31, (1946) p499-543.

¹⁰⁸The Security Council would appear to be more concerned with action "ex post facto" ie; enforcement action after the crisis has erupted instead of adopting peacekeeping forces as a preemptive, provisional measure under Article 40.

¹⁰⁹ See Professor Schwarzenberger, *supra* note 103 for a discussion of Article 48 (1). Professor Bowett criticizes this approach and notes that Article 48(1) merely regulates the nature and the extent of the participation of member states in the implementation of a Security Council decision already taken and does not provide the constitutional basis. See Bowett *supra* note 105 at 284. See also Sheikh "UN Peacekeeping Forces: Reappraisal of Relevant Charter Provisions" Revue belge de droit int (1971) Professor Bowett has also criticized the construction of Professor Draper that Article 29 provides the legal basis for peacekeeping for similar reasons; see Draper, "The Legal Limitations upon the Employment of Weapons by the UN Force in the Congo" International and Comparative Law Quarterly, 1963 at 392 and Bowett *id* at 178.

"assumed" powers of the UN.¹¹⁰ These theories invariably rest on the pronouncements of the ICJ in the Case of Reparation for Injuries Suffered in the Service of the United Nations "[U]nder international law, the organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."¹¹¹

While this may constitute a persuasive legal argument, in practice its utility is of little consequence unless there is the political inclination to authorize a peacekeeping force on these terms. The legal ambiguities concerning current peacekeeping operations cannot however, be permitted to continue for the simple reason that the credibility of the UN as an international peace organization is at stake. This prognosis thus begs two important questions:

- (1) Should the UN Charter be reviewed and revised ?
- (2) Alternatively, should UN peacekeeping be codified?

Review of the UN Charter has always been a controversial issue. To involve the UN in a formal revision of its Charter at this period in international relations would only open a Pandora's box of complex issues and embroil the organization in an ideological dilemma.¹¹² Much can be done to clarify the legal basis of peacekeeping without resorting to formal amendments of the UN Charter. The idea is to get the Charter functioning as envisaged by the drafters; not to tinker with procedural and legalistic amendments.

¹¹⁰See eg John Halderman, "Legal Basis for United Nations Armed Forces," AJIL 1962, at 972-973; Sohn AJIL (1958) at 230

¹¹¹ICJ Reports, 1949 at 182 - this theory formed the basis for the oral submissions of a number of governments eg Denmark and Canada, see Pleadings, Oral Arguments, Docs 1962 at 162 and 203

¹¹² See US Congress Senate Committee on Foreign Relations, 83d Congress, Senate doc, no 164, Review of the UN Charter.

Conclusions on the role of peacekeeping

The UN's initiatives in the practical field of international peacekeeping cannot be regarded lightly. Peacekeeping, despite its deficiencies and "ad hoc" approach, is a concept that should not be abandoned. However, it is clear that certain techniques of UN peacekeeping must be improved, the legal status, for one, must be put on a firm footing. A detailed analysis of peacekeeping and the necessary changes is, however, beyond the parameters of this paper.¹¹³ Suffice to say, the international community has recognised this need and various studies are underway.¹¹⁴ Any attempt to codify existing principles of UN peacekeeping and practice should at the outset define the concept of peacekeeping as distinct from coercive enforcement action under Chapter VII of the UN Charter. However, the argument against codification of peacekeeping principles is that it would narrow the circumstances in which such a force could be deployed and could not possibly cover all exigencies.¹¹⁵ The standard argument against codification of any legal norm for that matter, is that it lends to a narrow definition of the concept.

Paradoxically, this is the argument submitted to support the proposals for codification, the

¹¹³There is a dearth of literature on the subject of peacekeeping. See eg General H.T.Alexander "UN Peacekeeping Forces in Civil War situations" at p187 of E.Luard, *The International Regulation of Civil Wars*. (1972) For the view of a military expert on some practical difficulties facing UN troops in an internal conflict; see Major-General Indar Rikhye, "The Control of UN Peacekeeping at UN Headquarters" in E.Luard p195 for an evaluation of the command structure of UN forces. Many of his comments concerning peacekeeping operations would also apply to a permanent UN army under Article 43. Major-General Rikhye also points out the inherent dangers of mistaking a UN force for a solution of the basic problem and urges that a UN peacekeeping force should be considered in the overall framework of the UN Charter.

¹¹⁴See eg the Secretary General's Report titled *An Agenda for Peace: "Preventive Diplomacy, Peacemaking and Peacekeeping."* June 17, 1992 31 ILM.953 (1992)

¹¹⁵ See R.C.R Siekmann "The Codification of General Principles for UN Peacekeeping Operations," *Netherlands International Law Review*, 1988 XXXV, 328-332

assertion being that current peacekeeping operations have no legal basis and are lacking in strategy. Moreover, there would continue to be an interplay between the legal norms in any international convention and the ad hoc decisions as to their application. Security Council members would still have the ultimate say in what circumstances a UN peacekeeping force should be deployed. This continual interplay of legal norms and policy would therefore counteract any concerns of inflexibility.

There is evidence of a growing commitment not only to the ideals of UN peacekeeping but also to the recognition that it must be placed on a firm legal basis. The change in attitude of the Soviets is particularly encouraging. In its aide-memoire "Towards comprehensive security through the enhancement of the role of the United Nations" the Soviet Union indicated its desire to see the positive experience and practice of United Nations peacekeeping consolidated and put on a more solid legal and financial basis.¹¹⁶

There have also been recent moves to discuss a draft Convention on the Protection of United Nations Peacekeepers, prompted by the dramatic increase in deliberate attacks on peacekeepers and associated civilian personnel.¹¹⁷

The discussion thus far has sought to demonstrate that peacekeeping should not be authorised under Chapter VII of the UN Charter. Accordingly, there should be strict adherence to the voluntary nature of UN peacekeeping which relies essentially on the consent of the host state. There must also be a structured approach to peacekeeping based upon well-defined principles

¹¹⁶UN Doc A/43/629. The change in Soviet policy towards the UN was initiated by Mikail Gorbachev's article on "perestrojka" See Pravda, 17 September 1984 UN Doc A/42/574; see also S/19143, Annex)

¹¹⁷See External Affairs Legal Bureau of Canada, 1993 Document. The draft convention was due for discussion in the 6th Committee of the General Assembly, 1993.

and objectives agreed in advance as opposed to an "ad hoc" approach based upon the exigencies of the situation and to a large extent the prevailing political will at the time. Most important of all, UN peacekeepers should not be deployed into a situation which requires the use of force. The tragedy of Bosnia has illustrated that UN peacekeeping is not able to deal effectively and, when necessary, forcefully, with violent and single-minded factions in a civil war. Moreover, the experiences of both Bosnia and Somalia illustrate the difficulties a UN peacekeeping force can run into when it transcends the legal limitations necessarily imposed on it by the norms of impartiality and the non-use of force. Essentially, a UN peacekeeping operation is only effective when it acts as a buffer force with the full consent and cooperation of the parties to the conflict.¹¹⁸ When a situation involves internal faction and unidentifiable armed parties as opposed to discernable national troops, the UN encounters difficulties.

If it is to be assumed (or, indeed, expected) that the United Nations will continue to move in the direction of more forceful and proactive action in response to civil wars involving an intolerable level of human suffering, it must develop a credible and effective enforcement mechanism.

¹¹⁸UN forces have also recently become involved in some situations which have not required the use of force. For example, the UN has played an instrumental role in the process of decolonization and has recently helped to politically reconstruct and stabilize newly independent states. The UNTAG operation, for example, in Namibia, was not a peacekeeping force but an election supervisory operation. It successfully supervised free and fair elections resulting in the independence of Namibia on 21 March, 1990. For a discussion of the issues involved see David Stoelting, "The challenge of UN - monitored elections in independent nations" *Stanford Journal of International Law*, p371 - 424, Spring 1992, v28 ; Richard Johnstone, "The Namibia dispute: the transitional government of national unity and the problem of enforcing Resolution 435. v15 *Melbourne University Law Review* p339 - 59, December 1985. Similar approaches were used in Angola and El Salvador in 1992; see "Democracy under the Gun," *The Times (London)*, 10th January, 1993 re: Angola. A larger UN force was deployed to Cambodia in 1991, which at the time of writing is withdrawing, having achieved its mandate. "UN Approves Troops for Rwanda" *The New York Times* " 1992 (reporting on the decision by the UN Security Council to deploy a small peacekeeping force with a clearly defined mandate and deadline to prepare for new elections and disarm irregular forces)

A UN Army Under Chapter VII

The key necessity for the UN is to be able to act earlier and more decisively in potentially explosive humanitarian disasters. A panel of discussants convened by the Carnegie Endowment for International Peace recently concluded that "...the United Nations must take steps to prepare better for military enforcement actions...If collective security is to be taken seriously, the UN must be prepared, in the end, to use force."¹¹⁹

Creating a UN enforcement unit is therefore an appropriate response to the predicament of current peacekeeping actions. It is, however, a controversial proposal that demands not only a fundamental change in the ways characteristic of UN operations, but also in the way that member states perceive the world organization.

In his 1992 Report titled *An Agenda for Peace*, the UN Secretary General Dr Boutros Boutros Ghali recommended the deployment of "peace-enforcement units from member states, which would be available on call and would consist of troops that have volunteered for such service," the idea being to enhance and extend traditional activities of UN forces into new areas. This concept thus retains many features of traditional UN peacekeeping but would go further, to the extent that the operation would be deployed without the express consent of the parties involved. UN troops, would accordingly, be authorized to use force to bring an end to civil violence.¹²⁰ It is this feature that distinguishes the concept of peacekeeping from that of peace-enforcement.

¹¹⁹ Carnegie Endowment National Commission on America and the New World, *Changing Our ways: America and the New World* (Washington D.C: Carnegie Endowment for International Peace) 1992, p67

¹²⁰ This proposal is not entirely a new idea. In 1948 the then UN Secretary General Trygve Lie proposed the creation of a "small guard force, as distinct from a striking force" recruited by the UN Secretary General and placed at the disposal of the Security Council. Lie argued that "even a small United Nations force would command respect, for it would have all the authority of the UN behind it". Lie, *In the Cause of Peace*, (1954); Cordier & Foote, *Public Papers of the Secretaries - General of the United Nations Vol I* Trygve Lie 1946 - 1953; see also Ruth Russell, *supra* note 11 at 1-45.

The UN Secretary General recommended the deployment of "peace-enforcement units from member states, which would be available on call and would consist of troops that volunteered for such service",¹²¹ the idea being to enhance and extend traditional activities of UN forces into new areas.

Dr Boutros Ghali argues that providing the UN with military forces would provide an effective means of deterring aggression and containing humanitarian crises. He explains that "the ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace, since a potential aggressor would know that the Council had at its disposal a means of response."¹²² On the other hand, the Secretary General concedes that a UN army formed under the legal authority of Article 43 might not be able to deter aggression of a major nation and could only be deployed to meet "the military force of a lesser order." Peace enforcement units would therefore engage in active military combat where traditional peacekeeping operations were regarded as being an inappropriate instrument to prevent the resumption of hostilities. The Security Council would "consider the utilization of peace-enforcement units in clearly defined circumstances and with their terms of reference specified in advance."¹²³

Though controversial, support for a UN military has grown rapidly since the proposal of the UN Secretary General in his Agenda for Peace. The new era of cooperation in the Security Council has prompted a number of prominent observers, in addition to the Secretary General, to call for the creation of a UN military force under the authority of Article 43 to stamp out aggression and

¹²¹ *supra* note 114 at p966 - 967.

¹²² *Ibid*

¹²³ *Ibid.*

human suffering around the world. Of particular interest among academic circles is a plan put forward by Professor Alan Henrikson of the Fletcher School of Law and Diplomacy. Henrikson proposes the creation of a three tier UN military that would be comprised of a Standing Reserve Peace Force, a Rapid Response Peace Force and a Permanent Peacekeeping Force, although he emphasizes that these would be "supplementary to the United Nation's pacific-settlement, or mediation activities and to its increasingly important economic and social work" in keeping with the Secretary General's Agenda for Peace.¹²⁴ Henrikson believes that the international community can no longer rely on "ad hoc" coalitions led by the United States to maintain international peace and security. American politicians are often overheard bemoaning US foreign policy, the general consensus being that "one Iraq is enough." Henrikson advocates the creation of a rapid-response force which would be ready for call on short notice and could be deployed to disputed international borders in order to prevent possible conflict.

Richard Gardner, a Professor of Columbia University and former US ambassador to Italy, also endorses the creation of a UN rapid deployment force comprised of some 100,000 troops from member states.¹²⁵ Gardner's proposals for a UN force rest on the legal authority established in Article 43. Such a force, he envisages, would be used by the Security Council to prevent both interstate aggression and internal strife.¹²⁶

¹²⁴ Alan K. Henrikson, "How can the Vision of a New World Order be Realized ? " Fletcher Forum of World Affairs, Winter 1992 at 63; Other international lawyers that have lent support to the proposal for UN peace enforcement units include David Scheffer, Senior Associate at the Carnegie Endowment for International Peace, Use of force after the Cold War: Panama, Iraq and the New World Order, in *Right V. Might* (Louis Henkin et al, eds 1991) Scheffer argues that "international peace cannot depend on the US of Secretary State flying 100,000 miles over many long months to build the necessary coalition." *Id* at 155-56.

¹²⁵ Richard.N Gardner, "Collective Security and the New World Order" Leaders, Jan- March 1992 at 24

¹²⁶ *Ibid* at 12

Politicians, newspapers and academic writers have all lent support to the idea of creating a UN army. The *New York Times* has argued in several recent editorials for the creation of UN military forces.¹²⁷ *New York Times* columnist Flora Lewis has urged the UN to "acquire a permanent force in readiness, loyal to its flag and to no state," comprised of Gurkhas from the Indian Army,¹²⁸ whereas political scientist Joseph S Nye Jr proposes the creation of a UN "rapid-deployment force" of 60,000 soldiers, with a core of 5,000 troops who would train regularly together.¹²⁹

In a *New York Times* article, US Senator David Boren suggested that 40 to 50 UN member nations contribute to a rapid deployment force of 100,000 volunteers. He argued that such a force would "help discourage regional conflicts, violations of basic justice, the proliferation of weapons and international terrorism."¹³⁰ In a similar vein, Senator Joseph Biden introduced Senate Joint Resolution 325, the "Collective Security Resolution Participation Resolution", that urged "the US president to take all appropriate steps to negotiate, under Article 43 of the United Nations Charter" a special agreement or agreements" with equitable terms under which designated forces from various countries, including the US, "would be available to the Security

¹²⁷ "Who can stop civil wars?" *The New York Times*, December 29, 1991; "The New World Army," *The New York Times* March 6th 1992; "The New Blue Army," *The New York Times*, September 20, 1992 (Stating that "with a force capable of responding quickly, the United Nations could save lives, check massive tides of refugees and discourage warlords. In the world, as on a city street, the mere presence of a cop on the beat matters." A USA editorial argued that "If the world doesn't learn to resolve ethnic rivalries loosed by the Cold War's end, hundreds of Yugoslavias could crater the future," See Editorial, "Beef Up the UN's Peace Role", *USA Today*, September 28, 1992.

¹²⁸ Flora Lewis "Gurkhas can solve the UN's problem" *The New York Times*, February 8, 1992

¹²⁹ *Ibid*

¹³⁰ David Boren, "The World Needs An Army on Call," *The New York Times*, August 26, 1992

Council..for the purpose of maintaining international peace and security." ¹³¹

Senator Paul Simon also proposes that "volunteers from "our" (US) armed forces..be made available at the discretion of the president to help get food into Somalia, or provide air cover for food and medicine going into Bosnia - or whatever situation is serious enough to warrant United Nations Security Council action." ¹³²

President Bill Clinton, during his electoral campaign, pledged his support for the creation of a UN military force. A Clinton administration would "stand up for our interests, but we will share burdens, where possible, through multilateral efforts to secure the peace, such as NATO and a new voluntary UN Rapid Deployment Force. In Bosnia, Somalia, Cambodia and other war-torn areas of the world, multilateral action holds promise as never before and the UN deserves full and appropriate contributions from all the major powers." ¹³³

Proposals for the creation of a UN army are not however confined to academic circles and have led to contentious debate in Security Council meetings. At the UN Security Council Summit in January 1992, several member states specifically endorsed the creation of a UN force. ¹³⁴

¹³¹*Ibid.*

¹³²Paul Simon, "What roles for the US and the UN in Bosnia and Somalia ?" *Press Release*, August 23, 1992

¹³³ Bill Clinton, "Remarks of Governor Bill Clinton," *LA World Affairs Council*, August 13, 1992. Although former President Bush was less enthusiastic about the proposal for a UN army, he did pledge stronger US support for peacekeeping operations and offered to make available to the UN, US military facilities and expertise. See James Bone "America offers to train Army of UN Peacekeepers" *The Times (London)* August 1992 In his last UN address in office, former President Bush lent his support to the Secretary General's Agenda for Peace proposals, which he seemed to endorse in principle. The former President did not, however, commit the US to earmarking troops to serve in a UN army. However, in January, 1993 the recently appointed US Representative under the Clinton administration to the UN, Madeline Albright, called for the creation of a UN force and cited Article 43 of the UN Charter, *The New York Times* January 29, 1993.

¹³⁴ Sweden created a special rapid intervention unit some time ago specifically for this purpose; For details, see *Swedish Stand-By Force in the Service of the United Nations* (Stockholm: Ministry of Foreign Affairs, 1982) See United Nations Security Council Summit Meeting January 31, 1992, 47th session, 3046th mtg UN Doc.S/23500; [hereinafter *UNSC Summit*] See eg the comments of the Austrian Chancellor Franz Vranitzky who stated that there

France in particular displayed an especially keen interest in implementing the provisions of the Charter although specific mention was not made to Article 43.¹³⁵ Nevertheless, President Mitterand offered to "make available to the Secretary General a 1,000 man contingent for peacekeeping operations, at any time on 48-hours notice" and also recommended the use of the MSC as envisaged by the UN Charter.¹³⁶ President Yelstin endorsed the idea of a "UN rapid - response force" although he construed the idea in different terms from the French proposal.¹³⁷ Britain and America, however, notably failed to lend support for the creation of UN military force under Article 43. Prime Minister John Major was quoted as saying "The UN does not need military forces in order to accomplish its traditional role of playing the "honest broker" in

must be authority to dispatch such a force before a conflict ignites, without necessarily obtaining the consent of all the parties to the potential conflict. Paul Lewis, "UN set to debate Peacemaking Role, *The New York Times*, September 6, 1992. "Leaders want to enhance UN's Role" *The New York Times*, January 31, 1992 at A8 ; "World Leaders Pledge to Broaden Role of UN," *The New York Times*, February 1, 1992.

¹³⁵ *UNSC Summit supra* note 134 at 18.

¹³⁶ *Ibid.* The French President did not specify whether the troops for this UN force would remain with their respective national military establishments until mobilized by the United Nations, or instead form a standing UN army. He was also unclear as to whether the authority to dispatch such a force would lie with the Security Council or the UN Secretary General.

¹³⁷ President Yelstin spoke of the need of such a force to be "expeditiously activated in areas of crisis...to ensure peace and stability"...He expressed Russia's commitment to "playing a practical role in United Nations peacekeeping operations and contribute to their logistical support". *UNSC Summit supra* note 135 at 47. A recent statement on Russia's new military doctrine reaffirms Russia's willingness to commit troops to UN peacekeeping operations; *Reported on CBC news*, November 14th, 1993. See also "The Idea of a Potent UN Army Receives a Mixed Response," *The Washington Post*, 29th October 1992. The former Soviet leader, Mikhail Gorbachev probably did more than any other world leader to focus attention on the possibility of reviving Article 43. See article in *Pravda*, 17 September 1987. Several small states also endorsed proposals to establish a permanent UN army or Rapid deployment force. Hungary, for instance stated that "due consideration should be given to the idea of the United Nations instituting a force readily and constantly available that could be mobilized on very short notice and deployed without delay..." *UNSC Summit supra* note 135 at 119. Austria called for a "reassessment of Article 43 by the UN" *Id* at 63- 64 while the comments of Belgium, Zimbabwe and Cape Verde Islands seemed to implicitly endorse the creation of a permanent UN force. *Id* at 72, 121 and 78. Ironically, their enthusiasm for a UN force would appear to be at odds with their approach to the issue of sovereignty. See "Protection and Security of Small States": *Report of the Secretary- General*, U.N GAOR, 46th Session, at 50 UN Document A/46/339 (1991) which reported the views of several states on the issue of protecting small states by permanent UN military forces.

international disputes.¹³⁸

Canada, traditionally an ardent supporter of UN peacekeeping missions, has very recently indicated its willingness to participate in a stronger UN rapid-deployment force. In an innovative report, chaired by an eminent panel of Canadian citizens, recommendations were put forward to improve UN peacekeeping operations for deployment in well-defined areas and to create an altogether new approach for more forceful interventions.¹³⁹ The report is indicative of the growing concerns over the use of peacekeepers in intrastate crises and it is anticipated that the new Canadian government will adopt many of the proposals leading the way for other countries to follow suit.

A senior UN official and former UN Under- Secretary General, Sir Brian Urquhart, who has considerable experience in peacekeeping matters, has lent his support to the chorus of experts who strongly promote the use of Article 43 to give the UN sufficient forces to put an end to random violence and intervene in civil wars such as in the former Yugoslavia and Somalia as well as other countries where "sovereignty is also dissolving into anarchy."¹⁴⁰ Urquhart envisions "armed police actions" which would be deployed by the Security Council into crises where the cycle of violence could not be broken except by firm international intervention. Interestingly, Urquhart's legal premise for his proposal is based on a broader interpretation of Article 43 than originally intended by the phrase "international peace and security" and thus

¹³⁸ Oakely and Bone, "Leaders Hail New World Order," *The Times (London)* February 1, 1992 at 1.

¹³⁹ Canada 21, Canada and Common Security in the Twenty-First Century; See "Foreign Policy for Modern Canadians" *The Ottawa Citizen*, 21 March 1994; "A Promising Blueprint for Canadian Security" *The Globe and Mail* Friday March 18 1994; "Panel Points to new paths for foreign policy" *The Financial Post* March 18 1994.

¹⁴⁰ Brian Urquhart, "For a Military Force" *New York Review of Books*, June 10 1993 .

would appear to endorse military intervention specifically into civil wars, hitherto excluded from UN competence. This proposal therefore goes further than traditional legal scholarship and, indeed, the Secretary General's recommendation in Agenda for Peace. Dr Boutros Boutros Ghali proposes a more formal and somewhat modest definition of peace-enforcement as "action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the UN Charter".¹⁴¹ Furthermore, he proposes that "peace-enforcement units" be authorized under Article 40 of the Charter by the Security Council but commanded by the UN Secretary General.¹⁴² The legal basis of his proposal is, therefore, somewhat dubious; Article 40 authorizes the use of provisional measures as a prerequisite to Article 42 actions yet the creation of peace-enforcement units necessarily involves the use of force which can only be authorized properly under Article 42. Accordingly, the Secretary General argues for a narrower proposal than Article 43 envisages. Whatever the terminology used, "UN Rapid-Deployment" force, or "Peace-enforcement units," the proposal for a UN force raises more questions than answers. There is an almost overwhelming variety of problems that this proposal raises ranging from the practical to the political.

Legal Difficulties as regards the creation of a UN army

From a legal perspective, perhaps the greatest difficulty is defining the circumstances in which

¹⁴¹ *supra* note 114 at 960

¹⁴² Article 40 of the UN Charter allows the Security Council to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.." This was the legal basis of ONUC in the Congo crisis according to Dag Hammarskjöld who stated that the constitutional basis of ONUC "may be considered as implicitly taken under Article 40 and in that sense, as based on an implicit finding under Article 39." UN SCOR, 884th mtg, at 4 (1960); See Oscar Schacter, "Legal Aspects of the UN Action in the Congo" *American Journal of International Law*, 4-6 1961

UN forces should intervene and in what role. This is a particularly pressing problem if the distinction between internal conflicts and crises of international concern continues to fade as fast as it has in recent times. There are at least a dozen violent crises in the world requiring UN assistance. A UN enforcement-unit or even a larger multinational force as envisaged by Sir Brian Urquhart could not possibly be deployed to all areas. The question remains as to how the UN would determine which humanitarian crises should receive help. Would the UN Security Council for example, ever consider deploying a UN enforcement-unit to the former Soviet republics of Georgia, Azerbaijan and Nagorno - Karabakh in the face of a Russian veto ?

There is also the danger that the UN force might simply become a reinforcement to the weaker side, not only discouraging it from facing its aggressor but also jeopardising a lasting political solution. The Bosnian-Muslims in the former Yugoslavia is a good, if sad, case in point. Public opinion has largely rallied to the side of the Muslims as the victims of Serbian aggression yet, in a quagmire, the weaker side does not necessarily always have right on its side.¹⁴³

Indeed, the conceptual problems involved with this proposal have raised concerns as to whether the UN should, in fact, attempt to codify the types of situation in which a UN army should be deployed, similar to the UN General Assembly's codification of the definition of aggression.¹⁴⁴

An essential problem with any codification, however, that has emerged in the current debate is the desirable degree of specificity: the enumeration of appropriate circumstances in which the UN should conduct a humanitarian intervention might exclude unforeseen situations requiring

¹⁴³ Although the media has portrayed the Muslims as the subject of "ethnic cleansing", the United Nations has evidence of war crimes being committed on all three sides in the conflict, See *eg* UN Chronicle, March 1993 p4-12, June p4-12.

¹⁴⁴ UN General Assembly Resolution 3314 (XXIX) see also *The Draft Code of Crimes Against the Peace and Security of Mankind*, Article 12, 83 American Journal of International Law 153. (1989)

assistance which do not fall strictly within any agreed categories. Definitions of humanitarian intervention cannot be exhaustive, nor can they be extensive without becoming too restrictive, yet flexibility requires general provisions which are then open to abuse.¹⁴⁵

There is also the suggestion that a UN army would not be "constitutional" under the UN Charter. The argument follows that such a force would in effect be beyond the control of member states, thereby posing a threat to the sovereignty of individual member states.

While the weight of traditional legal scholarship holds that agreements under Article 43 of the Charter are sufficient authority for a UN force, recent academic proposals discussed above would appear to go further.¹⁴⁶ Sir Brian Urquhart, for example, advocates the creation of a force on a wider legal premise than Article 43 originally envisaged. On the other hand, John Halderman writing in 1962 concluded that the constitutional justification for UN armed forces lay in the plain language of Article 1(1): "to take effective collective measures for the prevention and removal of threats to the peace." Halderman believed that the words "to take" required that

¹⁴⁵See generally Part Two

¹⁴⁶ Many legal theorists would go so far as to assert that the signing of Article 43 agreements is inherent in UN membership, "a condition for which is acceptance of the obligations contained in the Charter and ability and willingness to carry out those obligations" See *eg* Russett and Sutterlin "The UN in a New World Order", *Foreign Affairs* 1991 at 78. During the early years of the United Nations, and even recently, it was thought that such agreements were a condition precedent to collective measures undertaken by the Security Council. This would appear to have been the view of governments at the San Francisco Conference. Article 106 seems to support this interpretation. It reads: "Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42...." See Ruth Russell, *A History of the United Nations* 1052 (1958). Moreover, for example, Article 25 of the UN Charter requires member states to "accept and carry out the decisions of the Security Council" and Article 48 asks member states to "carry out the decisions of the Security Council for the maintenance of international peace and security." In 1948 UN Secretary General Lie also stated that action under Article 42 required the agreements under Article 43. See 3 UN GAOR Part 2, UN Doc.A/656 (1948). Hans Kelsen on the other hand, says that "the members of the United Nations are certainly not under any obligation to conclude with the Security Council the agreements referred to in Articles 43 and 45," See *eg The Law of Nations* (1950) 756 whereas contemporary legal scholarship argues that "the negotiation of Article 43 agreements is not merely an option available to UN members, it is a legal obligation of membership in the world organization", Gardner, *supra* note 126 at 16.

action be taken by the United Nations and not by its member states acting independently.¹⁴⁷

Traditional legal scholars such as Louis Sohn and Oscar Schachter hold the view that a UN army is entirely constitutional under Article 43 of the UN Charter.¹⁴⁸

Opponents of such a proposal maintain that the creation of a standing UN army or "peace-enforcement units" as proposed by the Secretary General in Agenda for Peace is a threat to the individual sovereignty of member states different from even what the framers of Article 43 had envisaged.¹⁴⁹ The obvious objection to such a force is indeed, the "spectre of supranationality" it creates.¹⁵⁰ John Gerlach for example, believes that small, weaker countries would be targeted for UN intervention as peace-enforcement missions against a powerful state would involve too many risks.¹⁵¹ Besides a complete reexamination of the concept of sovereignty, an

¹⁴⁷ John Halderman "Legal Basis for United Nations Armed Forces" Vol 56 American Journal of International Law (1962) 971

¹⁴⁸ Louis B.Sohn, "The Authority of the United Nations to establish and Maintain a Permanent United Nations Force" American Journal of International Law Vol 52 1958 at 229; and Oscar Schachter, "Authorized Uses of Force by the United Nations and Regional Organizations" in *Law and Force*, *supra* note 3

¹⁴⁹ Article 43 requires member states to make arrangements for the provision of forces so that the Secretary General can gather a force for each new crisis. It does not therefore envisage a *permanent* UN army. In 1944, the Dumbarton Oaks conference debated the idea of establishing a standing army but ultimately rejected it, the fear being that the UN would become a "superstate or world government." The US representative noted during one debate that "The United Nations is not a world government. It is based on the principle of sovereign equality of all of its members, therefore it could not have a permanent standing armed force of its own in the same sense that individual nations possess such forces." UN SCOR, 2d Sess, 43d mtg (1947).

¹⁵⁰ Some commentators have referred to this as collective internationalism. Richard Gardner of Columbia University describes collective internationalism as "the construction of a peaceful world order through multilateral cooperation and effective international organization. Richard Gardner "The Comeback of Liberal Internationalism," The Washington Quarterly, Summer 1990 p23. The development of an enforcement mechanism under Article 43 is thus, central to the collective internationalism goal which envisions a world in which regional and global organizations would be responsible for solving an array of international difficulties; See also Joseph.S.Nye Jr "What New World Order?" Foreign Affairs, Spring 1991 p96. Flora Lewis has also contributed to the debate and calls the strategy "a way to resolve the dilemma between dangerous global unilateralism and sulky, equal dangerous, isolationism. It is neither utopian nor meanly narrow realpolitik." Flora Lewis, The G-7 1/2 Directorate, Foreign Policy, Winter 1991-92 p40

¹⁵¹ John Gerlach, Orbis, "A UN Army for a New World Order ?" Spring 1993 at 235;

exercise of this kind would demand considerable consensus among Security Council members. This in itself, however, causes conceptual difficulties particularly if a UN force was to be deployed into the territory of one of the permanent states.¹⁵²

There is however, the strong alternative argument that in order to prevent genocide or ethnic aggression, the United Nations must have the military capability to intervene in civil wars in a different role to that of peacekeeping. As one commentator has remarked "the Security Council will need more enforcement power than any member can wield against it."¹⁵³ Then there is the argument that the mere existence of such a force would act as a powerful deterrent in any potentially explosive crisis.

Circumstances in which a UN force could be deployed

How would the United Nations decide which humanitarian crises are worthy of intervention? Does the plight of the Kurds supersede that of the Tibetans? There is a strong argument to be made that the UN would become a world policeman for fighting in intractable situations. It follows that "[V]irtually every region of the planet contains areas in which turmoil is already occurring or threatens to break out. To seek to right every injustice would be quixotic; even to address a relatively small percentage would require an enormous expenditure of blood and

¹⁵² Sir Anthony Parsons remains sceptical of a greater UN role in enforcement measures. He points out that in the present global atmosphere of defence cuts and peace dividends, it would be hard to envisage governments earmarking specific combat groups for UN enforcement in addition to normal establishments. He also does not believe that governments would put combat forces under the command of the Secretary General or the Military Staff Committee if their task was to fight a campaign rather than acting in the historic peacekeeping "non-threatening" role. See Sir Anthony Parsons "The UN in the Post Cold War Era" Foreign Affairs Summer 1992

¹⁵³ Robert C. Johansen, "Lessons for Collective Security," World Policy Journal, Summer 1991 p569-70, (noting the military logic to the idea that the United Nations should have more power than any single country if it intends to prevent an aggressive nation from disrupting the peace)

treasure."¹⁵⁴

Although this is an obvious problem in the subjective nature of such decisions, a credible UN enforcement mechanism is preferable to the current "ad hoc" approach of Bosnia and Somalia. The authorization of such a force would still require a political judgement from the Security Council members acting on the exigencies of the situation, yet it is arguable that with the forces already assembled the Security Council would be able to act earlier to prevent the spread of hostilities. A UN force of this nature could have been used in Bosnia, for example, to deter attacks on relief workers by the warring factions and break the Serbian blockade to allow humanitarian aid to get through to Sarajevo.¹⁵⁵ Special military units could, for example, serve humanitarian purposes by assisting with the demobilization of armed factions. However, a UN force in Bosnia today would achieve limited humanitarian objectives as the practice of "ethnic cleansing" has already destroyed much of the existing country. If the UN had acted in 1991 when the city of Dubrovnik was under seige and deployed a UN force, perhaps the spread of hostilities could have been prevented into Bosnia. Accordingly, one of the key advantages of this approach is its preventive deployment to defuse a situation as opposed to an ameliorative response, which has been characteristic of the UN in recent years.

Conclusions

The crisis in the former Yugoslavia tragically illustrates the need to develop prompt and effective measures for future interventions. As the number of humanitarian crises proliferates, such as, for example the latest crisis in Rwanda which demands immediate attention from the UN, it is

¹⁵⁴John Gerlach *supra* note 151 at 231

¹⁵⁵See Ken Adelman "Breathing New Life into the UN" *The Washington Times*, July 1st, 1992.

imperative that the UN devise new means to deal with humanitarian disasters.

There are numerous proponents who believe the hegemonic leadership of the US is a viable mechanism for humanitarian intervention.¹⁵⁶ This thesis has, however, sought to demonstrate that multilateralism is the preferred option in the post Cold War climate. In keeping, therefore, with the hypothesis presented, the overriding conclusion is that collective security measures should be developed under the aegis of the UN. The prevailing climate of consensus and cooperation of recent years has greatly enhanced the possibility of international peacemaking in humanitarian crises becoming a reality. The revolutionary and mostly positive changes of the last two years are a cause for hope, particularly in the general emphasis on the resolution of conflict by a United Nations force. However, we should not underestimate the radical change of attitude, especially on the part of powerful nations, that the transition from peacekeeping to a UN force under Article 43 requires. In 1948 Trygve Lie, the then UN Secretary General, remarked that his proposal for a UN force "...would have required a degree of attention and imagination on the part of men in charge of the foreign policies of the principal member states that they seemed to be unable to give..to projects for strengthening directly the authority and prestige of the United Nations as an institution."¹⁵⁷ However, as this section has illustrated, in the absence of such a force under Article 43, the UN has employed other techniques such as peacekeeping, which in some circumstances has proved highly successful.

There is however, increasing evidence that the international community has recognised the

¹⁵⁶ See generally Charles Krauthammer, "The Unipolar Moment", *Foreign Affairs* (America and the World) 1990/91 Vol 70, No.1 1991:23-33

¹⁵⁷ Trygve Lie, *In the Cause of Peace*, (1954); p99; Cordier and Foote, *Public Papers of the Secretaries-General of the United Nations Vol I Trygve Lie 1946-1953*

futility of sending in a peacekeeping force to civil conflicts.¹⁵⁸ It is somewhat paradoxical, therefore, that there is also growing reluctance from Security Council members to become involved in future humanitarian crises of such complexity where there is no discernable enemy and no peace to keep.¹⁵⁹ The US, for instance, recently indicated that it would not become directly involved in civil conflicts unless it is satisfied that there is a genuine threat to international peace and security, a major humanitarian disaster, or a gross violation of human rights.¹⁶⁰

Although there are strong minded opinions from leading international legal scholars and political leaders concerning the feasibility of the proposals for a UN peace-enforcement army, the international community need only look at the bitter humanitarian conflicts currently raging in various parts of the world to realize that demand for a stronger world organization with the military strength to enforce its decisions on the ground will only increase rather than diminish. Theorists may theorise, but UN soldiers pinned under Serbian mortar-fire have to know whether they are keeping the peace or enforcing it.

¹⁵⁸ A less forceful approach has been adopted by the UN over Haiti for example; See Steven Holmes "UN force to Rely on Haitians to Keep Order" *The New York Times* September 30th 1993 (emphasizing the non-combatant role of the UN peacekeeping force in Haiti in response to criticisms of the Somalian operation); Howard French "US Withdraws Troops Ship From Haiti" *The New York Times* October 12 1993 (citing UN officials bemoaning lack of international initiatives in Haiti) see also James Bone "Somalia Debacle Curbs UN ambitions on World Stage" *The Times (London)* October 12 1993 11 (reporting that peace-enforcement has proved impossible for UN peacekeepers) "A Wise Stand Down in Somalia" *New York Times Editorial* October 20th 1993 ("the hard lesson of Somalia is that UN peacekeepers cannot be arbiters of civil wars")

¹⁵⁹ See Paul Lewis "Clinton Gives Long List of Terms for Sending Troops to Bosnia" *The New York Times* September 28, 1993

¹⁶⁰ See Paul Lewis, "US Plans Peacekeeping Guidelines" *The New York Times* Thursday November 18 1993; Eric Schmitt, "US completes Drafting Limits on Troops Peacekeeping Role" *The New York Times*, January 28th, 1994 (the guidelines are a sharp departure from Clinton's election campaign in which he called for the creation of a "UN Rapid Deployment force")

CONCLUSION

Developments in the international community are taking place so fast that today's perspective on the situation may change tomorrow. This inevitably makes some of the observations in this paper somewhat tentative. As this final conclusion is being written, the latest series of events in Sarajevo and Rwanda are sorely testing some of the theses of this paper, with no obvious solution in sight.

Nevertheless, it is clear that the international community is slowly inching towards articulation of a law of humanitarian intervention where concern for human rights will displace anachronistic norms of domestic jurisdiction. Enhancing the role of the United Nations in humanitarian crises clearly demands a complete reappraisal of traditional notions of absolute sovereignty and non-interference in internal affairs. There is strong evidence to suggest that certain doctrinal concepts such the inviolability of state sovereignty, are no longer applicable in contemporary international relations in the area of human rights. Whether the nation-state system will ever in fact be replaced by a new concept of sovereignty is unlikely in the immediate future. This thesis has, however, sought to demonstrate that the norm of sovereignty has evolved to encompass human rights. A rare opportunity exists in international relations to harness the wave of concern for humanity and place it at the forefront of international decision-making in the coming new century. The United Nations must fully develop this jurisprudence so that a coherent and consistent human rights doctrine emerges.

It is also clear that traditional UN peacekeeping operations are unable to meet the demands of the post-Cold War world. If the UN is to regain its credibility and legitimacy in the eyes of the

international community it must devise new ways of conducting humanitarian military operations, quite different from its earlier practice of relying on peacekeeping forces. A UN army, under the command and control of the UN as opposed to the big powers is therefore, an appropriate response to the present crisis facing peacekeepers in central Bosnia. The prevailing climate of consensus and cooperation of recent years would appear to have greatly enhanced the possibility of international peacemaking by a credible UN force becoming a reality. Much of the present confusion however, surrounding UN operations stems from the misuse of the term "peacekeeping". The international community should proceed cautiously when referring to peacekeeping, particularly as the line between peacekeeping and peacemaking has become more difficult to delineate in recent times.

It is possible to conduct an effective humanitarian intervention under the UN provided certain objective criteria are followed. My final conclusion would therefore be that ideological notions of humanitarian intervention *are* reconcilable with the operational capacity of UN forces on the ground as long as the UN has clear objectives and the member states are willing to cooperate with the world organization. While it may be utopian to adhere to the notion that states will always cooperate with UN policy, it is nonetheless, imperative that the UN formulate some ideological signposts for future humanitarian operations. In the absence of the explicit activities enunciated in Agenda for Peace, current UN policy will continue to drift aimlessly from crisis to crisis. The big powers may prefer this "ad hoc" approach but action after the fact does not do much to promote human rights. One million ethnically displaced civilians in the former Yugoslavia and 20,000 civilians dead in Rwanda are surely adequate testimony for a reappraisal of this doctrine to meet the demands of contemporary international society.

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