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The Legal Status of Humanitarian Intervention

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Abstract

This study is an attempt to clarify the legal status of humanitarian intervention under international law today. Despite the long history of legal discourse on the matter, there is no consistent consensus as regards the legality of humanitarian intervention under international law. The opponents of formally acknowledging a right of humanitarian intervention often refer to the risk of abuse of the action and, in view of the many so-called humanitarian interventions which have been carried out for reasons of self-interest, this argument can be easily understood. Yet, others argue that situations of grave and systematic human rights violations do justify an intervention for humanitarian reasons and that such situations concerns the international community as a whole. Indeed, during the second half of the 20th century the development within human rights law shows a clear tendency towards a greater international responsibility.

Still, after having studied relevant legislation, case law and legal doctrine, it is my view that legality of humanitarian intervention is restricted to situations where there is prior authorization by the United Nations Security Council. Individual states or a community of states cannot without such prior authorization justify a humanitarian intervention on legal grounds under international law today. The following pages will portray why.

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Abbreviations

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| DUPI | Dansk Udenrigspolitisk Institut |
| EJIL | European Journal of International Law |
| ICISS | International Commission on Intervention and State Sovereignty |
| ICJ | International Court of Justice |
| NATO | North Atlantic Treaty Organization |
| UN | United Nations |

1 Introduction

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This is the wording of Article 2(4) of the United Nations Charter which is at the centre of the debate with respect to the legality of humanitarian interventions.¹ Does this provision allow for an intervention by the use of force for humanitarian reasons? Opinions differ immensely on this vexed question.

1.1 The Debate

The doctrine of humanitarian intervention is not exclusive to modern society but the debate started as early as the 16th century among legal scholars such as Grotius.² Although Grotius generally advocated the principle of non intervention, he acknowledged that where a tyrant practiced atrocities towards his subjects, military intervention by a foreign sovereign on their behalf may be legitimate.

Still, in spite of the long history of legal discourse concerning humanitarian intervention, there is a lack of consistent consensus (*opinio juris communis*) under international law. Throughout history and still today there has been a reluctance in formally acknowledging a right of humanitarian intervention out of fear of abuse of the same. This fear is not unfounded seeing as numerous questionable military invasions has been portrayed as interventions on humanitarian grounds. One apparent example being the German occupation of Bohemia and Moravia undertaken by Hitler on 15 March 1939 for the alleged purpose of disarming Czech troops threatening the lives of the German minority.³ On the other hand, there are situations where an intervention for humanitarian reasons may be well founded. Many argue that the United Nations Security Council should have responded earlier to the situation in Rwanda, where the lack of action resulted in genocide. Grave and systematic human rights violations are a concern not solely to the sovereign state in which they are conducted but to the international community as a whole. The development within the area of human rights law

¹ See Section 1.5 for further elaboration on the term “humanitarian intervention”.

² Hugo Grotius (1583-1645), founder of the modern natural law theory.

³ Ian Brownlie, *International law and the use of force by states*, (Oxford: Clarendon Press, 1963) at 340.

during the second half of the 20th century confirms this notion by portraying a clear tendency towards a greater international responsibility.

1.2 Purpose

The purpose of this paper is to examine the legal status of humanitarian intervention today, more than half a century after the occupation by Hitler but only a decade after the unauthorized intervention by NATO in Kosovo. Does a “right to intervene” on humanitarian grounds exist? If so, how and when can this right be exercised? I will commence by examining humanitarian interventions conducted under Chapter VII of the UN Charter i.e. with prior authorization from the United Nations Security Council and subsequently study interventions conducted without such prior authorization. A separate legal analysis of these interventions is preferable seeing as a prerequisite for the legality of unauthorized humanitarian is that humanitarian interventions are at all legally possible under international law today.

1.3 Limitations

In the pages to follow, an exploration of the legal status of humanitarian intervention is thus attempted. I will try, to the extent it is possible and desirable, to leave the issue of legitimacy to the side. Therefore, I will not delve into political and moral aspects but rather allow for the legal complexity to be examined. The relationship between legality and legitimacy in respect of humanitarian intervention is a relatively complex one. The notions seem to intertwine to the extent where it is rather difficult to separate them. However, it is important to differentiate between legality and legitimacy when trying to assess the legal status of humanitarian intervention. For example, when discussing humanitarian intervention without authorization by the United Nations Security Council, there may very well be strong reasons for the legitimacy of the action whereas the legality aspect is far more disputed. Still, in relation to the emergence of international customary law, the question of legitimacy is important as it expresses the ideas and desires of the individual states, legal experts and the general public.

Furthermore, I have chosen to limit my study to interventions on humanitarian grounds and I will thus not delve into the issue of individual or collective self-defense under Article 51 of the United Nations Charter. This excludes, for example, the events of 11 September 2001.

Finally, I will focus on humanitarian interventions by the use of force and thus not discuss intervention through peaceful means or other humanitarian actions of a more general character.

1.4 Terminology

Initially it might be useful to explain some of the terminology used in the debate surrounding intervention on humanitarian grounds which, in turn, may limit the scope of the paper further. Phrases such as “humanitarian intervention”, “a right to intervene” or “the responsibility to protect” are all frequently used in the current discourse.

The Danish Institute of International Affairs (DUPI) refers to “humanitarian intervention” in their report on the subject⁴ while the International Commission on Intervention and State Sovereignty (ICISS)⁵ prefers to approach the matter as “the responsibility to protect”. The report produced by the ICISS makes an effort in changing the language of the debate in order to reconcile conflicting principles. The basic idea presented in the report is that all sovereign states have an obligation to protect its citizens when a catastrophe can be avoided. If they fail to do so, may they be unwilling or unable, the responsibility passes to a broader community of states. The substantive problem remains the same but the language in which it is expressed is changed.

The use of the terms humanitarian and intervention together has been subject to much critique as they can be seen as conflicting notions. The term intervention has a rather ambiguous sense. There is a simply descriptive sense to the word but there is also a normative sense as a possessor of negative legal or moral quality.⁶ Oppenheim⁷ defines intervention as coercive interference in the affairs of another state. By “coercive” Oppenheim does not only refer to forcible means but for an intervention to be unlawful it must be coercive. He recognizes that intervention is normally illegal but he states that it may on occasions be undertaken “by right” or if otherwise in line with international law. For an intervention to be

⁴ The report “Humanitarian Intervention. Legal and Political Aspects” by the Danish Institute of International Affairs (DUPI) was a result of a request from the Danish government to study the political and legal aspects of humanitarian interventions.

⁵ ICISS was established in September 2000 by the Government of Canada together with a group of major foundations as a response to pleas made by UN Secretary-General Kofi Annan to try to reach a new consensus on the issue of humanitarian intervention.

⁶ Fernando R. Téson, *Humanitarian Intervention: an Inquiry into Law and Morality*, 2nd ed. (Irvington-On-Hudson, N.Y.: Transnational 1988) at 30.

⁷ Lassa Oppenheim (1858 - 1919), viewed by many as the father of the discipline of international law. His work “International Law: A Treatise” is still considered a standard text of International Law.

illegal it must fall under the sovereign state's *domain reserve*.⁸ The new terminology proposed by the ICISS might help re-evaluate some of the issues surrounding humanitarian intervention and resolve conflicts based on the language of the debate. When I use any of the above expressions on the following pages, I refer to coercive action by states, including the possible use of force, against another state without its consent with the object of preventing or stopping grave and massive violations of human rights or international humanitarian law. To the extent I refer to interventions without the authorization from the United Nations Security Council this will be clearly stated in the text.

1.5 Method

In my research I have studied legislation, case law as well as legal doctrine. The United Nations Charter, more precisely Art. 2(4) and Chapter VII, acted as the starting point for the study of the legal status of humanitarian intervention. In addition, I have studied various conventions and declarations adopted on the basis of human rights. I have also reviewed reports by the International Commission on Intervention and State Sovereignty⁹ and the Danish Institute of International Affairs.¹⁰ To the extent secondary sources have been used, they were chosen with the purpose of shedding light over the different opinions present in the legal discourse on humanitarian intervention.

⁸ Oppenheim, *International Law: a treatise* (H. Lauterpacht ed. 1955) at 306-20.

⁹ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, Ottawa, 2001.

¹⁰ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999.

2 The Notion of Legality

The question of the legality of humanitarian intervention is determined by the norms of international law, i.e. treaty law and customary law. In theory the question whether or not humanitarian intervention is legal or illegal in a specific situation should be clear but in practice this is not always the case. At times, the limits of international law are stretched and indeed violated. New customary norms may emerge.

2.1 The Correlation between Order and Justice

In the debate surrounding humanitarian intervention emphasis is put on the relationship between order and justice. What is the relationship between these two notions; is one a precondition for the other? What should determine the actions of the international community- efforts to preserve law and stability in the international arena or actions taken to end human suffering in a conflict?¹¹

There seem to be a tension between order and justice which in situations can be difficult to reconcile. One might argue that order is a prerequisite for justice in that without the existence of political order and authority within a state the risk of instability and civil war is apparent whereby it will be very difficult to ensure the protection of human rights. In a global perspective, international relations will be constrained unless there is a level of predictability and co-operation. As a result, national security issues will limit the ability of the international community to act in the event of massive human rights violations in fear of further disturbing the international order. From this viewpoint, maintaining order is a necessity to ensure domestic and international stability and a prerequisite to efforts to establish and uphold values such as human rights. This line of arguments is related to realist thinking and the realist emphasis on domestic and international order as the main priority for statesmen. However, the liberals are of a different opinion and argue that in fact, justice is a prerequisite for order. In their view, the legitimacy and stability of the domestic and international order is derived from the protection of individual rights and democracy. The absence of such rights in a state would result not solely in an authoritarian and unfair society but also a very unstable and vulnerable domestic order. If the international community would let the principles of sovereignty and

¹¹ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 14.

non-intervention prevent a reaction to massive violations of these basic rights it will surely result in an internal conflict with international effects.¹² No simple answer can be presented in respect to the relationship between order and justice. Efforts are made to reconcile the two notions, as regards humanitarian intervention the conflict arises between state sovereignty and the respect for human rights.

2.2. Humanitarian Intervention Emerged

The classical writers on the law of nations, such as Grotius¹³ acknowledged that a war fought with the objective to end injustice and punish those guilty of crimes was a just war. There were two key conditions for a *iusta causa* for permitted war; serious grievance suffered by the people and the refusal to rectify on the side of the state. Grotius further claimed the right of a third party to support the side they believed had a just cause.¹⁴ By the end of the nineteenth century the right of humanitarian intervention (*l'intervention d'humanité*) was recognized by a majority of legal writers. If a state had treated those under its power in an extremely brutal and cruel manner, it was concluded to have abused its sovereignty and thereby made itself liable to action by any state willing to intervene. However, the doctrine on humanitarian intervention was unclear regarding what situations justified an intervention.¹⁵ The risk of abuse was also present considering only states with power had the means of undertaking such measures. Often the military interventions justified as humanitarian interventions were undertaken for reasons of self-interest. The state practice relating to humanitarian intervention is therefore not easily examined since the humanitarian reasons were simply subsidiary. In addition, *ex post facto* classification of interventions as justified without reference to a particular doctrine of humanitarian intervention has rendered the study even more difficult.

Few genuine cases, if any, of humanitarian intervention had occurred by the early 1960s and it was considered by most legal scholars to be a notion of the past.¹⁶ During the Cold War, the doctrine of humanitarian intervention was debated solely among legal scholars as states preferred to maintain an approach of status quo. It was mainly by the end of the Cold War that the notion of humanitarian intervention yet again was articulated by states.¹⁷ However, it

¹² Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 15.

¹³ Grotius, *De Jure Belli ac Pacis*, Bk. II, ch. XXV. 8; ch. XX. 38.

¹⁴ Ian Brownlie, *International law and the use of force by states*, (Oxford: Clarendon Press, 1963) at 16.

¹⁵ Ian Brownlie, *International law and the use of force by states*, (Oxford: Clarendon Press, 1963) at 338.

¹⁶ Ian Brownlie, *International law and the use of force by states*, (Oxford: Clarendon Press, 1963) at 339.

¹⁷ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 27.

seems that with the end of the Cold War the struggle between free markets and communism was replaced by the universality of human rights in opposition to sovereign absolutism.¹⁸

2.3 State Sovereignty and the Principle of Non-Intervention

Present day conflicts are mostly internal rather than between states why the notion of sovereignty is very much a part of the discussion. Are “humanitarian” and “intervention” two contradictory conceptions with respect to sovereignty or can they co-exist? By studying the sources of underlying authority for sovereignty and human rights respectively reconciliation might prove possible.¹⁹

The notion of sovereign rule with respect to regulated relationships and legal traditions can be traced back centuries to unrelated territorial entities such as the Holy Roman Empire, China and Egypt. However, the contemporary conception of sovereignty was formed by agreements signed by European states in the Treaties of Westphalia in 1648. The theory of Westphalia, presents the legal identity of a state as drawn from the idea of sovereignty allowing the state to exercise total and exclusive jurisdiction within its territorial borders.²⁰ No power is higher than the individual state. In this regard, sovereignty represents equality among states which otherwise may be far from equal in power and resources. The 1933 Montevideo Convention on the Rights and Duties of States codified the elements of sovereignty.

The idea of non-intervention in domestic jurisdiction of other states is a fundamental principle of customary international law and can be seen as reflecting the principle of sovereignty whereby sovereign states are obliged to respect the sovereignty of all other states.²¹ The principle of non-intervention has been reaffirmed in numerous declarations²² passed by the United Nations General Assembly similarly the International Court of Justice has confirmed the principle as part of customary international law.²³ The customary norm of

¹⁸ Michael Likosky, *Transnational Legal Processes* (London: Butterworths, 2002) at 222.

¹⁹ Charlotte Ku & Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Boulder, Colo: L. Rienner Publishers, 1998) at 370.

²⁰ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, Ottawa, 2001, at 12.

²¹ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, Ottawa, 2001, at 12.

²² Examples are the *Declaration on the Inadmissibility of Intervention* (1965) and the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* (1970).

²³ For example in the *Corfu Channel* case, ICJ Reports 1949, p. 35 and in the *Military and Paramilitary Activities* case, ICJ Reports, (1986), para. 202.

non-intervention is relevant in the relationship between states whereas interventions by organs of the United Nations are regulated by the United Nations Charter Article 2(7).

The Charter of the United Nations was established in 1945, with the end of the Second World War. It recognized the principle of equality among states and the principle of non-intervention in articles 2(1)²⁴ and 2(7) respectively. Article 2(7) of the United Nations Charter stipulates 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.” The provision contains two essential elements. Firstly, the intensity of the action must amount to an “intervention” and secondly, the intervention must be designated to interfere in matters of internal affairs. Matters which are traditionally seen as being “essentially within the domestic jurisdiction” of a state include the constitutional order, and the political, economic, social and cultural system.²⁵

There are, however, a number of important and generally recognized limits to the notion of state sovereignty in international law. The United Nations Charter presents the challenge of respecting sovereignty, independence and equality among states while upholding the international obligation of maintaining international peace and security. Chapter VII of the Charter allows the Security Council to circumvent the notion of state sovereignty in situations where it takes measures in response to “a threat to peace, a breach of the peace or an act of aggression.”²⁶ In conclusion, the sovereignty of states, as provided for in the United Nations Charter, succumbs to the maintenance of international peace and security.

Additional limitations of state sovereignty can be found in customary and treaty obligations in international relations and international law.²⁷ Since the end of the Second World War, international law has expanded drastically in many areas, one being the international law of human rights. Conventions have been created and signed within the field of human rights emphasizing the rights of individuals. Three years after the signing of the United Nations Charter, the General Assembly adopted the Universal Declaration of Human Rights. The Universal Declaration of Human Rights reflects the belief that the basis of

²⁴ Article 2(1) of the UN Charter reads: “*The organization is based on the principle of the sovereign equality of all its members.*”

²⁵ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 49.

²⁶ Article 39 of the UN Charter

²⁷ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 49.

freedom, justice and peace is “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”.²⁸ Other fundamental documents in the field of international humanitarian law are the four *Geneva Conventions* from 1949, with *Additional Protocols I and II* from 1977.

Under international law, states have a legal responsibility to honor their international commitments and consequently their sovereignty is limited to the extent the states have obligations by virtue of their membership in the United Nations. Article 1(2) of the Charter reads: “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.” The article goes on to stipulate purposes and principles which obligate the Members to achieve international cooperation in fields of economic, social, cultural, or humanitarian character. It further promotes the respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The organization of the United Nations is acknowledged as a forum to harmonize state actions taken to reach these objectives. The United Nations Charter has thus referred the solving of these matters to the international sphere why human rights violations can not be interpreted as being an exclusively domestic matter but rather a concern of the entire international community.²⁹ Furthermore, Article 55 of the Charter states that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms”. In accordance with Article 56 all Members of the United Nations pledge themselves to take joint and separate action to achieve the object of protecting human rights.

In 1970, the International Court of Justice concluded that the obligations of a state towards the international community include the protections of “the principles and rules concerning basic rights of the human person”. The Court continued by affirming that the protection of these rights concerns the international community of states: “all states can be held to have a legal interest in their protection; they are obligations *erga omnes* (...)”.³⁰ Today, the most fundamental norms of international humanitarian law and human rights law are considered part of customary international law and thereby legally binding upon all states.³¹

The organs of the United Nations as well as states are increasingly involved in the protection of fundamental human rights which give weight to the idea that the protection of

²⁸ Universal Declaration of Human Rights, (1948), *preamble*.

²⁹ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 46.

³⁰ *Barcelona Traction* case, ICJ Reports 1970, para. 33-34.

³¹ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 51.

these rights is a concern of the international community as a whole, regardless of explicit legal obligation. The organs of the United Nations view the provisions in the Charter as sufficient legal basis for intervention in cases of gross and systematic human rights violations. Until today, no state has made a successful claim of 2(7) against United Nations involvement in issues of human rights.³²

Comments by UN Secretary-Generals have also enforced the notion that sovereignty today can not be seen as an absolute in the international community but that there are other aspects that need to be taken into account. In the words of the former Secretary-General Boutros Boutros-Ghali: “the time of absolute sovereignty (...) has passed; its theory was never matched by reality.”³³ Former Secretary-General Kofi Annan also expressed his concern by stating that “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica- to gross and systematic violations of human rights that affect every perception of our common humanity?”³⁴

Secretary-General Kofi Annan further elaborated on the issue by suggesting two notions of sovereignty. The first is vested in the state and the second in the people and individuals. The suggestion presented by the Secretary-General can be seen as a reflection of the growing international dedication to democratic governments as ‘of, by and for the people’. The two conceptions of sovereignty should not be seen as defying each other but rather the more traditional notion of sovereignty as vested in the state should find ways to include the latter and allow for greater individual and collective freedom for the people.³⁵

³² Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 53.

³³ Boutros Boutros-Ghali, *An Agenda for Peace*, (New York: United Nations, 1992), para.17.

³⁴ This question was asked in September 2000, by Kofi Annan, in the Millennium report to the General Assembly.

³⁵ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, Ottawa, 2001, at 13.

3 The Legal Regime of the UN Charter

The United Nations Charter came into force on 24 October 1945. In the period before the Charter, the General Treaty for the Renunciation of War (1928) constituted the legal regime for the use of force.³⁶ Hence, this instrument provided the settings for the development of customary law in the period prior to the United Nations Charter. The legal regime of the General Treaty, as it was interpreted by the signatories, prefigures that of the United Nations Charter why there is continuity in the state practice from the period of the General Treaty, 1928 to 1945, and the legal regime of the Charter.³⁷ The UN Charter is indeed a unique legal instrument which, still today is the most important legal instrument as regards the use of force.

The United Nations Charter contains a number of provisions concerning the use of force, the most essential provisions being Article 2(4), Article 51 and Chapter VII. The provisions do not explicitly speak of the use of force but instead refer to aggression (Art. 2.4), self-defense (Art. 51) and enforcement action (Chapter VII). As mentioned initially, the matter of self-defense is left to the side to allow greater emphasis to be put on Article 2(4) and Chapter VII of the UN Charter.

3.1 A Threat to Peace

The idea behind the United Nations Charter is a system of collective security where the UN Security Council has primary responsibility for the maintenance of international peace and security while the other organs of the United Nations, the General Assembly in particular, have a subsidiary responsibility. In line with Chapter VII of the Charter, the Security Council decides upon the measures necessary to maintain international peace. Such a decision may include the use of force. Important to note in relation to the Security Council's decision making is that in accordance with Article 25 of the Charter, the decisions taken by the Security Council are binding. Hence, if a resolution passed by the Security Council explicitly

³⁶ Signed in Paris on August 27, 1928. It has often been referred to as the Kellogg-Briand Pact.

³⁷ Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford; New York: Oxford University Press, 2003) at 698.

authorizes an intervention by the use of force the issue of legality of the action is generally not questioned.³⁸

Chapter VII thus provides the legal basis for military intervention by the Security Council in situations where a “threat to peace”, a “breach of the peace” or an “act of aggression” is at hand.³⁹ According to Article 24(1) of the Charter the Security Council is carrying out the responsibility of maintaining international peace and security on behalf of the Member States and decisions taken by the Council is binding upon the Member States.⁴⁰ Affirmative votes of nine of its fifteen Members including the concurring votes of the Permanent Members; the United States, the United Kingdom, France, China and Russia, is needed to reach a decision within the Security Council.⁴¹ However, established practice indicates that abstention by one or more Permanent Members does not prevent a decision from being made.⁴²

When a serious situation has arisen, posing a possible threat to international peace and security, a series of decisions must be addressed by the Security Council. According to Article 39 of the Charter, the existence of a “threat to peace”, “a breach of the peace” or an “act of aggression” need to be decided upon in addition to what would be appropriate measures in response to the situation at hand. Non-military measures such as economic sanctions may be sufficient and should always be used as a first resort according to Article 41 of the Charter but necessary measures may also include the use of military force. In accordance with Article 42 of the United Nations Charter, military force is only to be used when non-military measures “would be inadequate or have proved to be inadequate”.

If military enforcement action is decided upon, Article 43 stipulates that special agreements are to provide the Security Council with the forces necessary to carry out the action. Hence, no Member State has the obligation to provide the Security Council with troops but it is generally recognized that the Security Council can authorize a military action to be carried out on a voluntary basis by Members of the United Nations. The authorization by the Security Council may be directed to the Member States in general or to a particular Member, regional organization or agency.⁴³ Article 53 of the Charter recognizes the

³⁸ Olof Beckman, *Armed Intervention – Pursuing Legitimacy and the Pragmatic Use of legal Argument*, (Lund University, Media Tryck, 2005) at 38.

³⁹ Article 39, United Nations Charter (1945).

⁴⁰ Article 25 of the United Nations Charter (1945).

⁴¹ Article 27(3) of the United Nations Charter (1945).

⁴² Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 57.

⁴³ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 59.

possibility of using regional organisations or agencies for military enforcement actions but emphasises that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”.

Chapter VII of the United Nations Charter allow for the use of force in order to maintain or restore international peace and security and does not theoretically support sanctions against states acting in violation of international law. Yet the United Nations Security Council has on several occasions condemned gross and systematic human rights violations on the basis of Chapter VII. The minimum requirement for enforcement action under Chapter VII is a “threat to peace” under Article 39 of the United Nations Charter which according to Security Council practice is the relevant criterion with respect to humanitarian interventions.⁴⁴

The report by the Danish Institute of International affairs provides for a rather restrictive interpretation of a “threat to the peace” with reference to Article 39 of the Charter. It argues that a threat to peace refers to international peace and suggests that “It was hardly the intention of the framers of the Charter that internal conflicts and human rights violations should be regarded as a threat to international peace”. The United Nations Security Council has addressed internal conflicts through Chapter VII of the Charter as a threat to peace in cases such as of Somalia and Haiti. True, most of these situations had international repercussions but, according to the Danish report, they would not qualify as a “threat to peace” in its original sense. Furthermore, in the practice of the Security Council today, it is less often referring to international repercussions when dealing with internal conflicts under Chapter VII.⁴⁵ However, the report by the Danish Institute of International Affairs acknowledges the development and broadening of the notion through the acts of the Security Council which in situations has regarded civil war with massive human rights violations and human suffering as a threat to the peace regardless of its international consequences.⁴⁶ The report suggests that this practice can either be seen as the reflection of a change in the understanding of “international peace”, by moving away from the traditional and negative meaning of peace as the absence of military conflict, and embracing a wider and positive notion understood as stability and order for which internal conditions of a state is also

⁴⁴ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 61.

⁴⁵ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 62.

⁴⁶ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 69.

important. Or, the practice can be seen as a *de facto* derogation of the concept of a “threat to peace” and a go-ahead for the Security Council to act on solely humanitarian grounds.⁴⁷

The fact remains, the practice of the United Nations Security Council shows a clear tendency towards acknowledging inherently internal conflicts in violation of human rights, a threat to international peace. It is not a totally new phenomenon but present already in the Security Council practice from the 1960s and 1970s with the conflicts in Southern Rhodesia (1966)⁴⁸ and South Africa (1977)⁴⁹ being labeled as a “threat to peace”. Still, with the end of the Cold War, the Security Council has shown an increasing tendency in considering inherently internal conflicts as a threat to peace. There has undoubtedly been a widening of the notion throughout the 1990s and thus an inherently internal conflict need not have international repercussions to be considered a threat to international peace.⁵⁰ The Security Council has dealt with civil war and human rights violations under the provisions of Chapter VII in numerous cases such as, that of Former Yugoslavia, Liberia, Somalia, Haiti, Rwanda, Zaire, Kosovo and East Timor.

3.2 The Prohibition of Force

The legal norm guiding us on the prohibition of the threat or use of force is the United Nations Charter Article 2(4) which states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The prohibition formulated in 2(4) of the Charter is not solely treaty and international customary law but also *ius cogens* as codified in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties.⁵¹ As a part of *ius cogens*, Article 2(4) of the Charter is accepted and recognized by the international community as a whole and it is thus binding upon the states both individually and as members of international organizations as well as

⁴⁷ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 74.

⁴⁸ Security Council resolution 221: Question concerning the situation in Southern Rhodesia (9 April 1966) declared the situation in Southern Rhodesia a “threat to peace”. This was the first time the Security Council had determined violations of basic human rights a threat to international peace.

⁴⁹ Security Council resolution 418: South Africa (4 Nov 1977) considered the policy of apartheid and repressions as well as the attacks made on neighbouring states to endanger international peace and security.

⁵⁰ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 64.

⁵¹ Also concluded in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, ICJ Reports (1986) 14, para. 190.

binding upon the organization themselves. No derogation is permitted and the single way to modify the provision is by a subsequent norm of general international law having the same peremptory character. Thus, the prohibition of force embodied in Article 2(4) of the United Nations Charter cannot be set aside by contract at the regional level.⁵²

There are explicit exceptions to the prohibition of the use of force found in the United Nations Charter, such as Article 51 on self-defense and Chapter VII on enforcement actions by the Security Council to maintain international peace and security. If the provision leaves room for other exceptions, such as the right of humanitarian intervention, is a more problematic question.

Today, Article 2(4) is the subject of much debate among legal scholars as to the exact scope of the prohibition of the use of force. Does Article 2(4) of the United Nations Charter allow for humanitarian intervention? The intervention by NATO in Kosovo in 1999 much highlighted the issue of controversy. States and legal scholars alike expressed their differing opinions of the legality of the action with respect to Article 2(4). The primary subject of disagreement is the second part of the article, namely how to interpret the phrasing “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” A strict interpretation of the article would seem to prohibit all use of force against another state. A more narrow interpretation of the wording in Article 2(4) would suggest that the use of force is prohibited only when (i) it impairs the territorial integrity of the state subject to the action; (ii) it affects its political independence or (iii) it is otherwise inconsistent with the purposes of the United Nations.⁵³ Was Article 2(4) of the Charter a codification of existing international customary law in 1945 or was it to be narrowly interpreted and thereby provide a different approach to the use of force than that of international customary law?⁵⁴ The relevant norms with respect to interpretation of Article 2(4) would be Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

A strict reading of Article 2(4) of the United Nations Charter is argued by the opposition to interventions on humanitarian grounds. Since humanitarian intervention is not explicitly mentioned in the Charter as an exception to the use of force, it is thus unlawful use of force. They further argue that allowing yet another exception to the fundamental prohibition of the

⁵² Bruno Simma, “NATO, the UN and the use of force: Legal Aspects”, (1999) 10 EJIL, 1.

⁵³ Fernando R. Téson, *Humanitarian Intervention: an Inquiry into Law and Morality*, 2nd ed. (Irvington-On-Hudson, N.Y.: Transnational 1988) at 132.

⁵⁴ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 24.

use of force would render the provision less authoritative and it would leave the door open to abuse.⁵⁵

The proponents for humanitarian intervention, on the other hand, claim that intervention for this purpose is indeed an exception to the general prohibition of the use of force in Article 2(4). They support this view by interpreting the provision in line with the purposes of the United Nations Charter. The promotion and protection of human rights is a primary purpose of the United Nations why it would be wrong to argue the prohibition of the use of force to protect human rights. Also, the meaning of “force against territorial integrity and political independence” in 1945 when the United Nations Charter was drafted was rather technical and it did not include all use of force. Humanitarian intervention, for example, when genuine, does not result in territorial conquest or political subjugation.⁵⁶

The more narrow interpretation of 2(4), i.e. allowing other exceptions to the use of force, was of little concern in the past since few attempts were made to interpret Article 2(4) in this manner. The *Corfu Channel* case⁵⁷, however, provides us with an example. The United Kingdom undertook an intervention by the use of force in Albanian waters to try and recover evidence concerning an incident where two British warships were destroyed by mines. Before the International Court of Justice, The United Kingdom made an effort in justifying its military intervention in Albanian waters by referring to Article 2(4) of the United Nations Charter and stating that the action taken by the UK did not threaten the territorial integrity or the political independence of Albania. The International Court of Justice stated that it “can only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot find a place in international law. It is still less admissible in the particular form it would take here- it would be reserved for the most powerful states.”⁵⁸ The rejection of the argument presented by the United Kingdom has in turn been subject to interpretation. Was this an absolute rejection of the narrow interpretation of Article 2(4) of the Charter or was the rejected based on the particular facts of the case?⁵⁹

⁵⁵ Fernando R. Téson, *Humanitarian Intervention: an Inquiry into Law and Morality*, 2nd ed. (Irvington-On-Hudson, N.Y.: Transnational 1988) at 128.

⁵⁶ Fernando R. Téson, *Humanitarian Intervention: an Inquiry into Law and Morality*, 2nd ed. (Irvington-On-Hudson, N.Y.: Transnational 1988) at 131.

⁵⁷ *Corfu Channel* case, ICJ Reports (1949).

⁵⁸ *Corfu Channel* case, ICJ Reports (1949) 4 at 34.

⁵⁹ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 25.

4 International Customary Law

If the United Nations Charter does not provide the legal ground for humanitarian intervention- can it be found in international customary law? In order for a new custom to be created there need to be two elements present: general practice (*diuturnitas*) and the conviction that the practice reflects, or amounts to, law (*opinio juris*) or is otherwise required by economic, social or political necessities (*opinio necessitates*).⁶⁰

4.1 Diuturnitas and Opinio Juris

International law is constantly evolving, not only through the signing of new international conventions or amendment of existing conventions, but also through the progress of customary law. Article 38.1(b) of the Statute of the International Court of Justice recognizes as a source of law “international custom, as evidence of a general practice accepted as law.”

Whilst treaty law is the most important source of development of international law today, state practice was the dominant method in the past. The formal adoption of new norms by creating new international conventions or by amending the United Nations Charter is clearly the more direct and reliable way of development. However, state practice becomes increasingly important with respect to vexed questions such as humanitarian interventions.⁶¹

Initially, I did say I would leave the issue of legitimacy to the side but while discussing customary law it has some legal implications. The concept of legitimacy is not to decide whether an action is legal or not but it may affect the future development of international law (*de lege ferenda*). As the issue of legitimacy is subject to debate among legal scholars as well as the general public it reflects the ideas and desires of changes in international law. At times, there will be attempts to try and challenge the existing legal order by widening the scope of international law. The development of international law is, however, dependent upon the practice of the states when justifying their actions. The states can either claim legitimacy for their actions through mainly legal reasons or simply political and moral reasons. If they present a legal justification this may ultimately lead to the formation of a new legal norm whereas the purely political-moral justification doesn't challenge the existing legal norm. If a

⁶⁰ Antonio Cassese, *International Law*, 2nd ed. (Oxford; New York: Oxford University Press, 2005) at 156.

⁶¹ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 25.

legal justification changes the balance between legality and legitimacy is dependent upon the reaction by the international community. The states and as the final resort, the International Court of Justice, can either chose to reject or accept this new practice. If accepted, there has been an evolution of international customary law and new legal norms have been formed.⁶²

4.2 The Evolution in State Practice

So, has a right of humanitarian intervention been established through state practice? Can we see a return of the original concept of *ius gentium* where international law is based on human rights rather than being focused on nation-states?⁶³

During the Cold War, the legality of humanitarian intervention was argued by legal scholars rather than states. However, in the absence of state practice and with the adoption of the *Friendly Relations Declaration* (1970) excluding the right to intervene, it was difficult to see how a legal norm of the right to humanitarian intervention existed.⁶⁴ No exception was provided for humanitarian intervention in the resolution. The *Definition of Aggression* provision (1974) further stated “no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression”.⁶⁵

The International Court of Justice likewise rejected forcible humanitarian intervention in the *Nicaragua* case where the United States had supported the *contras* in an attempt to overthrow the government of Nicaragua.⁶⁶ The doctrine of humanitarian intervention had not been invoked by the United States but the Court still reflected over the possible legal justification of use of force to protect human rights. The Court of International Justice stated, “While the USA might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regards to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.”⁶⁷ Again, the case is subject to interpretation. Was this the rejection of humanitarian intervention or simply

⁶² Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 25.

⁶³ Fernando R. Téson, *Humanitarian Intervention: an Inquiry into Law and Morality*, 2nd ed. (Irvington-On-Hudson, N.Y.: Transnational 1988) at 158.

⁶⁴ UN General Assembly Resolution 2625 (xxv) Declaration on principles of international law friendly relations and co-operation among states in accordance with the charter of the united nations (1970).

⁶⁵ UN General Assembly Resolution 3314 (xxix) Definition of Aggression provision (1974).

⁶⁶ *Military and Paramilitary Activities* case, ICJ Reports (1970).

⁶⁷ *Military and Paramilitary Activities* case, ICJ Reports (1970) at para. 268.

the conclusion that the action taken by the United States did not promote any humanitarian objective? The Court further made a distinction between forcible intervention and genuine humanitarian assistance.⁶⁸

More recent state practice show a change in the attitude regarding the use of force to protect human rights with the NATO states more open to the notion and Russia and China in strong opposition against a legal doctrine of forcible humanitarian intervention. The first clear indication was the intervention in Iraq in 1991 with the purpose to protect the minority populations of Kurds and Shiites. After pressure from France, the Security Council had passed Resolution 688⁶⁹ calling upon Iraq to end the repression of its civilian population and to allow access to international humanitarian organization. The Resolution was not passed under Chapter VII and it did not authorize the use of force but explicitly recalled Article 2(7) of the Charter prohibiting organs of the United Nations to intervene in the domestic jurisdiction of Iraq. Nevertheless, a military intervention was conducted by the USA, the United Kingdom and France. Safe havens were proclaimed and Iraqi troops were required to leave the areas. The operation took place without prior authorization by the United Nations Security Council and no legal justification of humanitarian intervention was subsequently put forward in the Security Council. Still, the intervention was never condemned by the United Nations Security Council or the General Assembly.⁷⁰ Next, again without prior authorization by the Security Council, no-fly zones over north and south Iraq was proclaimed. The protests made by Iraq were met by the argument that the action taken was in support of Resolution 688. The line of reasoning seems to have included an implied authorization by Security Council Resolution in the absence of an explicit authorization which subsequently has been restated on numerous occasions. The United Kingdom has since the intervention in Iraq 1991/92 progressively recognized the legality of humanitarian interventions in the open forum. Not so much in the United Nations Security Council as statements and publications in the UK.⁷¹

As the state practice show, the line between legality and illegality is not always as sharp as it may be portrayed. Even though, in principle, the distinction is apparent there is always the shade of grey to complicate the matter.

⁶⁸ *Military and Paramilitary Activities* case, ICJ Reports (1970) at para. 242: “There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as an unlawful intervention, or as in any other way contrary to international law.”

⁶⁹ Security Council resolution 688 : Iraq (5 April 1991).

⁷⁰ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 28-29.

⁷¹ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 30.

5 The Question Of Authority

5.1 Authorization by the UN Security Council

Military actions by states, if authorized by the Security Council as enforcement actions under Chapter VII of the UN Charter, is considered to be carried out on behalf of the United Nations. The use of force is thus lawful under international law unless in breach of international humanitarian law concerning international armed conflict. If the use of force exceeds the level of scale or duration authorized by the Security Council it is equally considered a breach international law if there is no alternative legal basis for the action.⁷² Hence, it must be concluded that humanitarian intervention with the prior authorization by the Security Council is lawful under international law today and thus a legal option to end gross and systematic human rights violations.

The report by the ICISS concludes that the UN Security Council is the best and the most appropriate body to make a decision on the use of force for humanitarian reasons. The report stresses the need to improve the response by the Security Council rather than to find alternative sources of authority. The ICISS further acknowledges that the Security Council should take into account the possibility of states taking measures outside the legal framework of the United Nations if the Council fails to react to grave mass violations of human rights which in turn would damage the stature and credibility of the United Nations. According to the report, the authorization by the Security Council should be sought in all cases prior to any military intervention. A formal request for authorization should be made by those seeking an intervention or, alternatively, the Council could raise the matter on its own initiative or the Secretary-General could raise it under article 99 of the UN Charter.

However, in the discussion surrounding the authorization from the UN Security Council, there is an important question to ask; what causes greater harm to international order, a humanitarian intervention conducted without prior authorization by the Security Council or the inactivity by the United Nations followed by immense human suffering?

⁷² Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 59.

5.2 Alternative Bodies of Authority

If and when the United Nations Security Council fails to act quickly enough or in an appropriate manner, are there any alternative bodies of authority which may render a humanitarian intervention without prior Security Council authorization legal?

One alternative cited by the ICISS would be to consider the intervention in an Emergency Special Session of the United Nations General Assembly under the “Uniting for Peace” procedure. These procedures evolved during the 1950s as a response to situations where the Security Council failed to exercise its responsibility of upholding international peace and security due to unanimity among its permanent members.⁷³ The *Uniting for Peace Resolution*⁷⁴ states that “if the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, the breach of peace, or an act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Member States for collective measures, including the case of a breach to the peace or an act of aggression the use of armed force when necessary, to maintain and restore international peace and security.”

However, the DUPI report is more restrictive in its legal interpretations than the ICISS report. Unlike the report by the ICISS, this report argues that the Uniting for Peace Resolution does not provide the legal basis for the transfer of a human rights issue from the Security Council to the General Assembly in situations where the Council is unwilling or unable to act. The Resolution simply establishes the competence of the General Assembly to recommend military action in case of a “breach of the peace” or an “act of aggression” not in situations where there is a “threat to the peace” as is considered to be the case of humanitarian emergencies.⁷⁵

Other alternative bodies presented by the ICISS are regional or sub-regional organizations intervening under Chapter VII of the Charter and subsequently seeking the authorization of the Security Council. *Ex post facto* approval has in fact been sought in a number of cases, such as the African regional instances in Liberia and Sierra Leone.⁷⁶

⁷³ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, Ottawa, 2001, at 53.

⁷⁴ UN General Assembly Resolution 377 (V) Uniting for Peace (1950).

⁷⁵ Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen 1999, at 61.

⁷⁶ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, Ottawa, 2001, at 54.

5.3 Unauthorized Humanitarian Intervention

Since the end of the Cold War, there have been several interventions conducted without the expressed authorization by the United Nations Security Council. Examples are the ECOWAS/ECOMOG intervention in Liberia in 1990-91 and the intervention in Iraq in 1991-92 to protect the Kurdish and Shi'a populations.

A more recent case of unauthorized intervention is the action taken by the North Atlantic Treaty Organization (NATO) in Kosovo in 1999.⁷⁷ The seventy-eight day bombing campaign against Yugoslavia by the NATO was alleged to be the response to massive human rights violations by the Serb dominated government against the minority ethnic population of Kosovo Albanians. Whether this was the real reason behind the attack or whether there were ulterior motives has been subject to much debate. The intervention in Kosovo was carried out without prior authorization by the Security Council and its legality has been questioned by many.⁷⁸

The initial authorization by the North Atlantic Council of air strike did not explicitly refer to the doctrine of humanitarian intervention when justifying its action but rather spoke of a threat to peace and security of the region. The NATO strategy was to halt the violence in the Kosovo region and consequently avoid a humanitarian catastrophe.⁷⁹ When *Operation Allied Forces* began, moral and political rather than legal reasons were presented as justification of the intervention. The Secretary-General of NATO proclaimed the failure of all negotiated, political solutions to the Kosovo crisis and further stated that NATO was taking actions in support of the political goals of the international community. "We must halt the violence and bring an end to the humanitarian catastrophe unfolding in Kosovo."⁸⁰ This statement seems to imply the claim to humanitarian intervention. In addition, the action was declared to further the aims of the international community as a whole. Hence, NATO is to some extent relying upon a doctrine of implied authorization by the United Nations Security Council.⁸¹

However, uncertainty remains as regards the legal justifications presented by NATO in relation to the intervention in Kosovo. Were the Security Council resolutions and the doctrine

⁷⁷ John O'Brien, *International Law*, (London: Cavendish, 2001) at 687.

⁷⁸ Valerie Epps, *International Law*, (Durham, N.C.: Carolina Academic Press, 2001) at 412.

⁷⁹ NATO Press Release 99/12, 30 January 1999.

⁸⁰ NATO Press Release 1999 (040).

⁸¹ Bruno Simma, "NATO, the UN and the use of force: Legal Aspects", (1999) 10 EJIL. 1.

of implied authorization necessary to render the action legal or were the allied forces relying upon an autonomous doctrine of humanitarian intervention?⁸²

Following the military intervention in Kosovo, the Security Council meetings were marked by a vivid debate concerning the legality of the actions taken by the NATO. The arguments against the air strikes were plentiful. The opponents of the intervention accused NATO of violating the United Nations Charter, primarily the prohibition of the use of force in Article 2(4). The lead role of the Security Council in the maintenance of international peace and security under Article 24 of the Charter had also been sidestepped according to the critique. Chapter VII of the United Nations Charter emphasizes the need for Security Council authorization and the unilateral action taken by NATO was a clear breach of international law. Some Member States regarded NATO as a regional organization under Chapter VIII of the Charter whereby any enforcement action must be authorized by the Security Council in accordance with Article 53.⁸³

Those defending the actions taken by NATO similarly presented a number of legal arguments, stressing the resolutions passed by the Security Council urging Yugoslavia to halt its actions. Several states, such as France, the Netherlands and Slovenia argued that, although, none of the resolutions passed by the Security Council authorized the use of force they nonetheless justified the actions taken by NATO. The USA invested less effort in a specific legal justification and simply stated that the actions taken by NATO were completely justified and necessary to stop the violence and to prevent a further deterioration of peace and stability in the region.⁸⁴

In 2000, the Independent International Commission on Kosovo concluded that: “(...) the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”⁸⁵ This demonstrates once more that legitimacy of an action does not necessarily guarantee the legality of the same.

⁸² Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 33.

⁸³ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 33.

⁸⁴ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 34.

⁸⁵ Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned*, at 4.

After the NATO military intervention in Kosovo, many states, including states in support of the action, urged the importance of the primary role of the Security Council in maintaining international peace and security. Security Council Resolution 1244⁸⁶ was passed, not as a retrospective acceptance of the NATO bombings, but to reaffirm the central role of the Security Council and the purposes and principles of the United Nations Charter. It also reaffirmed the commitment by all Member States to respect the sovereignty and territorial integrity of Yugoslavia. Russia was satisfied that NATO had recognized the primary role of the United Nations Security Council as responsible for maintaining international peace and security. China continued to consider the intervention as a serious violation of the UN Charter and norms of international law. However, considering the accepted peace plan in the region and the reaffirmation of the above notions, China decided to abstain as opposed to veto the resolution. Still, several Latin American States expressed a continuous concern over the unauthorized use of force by NATO.⁸⁷

The response by the body of the United Nations can be summed up in the following remarks made by the former UN Secretary-General Kofi Annan: “(...) on one side, the question of the legitimacy of an action taken by a regional organization without a UN mandate; on the other, the universally recognized imperative of effectively halting violations of human rights with grave humanitarian consequences. The inability in the case of Kosovo to unify these two equally compelling interests of the international community - universal legitimacy and effectiveness in defense of human rights - can only be viewed as a tragedy.”⁸⁸

Humanitarian intervention is a controversial method of halting human rights violations but in considering the alternatives many advocate a harmonization on the vexed issue.

⁸⁶ Security Council resolution 1244 on the situation relating Kosovo (1999).

⁸⁷ Christine D. Gray, *International Law and the Use of Force*, Oxford; New York: Oxford University Press, 2000) at 34.

⁸⁸ Kofi Annan, “The Legitimacy to Intervene in International action to uphold human rights requires a new understanding of state and individual sovereignty”, *Financial Times*, (December 31, 1999), online: www.globalpolicy.org/secgen/interven.htm

6 Codification of Criteria

The former UN Secretary-Generals Kofi Annan and Pérez de Cuéllar have both urged a consensus on the matter of humanitarian interventions by the use of force. In his last annual report on the work of the Secretary-General, Pérez de Cuéllar advocated that the principles of non-intervention and sovereignty found in the United Nations Charter should be reinterpreted. He wanted to establish the possibility of intervention on humanitarian grounds by identifying the criteria under which it should be carried out.⁸⁹ A number of countries have also made an effort in studying the doctrine of humanitarian intervention, its effect on state sovereignty and stipulate the conditions necessary to justify such an intervention.⁹⁰ If the international community could indeed agree upon a set of objective criteria under which humanitarian intervention would not constitute a breach of international law, an additional question arises—should the criteria be codified?

A legal debate over the codification of objective criteria with respect to humanitarian intervention was very much present during the 1960s and 1970s. The debate had many parallels with the discussions which surrounded the definitions of “war” in the General Treaty for the Renunciation of War (1928) and “aggression” under the United Nations Charter (1945). Since there was no clear definition at hand, states simply continued to intervene in their spheres of influence while avoiding the classification of their actions as “aggression”. In an attempt to clarify the threat or use of force prohibited under 2(4) of the United Nations Charter, the General Assembly passed resolution 3314 on the “Definition of Aggression” in 1974.⁹¹ However, many had desired a more comprehensible drafting of the resolution. Yet, states have not been able to abuse the letter of the text, but instead turned to extensive readings of other lawful uses of force such as self-defense under article 51 of the Charter or invitation by states to justify their actions.⁹² Concerns over the comprehensiveness of a

⁸⁹ Charlotte Ku & Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Boulder, Colo: L. Rienner Publishers, 1998) at 370.

⁹⁰ Reports on the issue have been produced by, for example, the Netherlands (*Humanitarian Intervention*), Denmark (*Humanitarian Intervention: Legal and Political Aspects*) and with a Canadian initiative the International Commission on Intervention and State Sovereignty produced the report *The Responsibility to Protect*.

⁹¹ UN General Assembly Resolution 3314 (xxix) Definition of Aggression provision (1974).

⁹² Charlotte Ku & Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Boulder, Colo: L. Rienner Publishers, 1998) at 371.

codified right of humanitarian intervention and the fear of abuse of the phrasing are equally the main objections to the codification of criteria of humanitarian intervention.

One apparent argument against the codification of criteria with regards to humanitarian intervention is that history foresees the future. Past interventions to protect human rights have not necessarily had humanitarian results or even pure humanitarian objectives. One example is the intervention in the Jaffna Peninsula by the Indian army with the objective to help the Tamil minority. This resulted in continued civil war and is more widely understood as an intervention for political reasons rather than humanitarian. Others in favor of codification argue that the concept of humanitarian intervention has not yet reached its full potential simply because there is a lack of objective criteria identified and recognized by the international community.⁹³

Another argument put forth by the opponents to codification is that it would lead to further abuse as states could use extensive interpretations of the letter of the provisions to justify their actions. The law would serve the strong political powers rather than protecting the weak. The response in favor of codification is that clearly identified objective criteria would restrain the justification of abusive actions as humanitarian since a higher level of proof could be required.

A third argument articulated by some in opposition of codified criteria is that codification would not serve any purpose as existing international norms recognize mitigating circumstances which would allow a state without self-interest to conduct a humanitarian intervention, only harmful conduct is restricted. In addition, article 2(4) of the United Nations Charter is subject to enough violations without yet another exception to erode it further. A response to this critique could be that a set of objective criteria would not solely affirm the acceptable conduct but also restrict the abusive use of force. A clarification of what is to be considered an unlawful conduct would reinforce the general prohibition on the use of force under article 2(4) of the United Nations Charter.⁹⁴

Opponents to codification further argues that even if objective criteria are codified, there are no guarantees of sincere humanitarian concerns behind the intervention but it can be used

⁹³ Charlotte Ku & Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Boulder, Colo: L. Rienner Publishers, 1998) at 372-373.

⁹⁴ Charlotte Ku & Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Boulder, Colo: L. Rienner Publishers, 1998) at 372-373.

as an excuse for motives of self-interest. While this is true, does it matter if there are ulterior motives if the state action has fulfilled the objective criteria?⁹⁵

⁹⁵ Charlotte Ku & Paul F. Diehl, *International Law: Classic and Contemporary Readings* (Boulder, Colo: L. Rienner Publishers, 1998) at 372-373.

7 Conclusion

Living in the Western world it is perhaps difficult to understand the skepticism towards the institute of humanitarian intervention. At face, what could be legally or morally wrong with an act to end gross and systematic human rights violations?

If we instead start by reflecting over the recent past we soon realize that our own 'embrace' of this notion might not be so old. When it was the interests of the Western world at stake and our actions that were being questioned the situation was reverse. It is interesting to look at prior practice of the Security Council regarding internal conflicts as a potential "threat to peace". For example, the policy of apartheid in South Africa was considered to constitute a "threat to peace". However in the 1960s it was not the Western powers which were in favor of this development in international law but it was the developing countries in Asia and Africa, backed by the Soviet Union.

Now the tide has turned and the West is once again gazing over the oceans, this time for alleged humanitarian reasons. With the colonial rule not too distant in the memory of many developing countries it is perhaps understandable why there is a certain disbelief against the doctrine of humanitarian interventions, at least beyond the scope of the United Nations. By recognizing the protection of human rights as an international matter it will undoubtedly limit their sovereignty. For many developing countries, sovereignty is the only equal status they share with the international community of states, while lacking in power in areas of economy, democracy and social structure. Some developing countries might even see the institution of humanitarian intervention as a Trojan horse from the West enclosing a one way ticket for the western powers.

Still, there has been a broadening in support of the possibility of unauthorized humanitarian intervention in cases of grave and systematic human rights violations. There are strong moral and political arguments to justify humanitarian interventions without prior Security Council authorization in situations where the Council is unable to act on serious violations of human rights due to veto by a Permanent Member. However, the legitimacy of an intervention does not make it legal. In my opinion, a study of state practice in the post Cold War era does not crystallize a right of humanitarian intervention without Security Council authorization under international customary law. I cannot see the emergence of sufficiently substantial state practice (*diuturnitas*) nor sufficient acceptance in the international

community (*opinio juris* or *opinio necessitates*) to fulfill the requisite conditions of customary law.

Yet, I see it as unrealistic to assume that the international community of states would not react to gross and systematic human rights violations in a situation where the United Nations Security Council is unable to respond. In the future we might very well see an emerging customary principle of unauthorized humanitarian interventions by individual states and *ad hoc* coalitions. However, there will indisputably be an increased risk of abuse since the operation will no longer be conducted on behalf of the United Nations and the operations are not ensured to respect the purposes and principles of the United Nations Charter. It will also have implications on the role of the United Nations Security Council as the primary actor in maintaining international peace and security. What consequences will a decentralized role of the Security Council have on the credibility and significance of the United Nations organization?

A way to keep authority within the Security Council could be to codify a set of objective criteria with respect to humanitarian intervention and emphasize the importance of Security Council authorization. An aspect of codification is that while customary law evolves, codifications are less adaptable to the changes over time. This is not necessarily to be looked upon negatively. The use of force is an invasive measure and thus should be restricted to exceptional situations. While a customary norm might be easier to argue considering the emergence of a customary norm is difficult to pinpoint in time, a codification if clear in phrasing is not as adaptable to subjective interpretations.

Even though humanitarian intervention with prior authorization from the United Nations Security Council has been largely accepted as a measure of protecting fundamental human rights it is still with the individual state that the primary responsibility rests. International law is dependent upon the will of states. The enforcement of international law lies in the hands of each state and equally it is the states that decide the future development of international norms. International law can only be upheld as long as the states accept, co-operate in good faith and comply with the international legal norms.

However, the responsibility shared by the international community is critical in a situation when the state is unwilling or unable to fulfill its obligations. The notion of humanitarian intervention is thereby a very important instrument which should be used wisely and under supervision, preferably by the United Nations Security Council.

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