THE RISE OF INTERVENTIONS TO PROTECT HUMAN RIGHTS IN THE WANING YEARS OF THE 20TH CENTURY

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TABLE OF CONTENTS

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INTRODUCTION

The current international legal order accords states the privilege of being the primary persons in international law.[1] It is through the agency of the state that rules and principles ultimately affecting the very lives of natural persons are created and enforced.[2] There is no dearth of legal scholars who assert that the international legal order is only as good as its ability to improve the living conditions of individual persons.[3] Indeed, modern international law has made significant inroads to recognizing that its primary concern is the promotion of the welfare of individuals. Normatively however, states still refuse to give up their preferred status which allow them to subordinate the welfare of their citizens to a predetermined national or state policy.[4] Even oft-cited international human rights

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[1] I. BROWNLIE, PUBLIC INTERNATIONAL LAW, 59 (1990) [hereinafter, BROWNLIE, PIL]; Gavin Symes, *Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq*, 19 MICH. J. INT'L LAW 581, 592 (1996).

[2] W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, 213 (1964).

[3] HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 70 (1950), *See generally* FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1950) [hereinafter TESON, HUMANITARIAN INTERVENTION]; Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47 (1996) [hereinafter D'Amato, *A Plea*].

[4] H. LAUTERPACHT, *supra* note 3, at 68-69.

documents recognize that states may suspend fundamental rights during states of necessity.[5] Furthermore, practical considerations in the development of the international legal regime necessitate the recognition of the fiction of the state. It is, after all, inconceivable how the main sources of international law can be developed without the active participation of states.[6] Thus, general international law and the United Nations Charter protect the integrity of the state by proscribing the interference of other states in its affairs. This respect for the integrity of the state as a subject of international law, has however, been challenged by the growing recognition of the primacy of individual rights over state sovereignty.

This paper explores the present state of the principles of sovereignty and non-interference in light of recent state practice concerning the enforcement of human rights. The first part of this paper examines whether the principle of non-interference is as formidable as it is often portrayed. The second part discusses the development of international human rights law. The third part is devoted to a discussion of the interplay between state sovereignty and international enforcement of fundamental human rights.

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[5] *See for example* art. 4 of the International Covenant on Civil and Political Rights which provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

[6] The Statute of the International Court of Justice enumerates the recognized sources of international law. Art. 38(1) provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
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> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of art. 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

I. THE PENUMBRA OF THE PRINCIPLE OF NON-INTERVENTION

A. Under General International Law

General principles and customary norms of international law that have developed from the rise of nation-states in the early 19th century reinforce the ascendancy of states over considerations of individual rights and welfare.[7] The cornerstone of international law remains to be the principle of sovereignty;[8] the primary conception of an international legal order still is that of a community of states enjoying equal standing and rights[9]. Although the Hobbesian sovereigns that maintain internal order have gradually become more receptive to republican principles[10] and the Leviathans have become more or less enlightened,[11] the awesome power of the State over its citizens is still conceded in international law.[12] Sovereignty, popularly described as the right of a state to perform all the rights of a state within its territory, not only affirms the Hobbesian internal order but also confines the ambit of a state's influence to generally everything within its territorial limits. Indeed it is well recognized that the corollary of the principle of sovereignty is the principle of non-intervention.[13]

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[7] *Infra* notes 62 – 69 and accompanying text.

[8] BROWNLIE, PIL, *supra* note 1, at 287; LOUIS HENKIN, HOW NATIONS BEHAVE 18 (1968).

[9] BROWNLIE, PIL, *supra* note 1, at 287; Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 INDIANA LAW JOURNAL 887, 889 (1992).

[10] *See* Thomas Franck, *The Emerging Right to Democracy*, 86 AM. J. INT'L L. 46, 47-48 (1992) (where the author argues that the worldwide democratization of political institutions reaffirms Austin's view that for law to be effective, it must secure the voluntary compliance of the subjects of the State).

[11] *Id.* (Franck enumerates 110 governments that have embraced open, multiparty, secret-ballot elections. He further states, "...(T)he governments no longer blinded by the totalitarian miasma seek to validate themselves in such a way as to secure a degree of voluntary acquiescence in the governing process.").

[12] *Id.*; ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., NON-INTERVENTION 376, 384 (1956) [hereinafter THOMAS & THOMAS, NON-INTERVENTION].

[13] OLIVER RAMSBOTHAM & TOM WOODHOUSE, HUMANITARIAN INTERVENTION IN CONTEMPORARY CONFLICT, 34 – 35 (1996). BROWNLIE, PIL, *supra* note 1 at 287, 291, Symes, *supra* note 1 at 593; *See* Richard A. Falk, *The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States*, 5 HOWARD L. REV. 163 (1959).

Yet, the last decade of the 20th century has gradually chipped away at the once impenetrable fortress of domestic jurisdiction. International political and legal events have reinforced established exceptions to the inviolability of state sovereignty and, if some authors are to be believed, created new ones.[14]

The controversy is not in determining whether non-interventionism is still a basic principle of international law, but in defining the limits of what may be considered as permissible acts of intervention.[15] Such difficulty lies in the inherent relativity of intervention such that certain acts must be judged in specific contexts and circumstances. Furthermore, as new norms of international law develop or the hierarchy and value systems of international law norms are reordered, the relative primacy of the principles of sovereignty and non-intervention may be diminished.[16]

A number of writers support a broad construction of the concept of non-intervention, justifying such position through impassioned advocacy of the inviolability of state sovereignty.[17] According to Brownlie, the necessary corollaries of the sovereignty and equality of states are: "(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor."[18] Thus, states and international organizations are precluded from exercising any authority over the internal and domestic affairs of other states.[19]

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[14] *See for example Franck*, *supra* note 10 (where the author argues that there is an emerging right to democracy).

[15] Delbruck, *supra* note 9, at 890.

[16] *See* D'Amato, *A Plea*, *supra* note 3 (showing that the current Sovereignty paradigm is unable to reflect the heightened awareness and respect for fundamental human rights.).

[17] THOMAS & THOMAS, NON-INTERVENTION *supra* note 12, at 372; Opperman, *Intervention*, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 233 (R. Bernhardt ed. 1987).

[18] BROWNLIE, PIL, *supra* note 1, at 287.

[19] *Id.* at 287 -297.

In recent years, however, writers have begun to argue against classic non-interventionism.[20] The trend is to examine the principle in the light of the exigencies of modern international relations. This is because many have observed that a sweeping prohibition of any and all forms of intervention would not only brand much of customary diplomatic intercourse as illegal[21] but would also deny the obvious existence and acceptance of a tolerable level of coercion.[22] Some authors go so far as to claim that intervention and coercion are the natural order of things in the community of nations.[23] Others support a restrictive construction of non-intervention by asserting that such is necessary to meet the gradual globalization of every aspect of human life and the inevitable internationalization of states' responsibilities.[24]

In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, the International Court of Justice (I.C.J.) had the opportunity to examine the principle of non-intervention and define what constitutes a prohibited intervention. The Court stated:

> A prohibited intervention must accordingly be one bearing on matters in which each state is permitted by the principle of state sovereignty to decide freely. One of these is the choice of political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices which must remain free ones.[25]

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[20] D'Amato, *A Plea*, *supra* note 3 at 57 – 60 (In one part, D'Amato writes: "The most extreme version of sovereignty could be called strict national sovereignty. In this view, nations are sovereign over international law. Therefore, international law exists only to the extent that each nation decides to obey it...This strict view of sovereignty is simply a cumbersome way of saying that international law is not "law." It is not "law" because nations are entitled (by virtue of the sovereignty theory) to disobey it at will. For the person who believes that international law is really law, strict national sovereignty makes no sense.).

[21] Stephen M. Schwebel, *Aggression, Intervention and Self-Defence*, 136 RECUEIL DES COURS 419, 454 (1972).

[22] RAMSBOTHAM & WOODHOUSE, *supra* note 13, at 39.

[23] MYRES MCDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 197 (1961), *cited in* Schwebel, *supra* note 21, at 454.

[24] Delbruck, *supra* note 9, at 890.

[25] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US) *Merits* 1986 I.C.J. Rep. ¶ 205 [hereinafter *Paramilitary Activities in Nicaragua*].

There is a consensus that the I.C.J., in this decision, acknowledged the possibility of lawful interventions.[26] In fact, the mere qualification of certain interventions as prohibited is a tacit recognition of the existence of allowable or permissible interventions. More than that, the Court itself stated that "reliance by a state on a novel right or an unprecedented exception to the principle might, if shared by other states tend toward a modification of customary international law."[27] Seizing the court's definition of prohibited intervention above, one writer argued that since governments cannot be conceived as having the power under international law to starve or ill-treat a section of its people, then it follows that foreign states may intervene in cases of violations of human rights.[28]

Probably the most convincing of the arguments supporting a more liberal interpretation of the customary norm of non-intervention is the assertion that intervention is necessary to restore order and/or protect human rights.[29] It is notable that authorities regarded as firm advocates of the principle of non-intervention do not subscribe to an absolute prohibition of intervention. The moral and legal philosopher Kant, often called the father of non-interventionism, lays down the principle of non-intervention in his Fifth Preliminary Article in *Thoughts on a Perpetual Peace*, stating thus: "No state shall interfere in the constitution and government of another state."[30] Yet, he did not make any sweeping condemnation of intervention and acknowledged that in times of anarchy or civil war, when through strife, a state were to be split into two parts, a foreign state may intervene to lend support to one part.[31] Professor Lillich points out that Kant's Fifth Preliminary Article must be read together with his First

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[26] TESON, HUMANITARIAN INTERVENTION, *supra* note 3, at 207- 214; Nirmala Chandrahasan, *Use of Force to Ensure Humanitarian Relief – A South Asian Precedent Examined*, 42 INT'L AND COMP. LAW Q. 664, 668 (1993); Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L. L. 1005, 1010-1013 (1998).

[27] *Paramilitary Activities in Nicaragua*, *supra* note 25, ¶ 207.

[28] Chandrahasan, *supra* note 26, at 668.

[29] *See generally* Dino Kritsiotis, *supra* note 27 (The author launches into the defense of humanitarian intervention by addressing the three most prevalent objections to the legitimacy of humanitarian intervention – the abuse of the rights, the selective application of the doctrine and the impurity of the motives of States.).

[30] IMMANUEL KANT, *Perptual Peace: A Philosophical Sketch*, *reprinted in* KANT: POLITICAL WRITINGS 93, 96 (Reis ed., 2d ed., 1991).

[31] *Id.* at 96.

Definitive Article, that "the civil constitution of every state shall be republican."[32] To Kant, a republican democracy is that which fully respects fundamental human rights, including the rights to freedom, due process, and equality.[33] Thus, Lillich concludes that the Fifth Preliminary Article can be read to apply only "among freedom-loving states, and liberal democracies should be free to argue that they have the right to intervene to protect citizens in States engaging in gross human rights violations."[34]

Also worth noting is Vatell's proscription of intervention. His defense of a nation-state's integrity basically observes Hobbes's concept of a natural equality of sovereigns in their relationship with other sovereigns such that the exercise of a state's power is limited by the exercise of the same power by other international persons. Thus, he states that "to intermeddle in the domestic affairs of another Nation or to undertake to constrain its councils is to do it injury."[35] Yet, Vattel wrote, "(I)f the prince attacking the fundamental laws, gives his subjects a lawful cause for resisting him, if by his unsupportable tyranny he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for aid."[36]

For Oppenheim, intervention is the "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things."[37] Note that this definition does not in itself make any value judgments as to whether intervention is *per se* illegal. Though the noted jurist acknowledges that intervention as a rule is prohibited, he adds that there are interventions which may be undertaken as a matter of right and those which, although not undertaken as a matter of right, are nonetheless permitted by international law.[38]

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[32] Lillich, *Kant and the Current Debate Over Humanitarian Intervention*, 6 J. OF TRANSNAT'L L. & POL'Y 397, 401 – 402 (1997) [hereinafter Lillich, *Kant*].

[33] *Id.* at 402.

[34] *Id.*

[35] VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW Bk. I, Ch. III, sec. 37 (1758 ed.) *cited in* THOMAS & THOMAS, NON-INTERVENTION, *supra* note, 12 at 5.

[36] *Id.* at 6.

[37] OPPENHEIM, INTERNATIONAL LAW 305 (H. Lauterpacht, ed. 1955).

[38] *Id.*

B. Non-intervention under the United Nations

1. Collective Non-intervention

The Charter of the United Nations (U.N.) transforms the proscription against intervention contained in general international law into a conventional obligation of the Organization. Yet the actual delimitation of the Organization's sphere of influence has been marked in broad and indistinct lines.

Art. 2(7) provides 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.

This article ostensibly prevents the U.N. as an organization from asserting itself in internal or domestic matters. This principle of collective non-intervention was previously adopted by the Covenant of the League of Nations. Art. 15(8) of the said Covenant formulated the principle, thus:

> If the dispute between the parties is claimed by one of them and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as the settlement.

It is curious that unlike in the Covenant's Art. 15(8), the Charter's provision makes no mention regarding which body has the authority to determine whether a given controversy is one of domestic jurisdiction or one which properly falls within the direct and immediate concern of the international community.[39] Furthermore, Art. 2(7) does not refer to international law as the standard for the determination of the domestic jurisdiction of a state.[40] It has been opined that

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[39] THOMAS & THOMAS, NON-INTERVENTION, *supra* note, 12 at 142.

[40] THOMAS & THOMAS, NON-INTERVENTION, *supra* note 12 at 142; BROWNLIE, PIL, *supra* note 1, at 294.

these changes were the drafters' way of strengthening the doctrine of domestic jurisdiction.[41]

In the years immediately following the formation of the U.N., Art. 2(7) had been interpreted as proscribing even the discussion of matters considered within the realm of domestic jurisdiction. "Intervene" in art. 2(7) was then defined as involving "a peremptory demand or attempt at interference accompanied by enforcement or threat of enforcement in case of non-compliance."[42] It was understood as including even measures which fall short of imposing another state's will in an imperative form,[43] e.g. discussions or studies initiated by the General Assembly or Economic and Social Council, or even specific recommendations drawing the state's attention to the propriety of acting in a particular manner.[44] But it seems that these interpretations which restrict the U.N. and its organs have, through the years, been diluted by the actual actions of states and by the Organization. As will be discussed more extensively in the succeeding portions of this paper, the practice of the General Assembly and the Security Council reveal that the vagueness surrounding the Charter's provision on non-intervention has worked against the intention of the drafters.[45]

The last clause of art. 2(7) has likewise been the subject of varied constructions. Under Chapter VII of the Charter, the Security Council is granted the power to "determine the existence of any threat to the peace, breach of the peace or act of aggression"[46] which can justify the use of coercive measures to check the situation.[47] Once such determination has been made, the Security Council may then authorize the organs and individual members of the

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[41] BROWNLIE, *supra* note 1, *at* 294.

[42] H. LAUTERPACHT, *supra* note 3, at 168.

[43] *Id.* at 168.

[44] Id. at 169; MANOUCHEHR GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, 136 (1962).

[45] BROWNLIE, *supra* note 1, at 294. ("In practice, United Nations organs, particularly on the basis of Chapters IX and XI of the Charter and the provisions on human rights in arts. 55 and 56, have taken action on a wide range of topics dealing with the relations of governments to their people.") *See* notes 174 –199 and accompanying text.

[46] U.N. CHARTER art. 39.

[47] U.N. CHARTER art. 39 - 51; *See* RAMSBOTHAM & WOODHOUSE, *supra* note 13 at 41-42.

Organization to act in accordance with its instructions.[48] The Charter requires that resort be made to peaceful alternatives before any use of force is authorized.[49]

This final clause of art. 2(7) has been interpreted as granting the Security Council an implicit power to determine which matters are not essentially within the domestic jurisdiction of States. In other words, certain matters which constitute a threat to peace and security (as determined by the Council) are yanked out of the domestic jurisdiction and properly placed under the jurisdiction of the U.N.[50] Thus, the so-called exclusive domestic jurisdiction clause provides cold comfort for States violating human rights. The Security Council is empowered to step in – in a peremptory manner – when "systematic and flagrant denial of human rights by a State results in international friction and actual or potential danger to peace, or when isolated outrages [are of such magnitude as to] impose an intolerable strain upon peaceful relations."[51]

The same clause has also been construed as creating an exception to the claim of domestic jurisdiction. Thomas and Thomas stated this argument precisely: "Therefore, the limitation of collective non-intervention in the domestic jurisdiction of any state is a narrow one, for even if there exists a matter which is normally within the domestic jurisdiction of a state, but which leads other states to object, there can exist a threat to the peace, and the question of domestic jurisdiction can then be by-passed in favor of action under Chapter 7."[52]

There is a world of difference between these two interpretations. In the former, the ambit of a State's domestic jurisdiction stretches or contracts according to conventional and customary international law. In the second construction, matters within the domestic jurisdiction are immutable, but the assertion of domestic jurisdiction cannot be used as a blanket argument to evade U.N. actions addressing threats to peace. While in the first interpretation, states

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[48] U.N. CHARTER art. 48.

[49] U.N. CHARTER arts. 41-43.

[50] Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 188 – 189 (Lillich ed. 1973).

[51] H. LAUTERPACHT, *supra* note 3, at 185 – 186. *See* Louis Henkin, *Human Rights and State* Sovereignty, GA. J. INT'L & COMP. L. 31, 41 (1996). *But see* Fernando Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 351 – 354 (1996) [hereinafter Teson, *Collective*] (arguing that the Security Council can authorize intervention to remedy human rights violations even if circumstances do not strictly constitute a breach of the peace.).

[52] THOMAS & THOMAS, NON-INTERVENTION, *supra* note 12, at 144 – 145.

which undertake coercive action to uphold the international standards of human rights never actually violate the domestic jurisdiction of the target state. In the latter, it is granted that every intervention is a violation of domestic jurisdiction and sovereignty but is considered permissible in order to uphold international humanitarian standards.

However, the dilemma, whether the final clause of art. 2(7) qualifies or creates exemptions to the principle of non-intervention, may now be considered academic. The fact is that the practice of the Security Council especially in the past decade has been to construe the limitations against intervention liberally.[53] Whatever the justification, the normative implication is clear – the Security Council will not countenance large-scale human rights violations even if it involves questions of possible violation of state sovereignty.

2. Unilateral Non-intervention[54]

Though the Charter prohibits the United Nations as an Organization from intervening in domestic affairs of any state, it does not contain any explicit prohibition against intervention by individual states or groups of states in each other's internal affairs. This is mainly due to the lack of consensus on what constitutes permissible intervention.[55] In fact, even after more than 20 years from the time the U.N. Charter came into force, the special committee tasked by the General Assembly to formulate the principle of non-intervention failed to settle the matter altogether.[56] This, however, did not prevent the General Assembly from adopting Resolution 2131 (XX) or the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.[57] The rhetoric of this resolution attempts to separate in bold lines the realm of the international from the internal. Schwebel

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[53] *See* notes 286 – 290 and accompanying text of this paper.

[54] For the purposes of this paper, "unilateral" is not used in the sense that only one State performs acts of intervention. It is used to denote action by a State or States without prior recourse to formal international mechanisms such as those adopted by the United Nations or regional associations. There is in such instances a "unilateral" determination of the course of action.

[55] RAMSBOTHAM & WOODHOUSE, *supra* note 13, at 39.

[56] *Id.*

[57] Adopted by a vote of 109-0 and 1 abstention.

observes, however, that such rhetoric, couched in absolute terms, should not be taken seriously.[58] Note for example the following articles of the Declaration:

> Article 1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned.
>
> Article 2. 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 rights...
>
> ...
>
> Article 4. The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.

Schwebel points out that the absolute interdiction embodied in the formulation of the principle of non-intervention fails to consider international legal and political realities. For example, the principle in this formulation condemns accepted coercive actions such as a state's severance of diplomatic relations for the purpose of altering the other state's policies deemed offensive to the former.[59] Considering the number of times this practice has been resorted to before and after GA Res. 2131, it is clear that such action cannot be considered unlawful.[60]

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[58] Schwebel, *supra* note 21, at 453.

[59] *Id.* at 454.

[60] The foregoing observations notwithstanding, this version has been restated in General Assembly Resolution 2625 (XXV) or the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations and in Resolution 36/103.

What is apparent from the foregoing discussion of the principle of intervention under general international law and under the U.N. Charter is that the principle is not an airtight compartment that restricts any and all interventions. The principle is actually very porous and allows justifiable interference into a state's internal actions and policies. The practical application and usage of the exceptions to the principle are illustrated in succeeding portions of this paper. The section immediately following discusses the most notable of the justifications for interventions – the protection of human rights.

II. THE ASCENDANCY OF HUMAN RIGHTS IN MODERN INTERNATIONAL LAW

The notion of human rights as superior to state sovereignty[61] was unthinkable prior to the Second World War, when traditional theories of sovereignty and of the individual as non-subject of international law ruled the day.[62] The concept of sovereignty at that time rejected the idea of individuals as units of the international order, it being incompatible with the dignity of states.[63] Under this Positivist doctrine,[64] state sovereignty was the exclusive source of law; for individuals to obtain the character of subjects, there would have had to be a source independent of the will of States.[65] Moreover, the prevailing view then was that individuals enjoyed benefits under international law not because international law granted them, as individuals, rights, but because these rights had been granted earlier to the states of which they were nationals. The right was thus a right of the state, and the individual, a mere object of that right.[66]

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[61] H. LAUTERPACHT, *supra* note 3, at 70. ("An international legal system which aims at effectively safeguarding human freedom in all its aspects is no longer an abstraction. It is as real as man's interest in the guarantee and the preservation of his inalienable rights as a rational and moral being. International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State.").

[62] *See* Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 2 (1988).

[63] H. LAUTERPACHT, *supra* note 3, at 68-69.

[64] *Id.* at 6-8. *See also* Henkin, *supra* note 51, at 32.

[65] H. LAUTERPACHT, *supra* note 3, at 68-69.

[66] *Id.* at 6-8. See also Henkin, *supra* note 51, at 32.

Things changed rapidly after the Second World War.[67] The world witnessed atrocities against individuals for which no remedy would have been available without recognizing the individual as a subject of international law. The State, standing as the sole guardian of the individual's interests and as the impenetrable barrier between the individual and society at large,[68] was clearly not the instrument for protecting the interests of its nationals where violations to the dignity of these same nationals could be, and had actually been, perpetrated by the State and its agencies at will. More importantly, the remedy required recognition and declaration of human rights as a matter "of international concern,' [as] *everybody*'s business."[69]

The identification of "crimes against humanity" independent of any treaty then pre-existing[70] introduced the concept of rights inhering in the individual by virtue of his/her humanity[71] and superior to the law of the sovereign state.[72] The categorization was "essentially meant to provide jurisdiction for the trial and punishment of those responsible for the extermination of millions of German Jews and the 'useless eaters."[73] Significant then is the 1947 judgment of the United

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[67] Buergenthal, supra note 62, at 2.

[68] LAUTERPACHT, *supra* note 3, at 68, 70.

[69] Henkin, *supra* note 51, at 34. *See also* Fali Nariman, The *Universality of Human Rights*, 50 I.C.J. REV. 12, 12; LAUTERPACHT, *supra* note, 3 at 78-79.

[70] Henkin, *supra* note 51, at 37.

[71] LAUTERPACHT, *supra* note 3, at 36.

[72] Art. 6 of the Charter annexed to the Four-Power Agreement of 8 August 1945, as amended, provided for establishment of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (Treaty Series No. 27, 1946, Cmd.6903; or 82 U.N.T.S. 279) and gave the Court jurisdiction over "(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Other enactments of crimes against humanity soon after the Second World War included art. 5 of the Charter of the International Military Tribunal for the Far East, 19 January 1946, via the Proclamation of the Supreme Commander for the Allied Powers in the Far East; the Paris Peace Treaties of 1947 with Italy, Roumania, Hungary, Bulgaria, and Finland for the surrender of persons accused of crimes against humanity; and Control Council Law No. 10 of 20 December 1945 enacted by the Four Control Powers, as well as the Special Ordinance passed in the British Control Zone of Germany pursuant to said Control Council Law for the prosecution of crimes against humanity committed in Germany. LAUTERPACHT, *supra* note 3, at 35 – 38.

[73] GANJI, *supra* note 44, at 7.

States Military Tribunal in the *Justice Trial* (the Altstotter case) at Nuremberg[74] where, in answer to the plea of the accused that they merely acted according to their municipal law, the Court stated that:

> The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves contributed the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. *Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions.* It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.[75]

Historic as the Nuremberg trials may have been, what heralded the end of the state's legal capacity to carry human rights violations out with impunity was the advent of the United Nations. The U.N. is credited with the development of human rights as universal and legal rights not only for entrenching the concept in its Charter[76] but also for producing what is known as the International Bill of Human Rights.[77]

The human rights provisions in the U.N. Charter laid down the legal foundation for the development of contemporary international human rights law.[78] Both the Constitution of the Organization and a legally-binding multilateral treaty,[79] the Charter, reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women,"[80] and declared as one of its purposes the achievement of "international co-

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[74] Law Reports of Trials of War Criminals (United Nations War Crimes Commission), vol. 6 (1948), p. 49, *reprinted in* LAUTERPACHT, *supra* note 3, at 37.

[75] *Id.* Italics ours.

[76] H. LAUTERPACHT, *supra* note 3, at 159-160.

[77] The International Bill of Human Rights is composed of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Covenants' corresponding Protocols.

[78] Buergenthal, *supra* note 62, at 2.

[79] R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 10.1 (1985), *cited in* Buergenthal, *supra* note 62, at 3.

[80] U.N. Charter second preambular paragraph.

operation...in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[81] In so doing, the Charter necessarily recognized the individual as a subject of international law;[82] as an international legal document, it acknowledged the international legal character of human rights as arising independently of state law.[83]

Corollary to this right[84] is the mandatory legal obligation[85] in art. 55 for the United Nations to "promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[86] In art. 56, Member States pledged "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in art. 55,"[87] binding themselves thereby to promote human rights universally. Although this provision has been criticized for being a weak formulation,[88] it has been lauded for legally taking human rights out of the exclusive domestic plane and transforming it into a subject of international obligation.[89] Despite the absence of provisions which guarantee or compel

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[81] U.N. Charter art 1, ¶ 3.

[82] LAUTERPACHT, *supra* note 3, at 3-4, 35.

[83] *Id.* at 34.

[84] Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 311 (1987) (on the relationship between human rights and State legal duties following W. Hohfeld's theory of the jural relationship.). *See also* LAUTERPACHT, *supra* note 3, at 62, (regarding individual rights and individual duties).

[85] LAUTERPACHT, *supra* note 3, at 148.

[86] U. N. Charter art. 55 ¶ (c). *See also* U.N. Charter art 76 ¶ (c) on the U.N. trusteeship system's objectives. On the Organization's duty to promote and realize human rights and fundamental freedoms; art. 13 ¶ 1(b) on the General Assembly; art. 62, ¶ 1 and 2, art. 68 on the Economic and Social Council; art. 87 on the International Trusteeship System; and arts. 24, ¶ 1 and 2, 34 and 39 on the Security Council.

[87] *Id.* art. 56.

[88] It has been said that the obligation to promote respect and observance of human rights is not equivalent to the obligation to actually respect and observe human rights. *See* Buergenthal, *supra* note 62, at 4. This may have initially been the case but this contention can no longer be upheld considering developments concerning human rights subsequent to the U.N. Charter, *infra*. The general phrase "human rights and fundamental freedoms" has also been criticized for being articulated in too general terms. It is said that such loose language diminished the effectivity of the Charter. However, the use of such phraseology proved to be a boon to the future development of the human rights guarantees. GANJI, *supra* note 44, at 123; Nariman, *supra* note 69, at 12.

[89] Buergenthal, *supra* note 62, at 4.

protection of human rights,[90] grant affected individuals direct access or remedy to international organs or agencies,[91] or map out consistent authoritative methods to determine human rights abuses,[92] there is no question today that a State that violates human rights commits a breach of the U. N. Charter.[93]

Nothing, however, matches the Universal Declaration of Human Rights[94] (UDHR) in terms of impact on the development of the universality of human rights.[95] As the priority project of the Commission on Human Rights,[96] the UDHR was proclaimed by the General Assembly three years after the U.N. was formed[97], with 48 signatories, 8 abstentions[98] and 0 rejections. Even if the UDHR was originally a political compromise not meant to bind Member States,[99] it gained a force in international law which even its drafters did not foresee.[100]

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[90] LAUTERPACHT, *supra* note 3, at 146 – 147 (Lauterpacht draws this conclusion after pointing out the consistent restraint in language of the Preamble and the Purposes of the U.N., and the conspicuous choice of agencies entrusted with its implementation.); The General Assembly and the Economic and Social Council both do not have executive and legislative powers; the Security Council, which does, is not allowed to act save when the degree and scope of the violation is such as to constitute a threat to international peace and security. GANJI, *supra* note 44, at 137.

[91] LAUTERPACHT, *supra* note 3, at 287; GANJI, *supra* note, 44 at 138.

[92] Richard Falk, *Responding to Severe Violations, in* ENHANCING GLOBAL HUMAN RIGHTS, 208 - 209 (1979).

[93] LAUTERPACHT, *supra* note 3, at 34, 147, 149-151.

[94] G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc, A/810 (1948).

[95] Buergenthal, *supra* note 62 at 6 – 7 ("The legal and political importance that the UDHR acquired over the years remains unmatched by any other international human rights instrument."); LAUTERPACHT, *supra* note 3 at 394 ("a historic event of profound significance").

[96] The CHR was established by the Economic and Social Council pursuant to art. 68 of the U.N. Charter. The CHR was charged with submitting proposals, recommendations, and reports to the Council concerning, *inter alia*, an international bill of rights, The CHR was established by the Economic and Social Council pursuant to art. 68 of the U.N. Charter. The CHR was charged with submitting proposals, recommendations, and reports to the Council concerning, *inter alia*, an international bill of rights, LAUTERPACHT, *supra* note 3, at 223-224; Buergenthal, *supra* note 62, at 5. (The drafting of such bill of rights became the "first order of business" of the U.N.).

[97] The UDHR was proclaimed on 10 December 1948.

[98] Nariman, *supra* note 69, at 12. The abstaining States were Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., U.S.S.R., the Union of South Africa, and Yugoslavia.

[99] The UDHR, as its name suggests, was a mere declaration intentionally drafted in general terms to prevent disagreements over the content of a legally binding bill of rights from

If the U.N. Charter "internationalized" human rights, the UDHR became the "centerpiece of the human rights revolution."[101] Of note is the fact that the rights enumerated in the UDHR consisted of rights and freedoms – both civil and political as well as social, economic, and cultural[102] – already existing in various national jurisdictions even before the U.N. was created.[103]

In addition to political and moral authority,[104] the UDHR gained legal authority not just because it was the first comprehensive statement enumerating the basic rights of the individual to be promulgated by a universal international organ,[105] but due largely to the length of time it took to come up with the Covenants.[106] Whether the UDHR derives its legal authority from its status as an

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completely bogging down the drafting process. The UDHR was to be followed by treaties which would spell out specific legal obligations and establish an international enforcement system. Buergenthal, *supra* note 62, at 5; Richard Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1,1 – 2 (1996) [hereinafter, Lillich, *Importance of Customary International Human Rights Law*].

[100] From the language of the opening preambular paragraph ("common standard of achievement..."), the form in which it was adopted (a General Assembly resolution, generally non-binding in international law and U.N. practice), and the deliberations which led to its formulation (drafted to provide middle ground for obstinate Member States), it appeared that the UDHR was meant to be no more than a recommendation and consequently without any legal compulsion. GANJI, *supra* note 44, at 161; Lillich, *Importance of Customary International Human Rights Law*, *supra* note 99, at 1; Buergenthal *supra* note 62, at 8 (The UDHR was not originally intended to bind any Member State); LAUTERPACHT, *supra* note 3, at 408 – 417; Hurse Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).

[101] Buergenthal, *supra* note 62, at 6.

[102] *Id. See* UDHR, *supra* note 94.

[103] Contrary to popular notion, the concept of human rights as respect for the dignity of the human being is not a post-World War II phenomenon. Civilizations from antiquity had carved out what were considered natural inalienable rights of men.). Nariman, *supra* note 69, at 10 – 12; GANJI, *supra* note 44, at 152. *See also* Jordan Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L.147, 159 (1996); LAUTERPACHT, *supra* note 3, at 80-91 (On the history of human rights since the Greek period), *id.* at 90-91 (These early concepts of natural inalienable rights revolved around the denial of the absoluteness of the State and the assertion of the value and freedom of the individual). *See also* Sucharitkul, *supra* note 84, at 305 – 307.

[104] GANJI, *supra* note 44, at 161.

[105] Buergenthal, *supra* note 62, at 6.

[106] The existence of the UDHR as the only human rights instrument of general if not universal application for such a long period endowed it with greater and greater legitimacy until there appeared a widespread belief that even governments had the obligation to ensure the

authoritative interpretation of the human rights obligation in the U.N. Charter (by virtue of arts. 55 and 56)[107] or as customary international law,[108] no state today would dare claim that it could freely violate the rights and principles in the UDHR.[109]

The UDHR was but the first step in the elaboration of human rights and fundamental freedoms through authoritative legal instruments.[110] These legal instruments took the form of the International Covenant on Civil and Political Rights (ICCPR)[111] and International Covenant on Economic, Social, and Cultural Rights (ICESCR),[112] both of which were intended to be legally binding.[113] Separate treaties were made due in part to the consideration that each set of rights required different methods of implementation.[114] Optional Protocols, on the other hand, were intended to strengthen the implementation procedures in the Covenants. To date, there are three Optional Protocols available: the Optional Protocol to the

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enjoyment of the rights the UDHR proclaimed. Buergenthal, *supra* note 62, at 8-9; Lillich, *Importance of Customary International Human Rights Law*, *supra* note 98, at 1 – 2; *See also* EGON SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 35 (1964).

[107] MERLIN M. MAGALLONA, *Some Remarks on the Legal Character of United Nations General Assembly Resolutions*, *in* INTERNATIONAL LAW ISSUES IN PERSPECTIVE, 93, 99 (1996).

[108] T. Buergenthal, *supra* note 62, at 8-9; Hannum, *supra* note 100, at 317-354; Lillich, *Importance of Customary International Human Rights Law*, *supra* note 99, at 2; John Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527 (1976).

[109] *See* discussion of *Teheran Hostages Case*, *infra* note 149 and accompanying text. *See* Nigel Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L. Q. 321 (1989).

[110] Falk *supra* note 92, at 254.

[111] G.A. Res. 220 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52. U.N. Doc. A/6316 (1966), adopted December 16, 1966 and entered into force March 23, 1976.

[112] G.A. Res. 220 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49. U.N. Doc. A/63136 (1966), adopted December 16, 1966 and entered into force January 3, 1976.

[113] Buergenthal, *supra* note 62, at 10.

[114] If the ICCPR obligated a State Party to immediately comply with its provisions, the ICESCR under art. 2, para. 1 merely obligated States Parties to "take steps...to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures," Buergenthal, *supra* note 62, at 11-12.

ICCPR[115], the Second Optional Protocol to the ICCPR, and the Optional Protocol to the ICESCR.

Adopted by the U.N. General Assembly in 1966,[116] the two Covenants took around eighteen years to be drafted and around another ten years before they came into force. Of the three Optional Protocols, only the first has entered into force.[117] In addition to their long gestation period, the Covenants have been criticized for allowing limitations and derogations.[118] The Optional Protocols likewise have had their fair share of criticism for weakening the potentially stronger language found in the Covenants.[119]

Despite such criticism, the passage of said Covenants and Optional Protocols marked a milestone in modern international human rights law. These instruments have come to evidence a widespread belief among governments as to the requirements of human rights in international law, even among non-Parties.[120]

A number of other human rights treaties supplement the International Bill of Human Rights.[121] The Convention on the Elimination of Racial Discrimination,[122] the Convention Against Torture,[123] the Convention Against

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[115] G.A. Res. 220 (XXI), 21 U.N. GAOR Supp. (No. 16) at 59. U.N. Doc. A/6316 (1966).

[116] Buergenthal, *supra* note 62, at 10.

[117] The Optional Protocol to the ICCPR entered into force in 1979.

[118] THEODOR. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 86, 92 (1986) [hereinafter MERON, HUMAN RIGHTS IN THE UN].

[119] For instance, in the First Protocol, the Human Rights Committee organized under art. 28 of the ICCPR is reduced to an "investigatory" committee. *See also* discussion of *Hertzberg v. Finland*, Communication No. 61/1979, Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions), U.N. Doc. (CPR/C/OP/1 (1985)), acknowledging that, in the implementation of the Optional Protocol, because public morals differ widely, no universally applicable common standard can be made to apply, *Id.* at 116.

[120] Falk, *supra* note 92, at 254. *See* Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1147 (1982) [hereinafter A. D'Amato, *Concept of Human Rights*].

[121] Buergenthal, *supra* note 62, at 13. See H. Hannum, *supra* note 100, at 290; for an exhaustive list of international human rights instruments with references to the UDHR or International Bill of Rights, see his Annex 3, at 392-397.

[122] Adopted in 21 December 1965, entered into force on 4 January 1969, 660 U.N.T.S. 195, reprinted in 5 ILM 352 (1966). As of 1985, it has had 124 ratifications. *See* MERON, HUMAN RIGHTS IN THE UN, *supra* note 118, at 7; R. Falk *supra* note 92, at 221.

Genocide,[124] and the Convention Against Slavery[125] are some of the most influential Vienna conventions on human rights today.

Aside from conventions which tackle human rights head on, there is the Vienna Convention on the Law of Treaties.[126] Important is art. 60, para. 5: "Paragraphs 1 to 3 [of art. 60] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties." Art. 60 deals with termination or suspension of the operation of a treaty as a consequence of a breach; paras. 1 to 3 makes material breach a ground to terminate or suspend operation of the treaty. This provision recognizes the superior status of treaties of a humanitarian character[127] and veritably promises undisrupted application of the above human rights conventions on all States parties despite violation by any one of them of the terms of the conventions.

More important for purposes of this discussion are art. 53 on treaties conflicting with a peremptory norm of general international law (*jus cogens*) and art. 64 on the emergence of new peremptory norms of general international law. Art. 53 states that:

> A treaty is void if, at the time of is conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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[123] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, U.N. GAOR, 39th Session, Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 (1987).

[124] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[125] Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253.

[126] Opened for signature on 23 May 1969, entered into force on 27 January 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter VCLT].

[127] MERON, HUMAN RIGHTS IN THE UN, *supra* note 118, at 146-147(1986).

As a logical consequence of art. 53, art. 64 states that:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

These provisions recognize the existence of *jus cogens* norms and their superior status in international law.[128] Being both absolute and universal in character, these norms are said to "represent a shared hope, demand, and expectation that certain values prevail over others."[129] Precisely because they are superior, no state may stipulate to derogate from these norms.

Certain norms prohibiting violations of human rights can properly be classified as *jus cogens* norms. Identification of these norms however requires investigation not into treaty law but into extant general international law, or customary international human rights law.

If the authority of the UDHR stems from its character as authoritative interpretation of the U.N. Charter, and if the Charter, Covenants, Protocols, and other treaties are the only sources of international human rights law, then logically only U.N. Member States and State Parties to said treaties would be legally bound to uphold human rights worldwide. The obligation to respect human rights, however, attaches to all States regardless of membership in the U.N. or adherence to human rights treaties because of customary international human rights law binding on all States.[130]

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[128] The idea of a hierarchy in international human rights law between peremptory or *jus cogens* human rights norms and so-called regular human rights has been criticized as much as it has been acknowledged. Questions about the scope and content of these levels of norms remain unanswered, although some areas have been delineated more clearly than others. *Id.* at 190.

[129] Paust, *supra* note 103, at 155.

[130] MERON, *supra* note 118, at 7. *See* D'Amato, *Concept of Human Rights*, *supra*, note 120, at 1125-1127. *See also* RESTATEMENT [THIRD] OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT], § 702.

For human rights law to have gained customary status, it must have met the two primary elements of customary international law:[131] (a) general practice and (b) *opinio juris sive necessitatis*,[132] or belief in a legal obligation to conform.[133] Curiously, in view of the flexible nature of human rights,[134] detection of such status has been easier said than done.[135] There is no question, though, that, as gleaned from various sources,[136] foremost of which are judicial decisions[137] (both of international and of local courts[138]) and teachings of highly qualified publicists of

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[131] Paust, *supra* note 103, at 148. Lillich, however, debunks the traditional approach of determining customary law "by looking into the past to identify customary patterns of State practice" forwarded by B. Simma and P. Alston in *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992); he point outs instead that one should look towards new sources of state practice and new expressions of *opinio juris* to determine the emerging customary international human rights law, R. Lillich, *Importance of Customary Human Rights Law*, *supra* note 99, at 11 – 18. More important is the observation of Henkin: "Traditional customary law was not made; it resulted. Most of it was "always" there.... [T]he practice of States did not create it, state practice recognized the law as *having happened*. Now, in our time, non-conventional law is being *made*, purposefully, knowingly, willfully, and concern for human rights has provided a principal impetus to its growth, and the law of human rights is a principal instance of non-conventional law." [Emphasis Henkin's] Henkin, *supra* note 51, at 37. (Henkin talks of customary international human rights law as non-conventional law to point out that it did not arise through traditional customary law-making processes. This article will not expound on this point; even so, the reader is referred to LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES [1995].).

[132] North Sea Continental Shelf Case (W. Germany & Denmark, W. Germany & Netherlands), 1969 I.C.J. Rep. 3 (Judgment of Feb. 20), at 77.

[133] Henkin, *supra* note 51, at 36, 38-39 (on consent as "non-dissent). *See also* D'Amato, *Concept of Human Rights*, *supra* note 120, at 1143-1144 (on consent as required in general custom and in special custom).

[134] Paust, supra note 103, at 157-158 (note his observation on the influence individuals on the development of customary international human rights law which, after all, is created by States and not just governments)

[135] *Id.* at 148-151 and 159

[136] *Id.* at 147; Lillich, *Importance of Customary International Human Rights Law*, *supra* note 99, at 8-9; BROWNLIE, PIL, *supra* note 1, at 5 Sources for determining customary international human rights law is not limited to judicial decisions and teachings of highly qualified publicists. Because international human rights law is closely interconnected with regional and local processes, Paust, *supra* note 103, at 147; D'Amato argues with force that even universal conventions, especially the ICCPR and those on genocide, torture, and slavery evidence customary international human rights law, D'Amato, *Concept of Human Rights*, *supra* note 120, at 1129-1148.

[137] *See* note 6 for the text of Art. 38 of the Statute of the ICJ

various nations,[139] there exists today a customary legal obligation to respect human rights.

The International Court of Justice (ICJ) broke new ground in the *Reservations Case*[140] when it stated that "principles underlying the Convention are principles which are recognized by civilized nations as *"binding on States, even without any conventional obligation."*[141] More telling is the *Barcelona Traction Case*[142] where the ICJ distinguished between bilateral obligations and obligations "towards the international community as a whole."[143] The Court stated therein that these latter obligations were, "[b]y their very nature...the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*...."[144] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[145] The prohibition against discrimination is expounded on in the *Namibia Case*,[146] where the Court stated that "[t]o establish...and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of

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[138] *Id.* Art. 38, para. d of the Statute of the ICJ makes no distinction between international and local judicial decisions.

[139] *Id.*

[140] Reservations to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Rep. 15 [hereinafter *Reservations Case*].

[141] *Id.* at 23. Emphasis supplied. *See* discussion in Rodley, *supra* note 109, at 322.

[142] Case Concerning the Barcelona Traction Light and Power Co., Ltd. (Belgium & Spain), 1970 I.C.J. 3 (Second Phase) (Judgment of Feb. 5) [hereinafter *Barcelona Traction Case*].

[143] *Id.* at ¶ 33. Bilateral obligations are obligations *inter se*.

[144] *Id.* As opposed to *inter se* obligations which affect only State parties to a treaty or international agreement, *erga omnes* obligations are "obligations owing by and to all" Paust, *supra* note 103, at 152.

[145] *Id.* ¶ 34. See also, discussion in Rodley, *supra* note 109, at 323 (Note especially fn. 12).

[146] 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. Rep. 6 [hereinafter *Namibia Case*).

fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[147]

The statement "violation of the purposes and principles of the U.N. Charter" is not limited to violations of the Charter itself but covers violations of the principles enunciated therein. In the subsequent *Teheran Hostages Case*,[148] the Court pointed out that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."[149] More importantly, it held that Iran had successively and continuously breached obligations "laid upon it by...the applicable rules of general international law."[150] Reference to principles of human rights in finding breaches of general international law indicates the Court's application not of the U.N. Charter or the UDHR as legal instruments[151] but of the principles found therein as customary international human rights law.[152] This is highlighted by the Court's decision in the *Nicaragua Case*.[153] Here, even if on the facts the Court could not determine whether Nicaragua could be held liable for violating the Charter provisions on human rights of the Organization of American States,[154] "the absence of [a 'legal commitment' by Nicaragua towards

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[147] *Id.* ¶ 131.

[148] Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America & Iran), 1980 I.C.J. Rep. 3. [hereinafter *Teheran Hostages Case*]

[149] *Id.* ¶ 91. Rodley asserts that this is the "clearest statement on the juridical nature of human rights" the Court has made, Rodley, *supra* note 109, at 324.

[150] *Teheran Hostages Case*, *supra* note 149, ¶ 90. The Court's usage of "general international law" is properly understood as referring to customary international law instead of general principles of international law as technically understood. General principles of international law are different from customary international law. The Statute of the International Court of Justice in art. 38 distinguishes between "(b) international custom, as evidence of a general practice accepted as law; [and] "(c) the general principles of law recognized by civilized nations." For purposes of this article, however, there is no need to dwell on the differences between the two.

[151] Paul Alston, *The Universal Declaration at 35: Western and Passe or Alive and Universal*, 31 I.C.J. REV. 60, 69 (1983) ("there is a large growing body of evidence to support the contention that the justiciable provisions of the UDHR have now acquired the force of law as part of the customary law of nations").

[152] Rodley, *supra* note 109, at 325.

[153] *Paramilitary Activities in Nicaragua*, *supra* note 25.

[154] The Organization of American States mandates protection of human rights.

the Organization of American States to respect these rights] would not mean that Nicaragua could with impunity violate human rights."[155] Simply put, if it were shown that Nicaragua did indeed violate human rights, Nicaragua would still be liable under international law even if it did not legally adhere to the OAS Charter because its obligation to uphold human rights rose from a source other than treaty law, i.e. customary law.[156]

Genocide,[157] slavery, and racial discrimination are not the only human rights violations covered by customary international human rights law.[158] Others include the murder or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment;[159] prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized human rights.[160] War crimes and violations of humanitarian law can also be included on the list.[161]

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[155] *Paramilitary Activities in Nicaragua supra* note 25, ¶ 267.

[156] Rodley, *supra* note 109, at 328.

[157] Genocidal violations of human rights are particularly relevant for purposes of this article in that the Security Council has actually issued a resolution condemning such acts in S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1992). *See also* separate opinion of Lauterpacht in the *Case Concerning Application of the Convention on the Prevention of the Crime of Genocide* (Bosnia and Herzegovina & Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. Rep. ¶ 86 (Further Requests for the Indication of Provisional Measures of September 13) where he stated that "[t]he duty to 'prevent' genocide is a duty that rests upon all parties and is a duty owed by each party to every other." In so saying, he indicated that non-performance of a treaty obligation to grant protection to the human person does not result in breach of a treaty of a humanitarian character, in keeping with art. 60, para. 5 of the Vienna Convention on the Law of Treaties

[158] In enumerating the same in its decisions, the Court not necessarily meant to omit other human rights principles or rules but rather prevent the application of the *ejusdem generis* rule and allow for future inclusions into the list of human rights violations, Rodley, *supra* note 109, at 323. The obligation to avoid or prevent these violations, however, can be said to have attained the status of *jus cogens* norms, Paust *supra* note 103, at 153-155.

[159] The oft-cited case of Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) tackles this in point.

[160] RESTATEMENT (3RD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT], at section 702, paras. a to g, on the "Customary International Law of Human Rights." *See* Paust, *supra* note 103, at 154. Note the statement of the Human Rights Committee (established in compliance with the ICCPR) in General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.-1/Add. 6, at 3 (1994), reprinted in Lillich, *supra* note 99, at 20, that no State may make reservations on matters already representing customary international human rights law: "[A] State may not reserve the right to engage in

Note, however, that not all customary international human rights norms are *jus cogens* norms.[162] Genocide,[163] racial discrimination, and slavery[164] are clearly the more established *jus cogens* prohibitions; the prohibition against torture and retroactive penal measures[165] are also identified. It remains to be seen, though, whether all rights enunciated in the UDHR – all the civil and political and

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slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language."

[161] Paust, *supra* note 103, at 152-153.

[162] *Jus cogens* norms should not only be *erga omnes* or universal but also peremptory, at least insofar as there exists a general pattern of expectation that such norms are peremptory or non-derogable. *See* art. 53 of the VCLT, *supra* note 126; MERON, *supra* note 118, at 174-202, extensively discusses the issues involved in acknowledging a hierarchy between *jus cogens* and "regular" human rights norms (*Id.* at 191-193, 201). He cites political, cultural, and personal bias (*Id.* at 177), the improbability of reaching a meaningful consensus on the international level (*Id.* at 177), and the lack of standards (*Id.* at 180) as difficulties in determining the scope and identity of peremptory norms (*Id.* at 190-191). The use of the phrase "fundamental human rights" and "basic human rights" also poses problems insofar as it implies that certain human rights are not as fundamental or basic and therefore deserving of less protection (*Id.* at 182-186). He finally raises the effect of the concept of *jus cogens*, primarily a treaty law term, on unilateral acts of States, which acts violate the norm in question (*Id.* at 198-200). He prudently advises caution in applying hierarchical terminology until clear-cut norms are identified as non-derogable and peremptory (*Id.* at 202).

[163] The U.N. Commission of Experts investigating international crimes in the former Yugoslavia has noted that the applicability of human rights norms and the prohibition of genocide in that context is assured by "their character as peremptory norms of international law," Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 789 (1992), in a Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 48th Session, Annex, at 15, para. 46, U.N. Doc. S/25274 (1993), reprinted in J. Paust, *supra* note 103, at 154.

[164] In the Report of the International Law Commission to the General Assembly (18 U.N. GAOR Supp. (No. 9) at 1, U.N. Doc. A/CN.4/SER. A/1963/Add. 1 U.N. Doc. A/5509 (1963), reprinted in 2 Y.B. Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SER.A/1963/Add.1), the ILC, commenting upon the *jus cogens* provision of the VCLT, found not only that customary international law prohibited international slave trade but that this prohibition was "one of the most obvious and best settled rules of *jus cogens*" in that even new treaties could not derogate from it. Quoted from D'Amato, *Concept of Human Rights*, *supra* note 120, at 1133.

[165] MERON, *supra* note 118, at 186.

especially economic, social, and cultural rights[166] – fall under customary international human rights law.[167]

III. BY-PASSING SOVEREIGNTY FOR THE PROTECTION OF HUMAN RIGHTS

The preceding two sections illustrate two main themes of modern day international law: the preservation of the integrity of the state and the protection of human rights. However, 20th century history is replete with instances where these two aims of the international community have been in direct conflict with one another. Scholars have even argued that these twin goals, embodied in the U.N. Charter, can never be concurrently achieved.[168]

To persist in upholding the myth that states are the agents of international law within their sovereign territories constitutes a travesty of the humanitarian ends of the law of nations. There is no other entity capable of large-scale human rights violations except for the established governments of the world.[169] The genocide of the Jews in Germany, the massacre of Tutu tribesmen in Rwanda, the mass starvation in Ethiopia, the displacement of the Kurds in Northern Iraq, the ethnic cleansing in Bosnia, and a host of other heinous violations of international law were all perpetrated by the victims' governments, the direct manifestation of their very States. Especially now that it has become increasingly clear that no less than forceful intervention can stop serious cases of human rights violations,[170] a doctrinal advocacy of sovereignty is an anathema to the protection of individual rights.

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[166] D'Amato, *Concept of Human Rights*, *supra* note 120, at 1129.

[167] Rodley, *supra* note 109, at 333, 331. *See* Henkin, *supra*, note 51, at 40; Nariman, *supra* note 69, at 14; Lillich, *Importance of Customary International Human Rights Law*, *supra* note 99, at 4, 8. For purposes of this article, the determination will be limited to the rights for which humanitarian intervention is allowed. At this point, it is nonetheless proper to lay stress on existing patterns of expectation on the scope of universal human rights and what would constitute violations of the same. *See* Paust, *supra* note 103, at 162.

[168] D'Amato, *An Appeal*, *supra* note 3, at 64 – 67. *See* Christina Ellerman, *Command of Sovereignty Gives Way To Concern for Humanity*, 26 VAND. J. INT'L L. 341, 352. *See generally* Symes, *supra* note 1.

[169] RAMSBOTHAM & WOODHOUSE, *supra* note 13, at 24; D'Amato, *A Plea*, *supra* note 3, at 47.

[170] Ellerman, *supra*, note 169, at 347.

Fortunately, the international community has not allowed itself to be strangled by aging principles that curtail initiatives to protect and preserve human rights.[171] In the last quarter of the century, the international community has actively enforced human rights obligations of states through the doctrine of humanitarian intervention. Recent state practice has modified the traditional doctrine of humanitarian intervention such that there is a need to course the action through the appropriate U.N. organs, save in instances requiring immediate, extraordinary unilateral action from states.

A. Humanitarian Intervention

It has been shown earlier that the international law principle proscribing intervention is not absolute. One of the recognized exceptions to the principle is the doctrine of humanitarian intervention.[172] This doctrine is defined as reliance upon force for the protection of inhabitants of another state who are made to suffer arbitrary and abusive treatment that exceeds the authority by which the sovereign is presumed to exercise with reason and justice.[173]

The doctrine at its very core rejects absolutist conceptions of sovereignty and non-intervention.[174] As stated by Reisman:

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[171] Michael Reisman, *supra* note 50, at 167.

[172] THOMAS & THOMAS, NON-INTERVENTION, *supra* note 12 at 370; Lillich, *Kant*, *supra* note 32, at 398.

[173] STOWELL, INTERVENTION IN INTERNATIONAL LAW, 53 (1921). Verwey defines it as "the threat or use of force by a state or states abroad, for the sole purpose of preventing or putting a halt to a serious violation of human rights, in particular the right to life of persons, regardless of their nationality, such protection taking place neither upon the authorization by relevant organs of the United Nations nor with the permission by the legitimate government of the target state." *as cited in* RAMSBOTHAM & WOODHOUSE, *supra* note 13, at 3; Other authors give a wider definition which is not limited to the use of force. Thomas and Thomas defines humanitarian intervention as "the right of one state to exercise international control over the acts of another in regard to its internal sovereignty when such acts are contrary to the laws of humanity." THOMAS & THOMAS, *supra* note 12, at 372 *citing* Fauchille, Traite de Droit International Public, vol. I, p. 571 (8th ed. 1922).

[174] Reisman, *supra* note 50, at 168 – 173.

> The validity of humanitarian intervention is not based upon the nation-state principle 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 imperatives, and ultimately the confirmation of the sanctity of human life, without reference to place or transient circumstance.[175]

This doctrine gained widespread support and acceptance as a principle of customary international law during the end of the 19th century and early 20th century.[176] Probably, the most celebrated of 19th century interventions for humanitarian goals was the French occupation of Syria from August 1860 to June 1861. After the massacre of 6,000 Christian Maronites by the Muslim majority in territory of the Ottoman Empire and failure of the Turkish authorities to prevent further attacks on said minorities, France sent 6,000 troops to maintain peace and security in the region.[177] The humanitarian purpose of the mission was apparent but was further bolstered by the adoption of a protocol between the great European powers that their governments would not seek territorial or commercial concessions.[178]

Despite the flurry of interventions for humanity that occurred in the 19th century up to the early 20th century, [179] certain authors have expressed doubt whether the doctrine still retains its previous vitality.[180]

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[175] *Id.* at 168.

[176] BROWNLIE, PIL, *supra* note 1, at 338; THOMAS & THOMAS, NON-INTERVENTION, *supra* note 12, at 373.

[177] STOWELL, *supra* note 174, at 74.

[178] *Id.* at 64-66; BROWNLIE, USE OF FORCE 340 (1963) [hereinafter BROWNLIE, USE OF FORCE].

[179] For more examples of State practice on 19th century and early 20th century humanitarian interventions, see STOWELL, *supra* note 174, at 51 et seq.

[180] *Id.* at 338 – 339, 342; THOMAS & THOMAS, NON-INTERVENTION, *supra* note 12, at 373 – 374.

Some authors go so far as to even deny the legal validity of humanitarian intervention and surmise that the doctrine is merely a tool of international politics whereby powerful states enforce their hegemony over the rest of the international community.[181] Note for example Brownlie's contention that the doctrine was "open to abuse since only powerful States could undertake police measures of this sort; and when military operations were justified as 'humanitarian intervention', this was only one of several characterizations offered and circumstances frequently indicated the presence of selfish motives."[182] He states further that the doctrine was applied only against weak states and thus belongs to an era of unequal relations.[183] These normative statements are relevant in that it exposes the major weakness of the doctrine. The disproportionate economic and military circumstances that states find themselves in play as much role as the moral imperatives in determining whether or not they shall undertake interventions for the sake of humanity. Furthermore, Brownlie can (and did) cite the most infamous misuse of the doctrine – Hitler's annexation of Czechoslovakia ostensibly to protect ethnic German residents of that state.

Defenders of the doctrine point out, however, that the unequal relations between states do not preclude proper applications of the doctrine.[184] Lillich, for example, states that Brownlie's contentions suffer from an "imperialistic hypothesis." He states further that the possibility of abuse cannot possibly impugn humanitarian motives of an acting state.[185] On this same concern, Higgins wrote:

> Many writers do argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims to self-defense. That does not lead us to say that there should be no right of self-defense today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively.[186]

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[181] BROWNLIE, USE OF FORCE, *supra* note 179, at 338 – 339.

[182] *Id.*

[183] *Id.* at 40 – 41.

[184] Lillich, *Forcible Self-help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 333 (1967).

[185] *Id.*

[186] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 247 (1994).

The fact remains that there have been lawful applications of the doctrine of humanitarian intervention. Making such actions unlawful because of the possibility of abuse is, using a worn-out idiom, like throwing the baby out with the bathwater. The argument for abuse may be better used for advocating the regulation of humanitarian intervention through adequate safeguards than for arguing against its legality [187]

Other objections are founded, not so much on the permissibility of intervention in defense of human rights, but on the use of force. Critics of the doctrine cite a cavalcade of treaties, beginning with the Kellog-Briand Pact,[188] which renounce war or the threat of war as an instrument of national policy. The Kellog-Briand Pact provided:

> Article I. The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.
>
> Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[189]

The obligations under the Pact were reaffirmed in a number of multilateral and bilateral treaties,[190] most notable of which is the United Nations Charter which contains a prohibition against the use of force in arts. 2(3) and 2(4).[191]

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[187] Kritsiotis, *supra* note 26, at 1023 – 1026.

[188] US Treaty Series, no. 796.

[189] For an extensive discussion of the Kellog-Briand Pact, see BROWNLIE, USE OF FORCE, *supra* note 180, at 74 – 95.

[190] *Id.* at 75 – 76.

[191] *Id.* at 342. Of the effectiveness of the treaty, Stone has this to say: Even this pact, however, which came into force for virtually all States in the world, still left the customary liberty to resort to war unaffected in the following respects. First, all the Signatories reserved the liberty of self-defense. Second, war to enforce international obligations...not being "an instrument of national policy", was not forbidden. Third, the absence of machinery for authoritative determination of breach left a wide discretion to States...Fourth, only "war" was condemned, and the definition of "war" being difficult, States were able to exploit this difficulty

Art. 2(3) provides:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

On the other hand, art. 2(4) 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.

A number of authors maintain that this constitutes an expansive prohibition against the resort to force.[192] One scholar writes that "(t)his paragraph[193] is comprehensive in its reference to 'threat of use of force'...By reason of the universality of the Organization, it is probable that the principles of art. 2 constitute general international law."[194]

Equally adamant however, are authors who insist on the continuing vigor of the doctrine. Reisman argues that the U.N. Charter "neither terminated nor weakened the customary institution of humanitarian intervention"[195] and that it actually "strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in motion in a continuous authoritative process of articulating human rights, reporting and deciding infractions, assessing the degree of aggregate realization of human rights and appraising in its own work."[196] He further states that the prohibition on the use of force in art. 2(4) is not against the use of coercion *per se*, but against the use of it in specified unlawful purpose.[197] The threat or use of force is only unlawful if

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by resorting to hostilities under some other name..." JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 300 (1954).

[192] RAMSBOTHAM & WOODHOUSE, *supra* note 13, at 41; BROWNLIE, USE OF FORCE, *supra* note 180, at 113, THOMAS & THOMAS, THE DOMINICAN REPUBLIC CRISIS 2 (J. Carey ed. 1967), *cited in* Reisman, *supra* note 50, at 176.

[193] Referring to art. 2(4).

[194] BROWNLIE, USE OF FORCE, *supra* NOTE 180, at 113.

[195] Reisman, *supra* note 50, at171.

[196] *Id.*

[197] *Id.* at 177.

it is "against the territorial integrity or political independence of any state"[198] or utilized "in any other manner inconsistent with the Purposes of the United Nations."[199] Since respect for and protection of human rights is exhorted by the Charter in arts. 55 and 56, forceful interventions to promote these fundamental peremptory norms cannot be deemed to have been precluded by art. 2(4).

The most that art. 2(4) could have done is to modify the unilateral application of the doctrine of humanitarian intervention such that states must first resort to the enforcement measures in Chapter VII of the Charter before they may carry out independent forays into other states' territories under the banner of human rights.[200] As Judge Jessup wrote:

> It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take some time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international action shall be timely as well as powerful.[201]

This delicate compromise between those who deny the right of humanitarian intervention and those who assert that the doctrine is indispensable in the promotion of human rights may very well reflect the current status in international law.[202] Especially with the thawing of the Cold War, nations have reposed substantial trust and faith in the UN's ability to curtail large-scale violations of human rights.[203] The U.N. Security Council has responded to the clamor to uphold conventional and customary human rights norms by considering large-scale violations of human rights as threats to international or regional peace

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[198] Art. 2(4).

[199] *Id.*

[200] Reisman, *supra* note 50, at 178. ("The effect of the U.N. Charter has been to develop a coordinate set of competences. In circumstances in which an authoritative organ of the United Nations or of a relevant regional organization either cannot act or cannot act with sufficient dispatch, individual or coordinated collective non-U.S. humanitarian intervention is permitted as a substitute or functional enforcement of international human rights.").

[201] P. JESSUP, A MODERN LAW OF NATIONS 170-71 (1948).

[202] *See generally* Delbruck, *supra* note 9.

[203] *Id.*

and security.[204] It must be noted that the Security Council has never availed of art. 43[205] of the Charter (which obligates Member-States to supply logistical and military support to the Security Council) in undertaking humanitarian interventions. Instead, it has relied on blanket authorizations to member-States to enforce the goals of specific resolutions.[206] As is illustrated in the following survey, the Council resorts to calling "all States and regional organizations" to do "whatever is necessary" to pursue the goals of its resolutions.[207] The effect is a green light for all member-States of the U.N. to validly act for and in behalf of the organization.[208]

The recent spate of UN actions legitimizes as a normative fact the theoretical foundations laid by Lauterpacht half a decade ago. Writing on the Charter provisions on human rights without the benefit of actual state practice vis-a-vis arts. 55 – 56 of the Charter, he wrote:

> The correlation between peace and observance of fundamental human rights is now a generally recognized fact. The circumstance that the legal duty to respect fundamental human rights has become part and

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[204] *See infra.* notes 201 et. seq.

[205] Art. 43 provides:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces. their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

[206] For a good commentary on this practice *see* Sarah Whitesell, *The Kurdish Crisis: An International Incident Study*, 21 DENV. J. INT'L L. & POL'Y 455 (1993). *But see* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124 (1999).

[207] *Id.*

[208] For some authors, this is not necessarily good. *See* Lobel & Ratner, *supra.* Note 207, at 130. ("Disputes have arisen over whether a state or group of states claiming to be acting pursuant to implied or ambiguous Security Council authorization are acting lawfully.").

> parcel of the new international system upon which peace depends, adds emphasis to the intimate connexion.[209]

This intimate connection between peace and protection is revealed in the following survey of leading instances where the U.N. Security Council approved humanitarian intervention. An exposition of the events leading towards adoption of such S.C. Resolutions illustrates how the Security Council has recently applied the enforcement measures under Chapter VII on behalf of human rights. Note however that in some instances, unilateral humanitarian intervention was availed of by States without or before any authorization by the Security Council.

B. Survey of Leading Instances of Humanitarian Intervention

1. Iraq

The Kurdish ordeal began in the latter half of 1990 soon after a U.N.-sanctioned international military force terminated Iraq's invasion and occupation of neighboring country Kuwait.[210] Long wanting their independence, the minority Kurdish tribes launched a revolt at a time when the Iraqi Army had suffered humiliating defeat in Kuwait. The revolt was short-lived; the Iraqi government moved in quickly to crush the Kurds. It incessantly attacked Kurdish villages, driving millions of civilians into the countryside; half the number attempted to flee to the north to cross into Turkey. The Iraqi Army relentlessly pursued and attacked these fleeing civilians.

Things came to a head on 5 April 1991, when the Security Council, by a vote of 10 for, 3 against,[211] with 2 abstentions, adopted UNSCR 688.[212] Condemning the "repression of the Iraqi civilian population in many parts of Iraq" as human rights violations with consequences "which threatened international peace and security in the region," the Resolution demanded that Iraq "immediately end this repression" by allowing "immediate access by international humanitarian organizations to all those in need of assistance." The S.C.

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[209] LAUTERPACHT, *supra* note 3, at 186.
[210] Resolution 687, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991).
[211] Cuba, Yemen, and Zimbabwe.
[212] Resolution 688, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991).

Resolution likewise empowered the Secretary-General to "use all resources at his disposal...to address urgently the critical needs of the refugees and displaced Iraqi populations."

Pursuant to this Resolution, international humanitarian organizations sponsored by various nations poured into the area between Iraq and Turkey. Of note is the character of these humanitarian organizations; while initially appearing non-military, they necessarily included various Member States' military forces supplying humanitarian assistance. These military forces, however, did not simply dish out food or medical aid but actually enforced Iraqi acceptance of the assistance. In a striking example, the commander of the U.S.-led military aid force dangled the threat of use of allied offensive military force to make Iraqi military officers clear a designated area in Northern Iraq of ground forces and air operations in order to establish Kurdish "safe havens" for refugees fearful of returning to Iraq.

The language of this Resolution pointed to threat of international peace as a ground to authorize the relevant international organizations to send in humanitarian aid and demand Iraq to allow these humanitarian relief efforts to ensue unimpeded. It has been pointed out however that the Resolution sought not so much to curb a threat to international peace and security[213] as to stop human rights violations of the highest order.[214] Of course, the operation of military forces within Northern Iraq did not come unchallenged. However, most initial reservations about the humanitarian mission in Northern Iraq were laid to rest bearing in mind the universal international interest in responding to human rights emergencies.[215]

Clearly then, the international community's experience with the Kurds constituted the first instance of humanitarian intervention in this decade; more importantly, it set the foundation for authorizing the use of force to curtail State-sanctioned human rights violations even if the violations were territorially limited within the State.

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[213] *See* Preamble of the Resolution 688 which referred to repression leading to "massive flow of refugees towards and across international borders and to cross-border incursions which threat to international peace and security in the region."

[214] Teson, *Collective*, *supra* note 51, at 345-346.

[215] Report of the Secretary-General on the Work of the Organization, U.N. GAOR, 46th Sess., Supp. No. 1, at 5, U.N. Doc. A/46/1 (1991).

2. Bosnia-Herzegovina

Bosnia-Herzegovina was located in a region highly unstable politically. Part of the former Yugoslavia, it seceded and declared independence only in 1991. Upon such announcement, rebel Bosnian Serb forces launched an offensive to overthrow the new government, executing simultaneously the practice of "ethnic-cleansing" directed against local ethnic Muslim civilians. Indiscriminate and excessive use of force by Serb police and rebel forces against each other did not help.

The U.N. Security Council issued UNSCR 770 under Chapter VII of the U.N. Charter to arrange measures for delivery of humanitarian assistance in Bosnia-Herzegovina proved futile in abating human rights abuses against civilians. When this failed, the Security Council authorized member-States through UNSCR 781[216] to take "all necessary measures in the airspace of the Republic of Bosnia and Herzegovina in the event of further violations to ensure compliance with the ban on flights." Pursuant to these, North American Treaty Organization (NATO) air forces conducted bombings and undertook military action against Bosnian Serb military forces, especially in view of brutal non-stop rebel attacks on the minority Muslims.

The NATO action has been criticized for not remaining neutral; their attacks appeared to side with the Bosnian government inasmuch as they were targeted at rebel forces. More than that, the human rights violations in question were perpetrated not by the government but by rebel forces. It has been argued, however, that the NATO action was necessary if the objective of peacekeeping was to be attained. The need to restore peace on one hand and to end human rights violations on the other should be foremost in mind when in evaluating NATO's actions in Bosnia-Herzegovina.[217] Intervention to end human rights violations is an intervention to uphold human rights and humanitarian law that all participants in war, civil or international, are bound to honor.[218] This necessitates action against any party, whether from the state's government or otherwise, who violates human rights and humanitarian law.

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[216] S.C. Res. 781, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/781 (1992).
[217] Teson, *Collective, supra* note 51, at 368-369.
[218] *Id.*, at 353.

3. Somalia

In early 1991, warring political factions backed by clan militias clashed in bloody encounters following the flight of Somalia's dictator. By the end of the year, the situation had worsened into a full-scale civil war. Militias blocked international relief efforts and confiscated or stole food supplies. Despite S.C. Resolutions creating the U.N. Operations in Somalia (UNOSOM)[219] as well as authorizing air-lifts of aid and dispatching of international troops to aid relief distribution,[220] much-needed relief supplies failed to reach civilians. Drought and the deterioration of the political situation in mid-1992 led to famine across the country, resulting in mass starvation of almost 1.5 million Somalis.

On 9 November 1992, the United States unilaterally entered Somalia to assist in the distribution of food supplies. It was only on November 24 that the U.S. Secretary of State offered to lead a multi-national force into Somalia. Within a week, the Security Council issued UNSCR 794[221] authorizing the U.S.-led military force to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" in view of "the magnitude of the human tragedy caused by the conflict," "deterioration of the humanitarian situation," and "widespread violations of international humanitarian law." Such action saved hundreds of thousands of Somalis from imminent death such that by May the next year, the U.S. was able to formally turn over the operations to the U.N. Matters, however, worsened when the U.N. failed to bring about the formation of a government in Somalia. In 1995, the U.N. was constrained to withdraw the last U.N. peacekeepers in the country.

Noteworthy, however, is the U.N. Secretary-General's Report in that year to the effect that U.N. operations were increasingly becoming concerned with intra-state rather than inter-state conflicts. More importantly, the Report recognized a new development in the use of force under Chapter VII of the U.N. Charter:

> ...[T]he use of United Nations forces to protect humanitarian operations...has led to a new kind of United Nations operation. Even though the use of force is authorized under Chapter VII of the Charter,

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[219] S.C. Res. 751, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/733 (1992).
[220] S.C. Res. 767, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/767 (1992).
[221] S.C. Res.. 794, U.N. SCOR 47th Sess., U.N. Doc. S/RES/794 (1992).

> the United Nations remains neutral and impartial between the warring parties, without a mandate to stop the aggressor (if one can be identified) or impose a cessation of hostilities. Nor is this peace-keeping as practiced hitherto, because the hostilities continue and there is often no agreement between the warring parties on which a peace-keeping mandate can be based.[222]

The Resolution sought to correct the horrible human rights situation in Somalia and blatant violations of humanitarian law therein. From the causes that spurred the adoption of UNSCR 794, it is clear that the catch-all language of art. 39 of the U.N. Charter was inapplicable. Not only did the civil war in Somalia pose no serious threat to international peace, it was the extreme situation of famine, death, and disease caused by the civil war that prompted the enforcement action of the Security Council.[223] Yet, the Security Council authorized action under Chapter VII, enjoining use of "all necessary means," including thereby the use of force.

It has been noted that even if there was no government in Somalia, this did not mean there was no State; thus, the intervention clearly punctured Somalia's sovereignty, especially in a situation traditionally removed from international participation – civil war. The U.N., in authorizing intervention, thus recognized that human suffering took precedence over state sovereignty, which is precisely the policy buttressing humanitarian intervention.[224] That the situation was identified as a "threat to international peace and security" in the text of the Resolution does not automatically result in the existence of actual threat when in reality there is no such threat.[225] The fact remains that adoption of the Resolution was driven by the urgency of providing humanitarian assistance.[226] Its "unique character of a "deteriorating, complex, and extraordinary nature" does not deter from this conclusion inasmuch as only an extreme situation warrants use of force.[227]

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[222] Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. GAOR, 50th Sess., P11, U.N. Doc. A/50/60 (1995), at 5-6.

[223] Teson, *supra* note 51, at 351-352.

[224] *Id.* at 353.

[225] *Id.*

[226] *Id.*

[227] *Id.* at 354.

The significance of the Somalian experience cannot be confined to the reinforcement of the validity of U.N. humanitarian intervention. This case is also illustrative of the emerging practice eschewing resort to U.N. processes in favor of unilateral action in cases of emergencies. The United States' foray into the anarchic situation drew widespread support from the international community, and reinforced the admissibility of unilateral humanitarian intervention.

4. Rwanda

Like Bosnia-Herzegovina, Rwanda had long been steeped in turmoil. In fact, to help the country recover from a civil war between the Rwandan Patriotic Front and the government, the U.N. had sent an Assistance Mission (UNAMIR) to monitor a peace agreement between the two factions. However, the assassination in 1994 of the Rwandan President unearthed a long-standing grudge by the Hutu majority against the generally more affluent Tutsi minority. Within hours of the assassination, young Hutu militiamen systematically began to slaughter thousands of Tutsi civilians. In response to the carnage, the Rwandan Patriotic Front, dominated by Tutsis, renewed its civil war against the Rwandan government. UNAMIR observers could not abate the killings; on the contrary, 10 U.N. troops were hacked to death trying to protect the Rwandan Prime Minister. Hundreds of thousands of refugees fled to neighboring nations Zaire and Tanzania. In two weeks' time, tens of thousands had been killed in Rwanda. In a little more than a month, almost half a million were dead. In another month, the U.N. estimated over three million internally displaced Rwandans and over two million refugees who had fled, with the number of massacred unverifiable.

Mirroring the Somalian experience, the U.N., through UNSCR 929,[228] approved in three days an offer, this time from France, to send foreign troops unilaterally into Rwanda. Authorizing France to use "all necessary means to achieve humanitarian objectives," it stressed the "strictly humanitarian character of this mission, which shall be carried out in an impartial and [politically] neutral fashion." Troops entered to help distribute relief goods and patrol the countryside, keeping out of the internal political conflict between the Rwandan government and Rwandan Patriotic Front. They withdrew only two months after but urged the U.N. to send U.N. troops. These troops were replaced by African forces from Ethiopia, Ghana, and Zimbabwe.

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[228] S.C. Res. 929, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/929 (1994).

The actions taken by the U.N. over Rwanda bolsters the U.N.'s stand in Somalia. Like the latter, the main motivation for authorizing the use of force was not so much the alleged threat to international peace and security to the region but the alleviation of the tense and gory situation in Rwanda. Stress is also placed on the French mission's impartiality as regards the political situation in Rwanda, evidenced by the speedy withdrawal of French troops once the situation had stabilized. Such attitude corroborates the legitimacy of the French intervention.[229] And, as with Somalia, the identification of a "unique case which demands an urgent response by the international community" does not weaken the case of Rwanda as legitimate humanitarian intervention to deter human rights violations.

5. Haiti

Trouble in Haiti began when the President of Haiti, elected in 1990 through popular vote, was unseated by a military coup in 1991. Even if the Security Council did not step in at first instance because the situation was viewed largely as a domestic affair, the Organization of American States and the U.N. General Assembly almost immediately condemned the coup. The Security Council, taking into account the condemnation of the OAS and the General Assembly, eventually reversed its position a year later in view of the coup perpetrators' refusal to restore the former democratic government and unceasing violent persecution of the President's supporters, and imposed an economic embargo pursuant to Chapter VII of the U.N. Charter.[230]

Because of this, the military junta was constrained to agree to the U.N.'s demand for restoration of democratic rule.[231] It went through the motions of implementing this agreement such that the Security Council eventually lifted the embargo.[232] However, in 1993, violence erupted on the streets once more, causing the Security Council to issue Resolutions 873 reviving the embargo and 875 authorizing Member States to use force to enforce the sanctions.

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[229] Teson, *supra* note 51, at 365.
[230] S.C. Res. 841, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/841 (1993).
[231] The U.N.-brokered agreement was known as the Governors Island Agreement.
[232] S.C. Res. 861, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/861 (1993).

In 1994, the Security Council issued Resolution 940[233] which not only highlighted "the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal *de facto* regime of systematic violations of civil liberties, the desperate plight of Haitian refugees" but also reaffirmed "that the goal of the international community remain[ed] the restoration of democracy in Haiti and the prompt return of the legitimately elected President." Most importantly, it recognized that "the unique character of the...situation in Haiti and its deteriorating, complex and extraordinary nature, requir[ed] an exceptional response." This exceptional response came in the form of "a multinational force" through which Member States could "use all necessary means to facilitate the departure from Haiti of the military leadership,...the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti."

Armed with Resolution 940, the United States threatened the junta with an invasion by U.S.-led multinational forces unless the junta agreed to take measures to fulfill the terms of the earlier U.N. agreement. Thanks to the timely intercession of a former U.S. President, an agreement was reached hours before the actual invasion took place. In the next few days, U.S. troops landed in and occupied Haiti with a mission of non-interference; the U.S., however, abandoned this policy when military and police began assaulting supporters of the Haitian President. In the next few months, U.S. forces successfully helped restore the Haitian President, democratic rule, and stability in Haiti. Soon after, the U.S. officially turned the mission over to the U.N.

The intervention undertaken in Haiti is tricky to appraise in view of the object of the intervention: democracy. The right to a democratic government is not one of the human rights enumerated in the UDHR, the ICCPR, or international treaties, nor is it established in customary international human rights law.

The Haitian experience appears to support the literature on the emerging right to democratic governance. Teson argues forcefully for democratic legitimacy of a government in international human rights law.[234] Two strong points he makes are, first, that a democracy is the best way to determine the proper political agent

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[233] S.C. Res. 940, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/940 (1994).

[234] Teson, *supra* note 51 at 332-333.

of a State,[235] and second, that democracy is a precondition to the enjoyment of other human rights. To support the first argument, he debunks the traditional international law theory of effectivity for determining the proper state representative, that the government has effective political control over the people is the international representative of a people in a territory. Instead, he highlights the manner by which that political control is acquired: the government that international law legitimately recognizes should be the one the people want and politically consent to, and this real representative appears best determined through democracy. For the second, he claims that grounds exist for believing that democracy is instrumental for enjoying other human rights, especially the right to political participation. The theoretical "enlightened despot" respecting human rights has yet to come into being.[236]

Franck's arguments on the emergence of the right to democratic governance is likewise instructive. He traces the development of this right from the right to self-determination embodied in customary international law. This right was subsequently codified in a host of conventional sources most notable of which are the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Right. These conventions however, did more than just recognize an abstract right of a people against the external interference of states in the political choices of a people; they expressly acknowledged republican ideals of free association, free expression, and democratic governance. Thus, the UDHR declares: "The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[237] Lastly, he points out that the gradual incorporation by states into their national law of republican principles and procedures indicates an emergence of the principle of democratic rule in the body of general principles of international law.

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[235] Cristina Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, N.Y.U. J. INT'L L. & POL. 289 (1995).

[236] *Id.* at 294-295, 327; Teson, *supra* note 51, at 333.

[237] UDHR art. 21(3).

Cerna repeats the arguments of the above two writers;[238] she adds however that art. 30 of the UDHR implicitly prohibits political ideologies which undermine democracy, namely National Socialism, fascism, and government by military dictatorship. Art. 30 states that:

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

This provision is said to have been designed "to safeguard the rights protected by the Universal Declaration and secured by the International Covenants, by protecting the free operation of democratic institutions."[239]

The Haitian experience is notable for shoring up not only the argument in favor of a right to democracy but also that for warranting unilateral use of force in extraordinary human rights violations situations even when there is no actual threat to *international* peace and security. Apparently, the earlier S.C. Resolutions took time coming forth precisely because the situation was initially viewed merely as an exclusive domestic problem and therefore off-limits under Art. 2(7) of the U.N. Charter, more so under Chapter VII. However, the discovery of violations of Haitians' human rights – both personal and political – took the situation out of the sphere of exclusive domestic jurisdiction and into the lap of the international community. In recognizing impliedly that human rights are outside the exclusive domestic sphere, the Security Council, following the OAS and U.N. General Assembly's lead, was thus able to bring the Haitian issue within its jurisdiction and order timely measures regarding the same.

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[238] Cerna, *supra* note 225, at 294-297.

[239] *Id.* at 298, *citing* ERICA-IRENE DAES, FREEDOM OF THE INDIVIDUAL UNDER LAW: A STUDY ON THE INDIVIDUAL'S DUTIES TO THE COMMUNITY AND THE LIMITATIONS ON HUMAN RIGHTS AND FREEDOMS UNDER ARTICLE 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 129 (United Nations, Study Series 3, 1980).

More importantly, despite the limited territorial effect of the said human rights violations[240] and the unlikelihood of these constituting an international threat,[241] it has been pointed out that the Security Council nonetheless characterized this as a situation warranting the use of force under Chapter VII. Among the Resolutions discussed, Resolution 940 on Haiti is the clearest example of a determination of an international threat to peace when in reality there is no such threat.

6. Sierra Leone

Like in Haiti, Sierra Leone's democratically-elected President was also overthrown by military forces in a coup d'etat; in Sierra Leone, however, use of force was key in the restoration of the President.

After 14 months of democracy, rebel soldiers in Sierra Leone in 1997 ousted the President and established themselves as Sierra Leone's new government. The President went into exile and sought foreign intervention to help restore democracy. While the Organization of African Unity (OAU) condemned the coup d'etat at once, the Security Council responded only some months thereafter. Through Resolution 1132,[242] the Security Council determined the existence of a threat to international peace and security, sought the "restoration of the democratically elected government," imposed economic and military embargoes on the military government of Sierra Leone, authorized military force to halt maritime shipping pursuant to the embargoes, and requested all parties, including ECOWAS to ensure safe delivery of humanitarian assistance. At around the same time, neighboring States were able to broker a deal, the Conakry Agreement, with the military government for demobilization and disarmament.

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[240] These violations were limited largely to the territory of Haiti. It may be noted though that a number refugees sought entry into neighboring countries such as the United States. This situation, however, does not appear sufficient to constitute an international threat to peace and security in the region, Teson, *supra* note 51 at 359-360.

[241] Even if the Resolution determined that the situation in Haiti continued to constitute a threat to peace and security in the region, this statement should be understood properly not to mean that there constituted a threat when in fact none existed. A mere declaration of a state of affairs does not mean that such state of affairs truly exists. *id.* at 353.

[242] S.C. Res. 1132, U.N. SCOR, 51st Sess., U.N. Doc. S/RES1132 (1997).

When it became clear that the timetable in the Agreement would not be upheld, Nigerian troops already present in the country as part of the Economic Community of West African States (ECOWAS) Military Observer Group (ECOMOG) captured the capital and overthrew the military regime.

The restoration of the democratic government by Nigerian forces was welcomed both by Sierra Leone civilians and the international community. In the 26 February 1998 Statement by the President of the Security Council,[243] the Security Council lauded ECOWAS for its role in working "towards the peaceful resolution of the crisis," "welcome[d] the fact that the rule of the military junta ha[d] been brought to an end," and instructed the ECOMOG to "proceed in its efforts...in accordance with relevant provisions of the Charter of the United Nations."

The case of Sierra Leone tackles squarely the right to restore democracy by itself or as the primary reason to justify foreign armed intervention. While writers have criticized the Nigerian action for going against international law,[244] the same have noted that, together with Haiti, the Sierra Leone example indicates the possibility that "there are now 'clear cases' where the lawfulness of a government is measured by its democratic legitimization rather than its effective control in the form of brutal oppression."[245] Like previous instances of humanitarian intervention, the Sierra Leone experience did not follow instructions to the letter; yet, the international community, instead of condemning the interventions, commended the same.

7. Kosovo

Kosovo lies in southern Serbia. The region had enjoyed a high degree of autonomy within the former Yugoslavia until 1989, when President Slobodan Milosevic removed its autonomy and brought the territory under the direct control of Belgrade, the Serbian capital. In 1992, the Federal Republic of Yugoslavia (FRY) was proclaimed. In 1998, open conflict between Serbian military

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[243] Statement of the President of the Security Council, U.N. SCOR, 53rd Sess., U.N. Doc. S/PRST/1998/5 (1998).

[244] Karsten Nowrot and Emily Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 349-378 (1998). *But see* 386-403, justifying the intervention on other grounds.

[245] *Id.* at 321, 396-397 (1998).

and police forces and Kosovar Albanians broke out, resulting in the death of over 1,500 Kosovar Albanians and forcing people from their homes.

In response, the Security Council adopted UNSCR 1160[246] condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo and calling upon the FRY to immediately take the necessary steps to achieve a political solution to the issue of Kosovo through dialogue. There was a warning, to the effect, that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo would lead to the consideration of additional measures. FRY ignored the Resolution.

As fighting became intense and excessive and indiscriminate use of force increased, the SC adopted UNSCR 1199[247] where, "alarmed at the impending human catastrophe," it noted the rapid deterioration in the humanitarian situation throughout Kosovo. The resolution stated that the SC was "deeply concerned by reports of increasing violations of human rights and of international humanitarian law, and emphasiz[ed] the need to ensure the rights of all inhabitants of Kosovo are respected." The Council demanded further that FRY immediately implement several measures towards achieving a political solution, including cessation of all action by the security forces affecting the civilian population and ordering of the withdrawal of those security units.[248] Although similar in most respects to the earlier resolution, UNSCR 1199 is significant because of the introduction of the catch-phrase "threat to peace and security". This illustrated the determination of the SC to put an end to the large-scale violations of fundamental human rights. The catch-phrase effectively signals the possibility of the use of enforcement measures under Chapter VII of the U.N. Charter.

The threat of enforcement under Chapter VII may have been instrumental in convincing Belgrade, albeit temporarily, to seek compliance with the provisions of UNSCR 1199. A Kosovo Verification Mission was established

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[246] S/RES/1160, adopted March 31, 1998. In the report of the Secretary-General prepared pursuant to Security Council Resolution 1160, it noted that the lack of credibility of the threat to use international forces caused the FRY's continuation of the military offensive, resulting in egregious humanitarian abuses in Kosovo.

[247] S/RES/1199, adopted September 23, 1998.

[248] Press Release SC/6626 12 January 1999.

and the FRY inked an agreement with the North Atlantic Treaty Organization (NATO) establishing the NATO Kosovo Air Verification Mission.[249]

A subsequent third resolution UNSCR 1203,[250] while affirming the S.C.'s determination that the Kosovo situation constitutes a continuing threat to peace and security in the region, was noticeably less hostile as it expressed its endorsement of the creation of the verification missions and exhorted FRY to comply with its commitments under UNSCR 1160 and UNSCR 1199.

However, despite the existence of the verification missions, Milosevic, either due to an inherent stubbornness or through an inability to read between the lines of the resolution, still ignored the provisions of UNSCR 1160 and UNSCR 1199. From the time of the creation of the verification missions in October 1998, up to the following year, Belgrade played cat and mouse with the UN and NATO – at some instances appearing to accede to the provisions of the resolutions, and challenging the resolve of the international community in others. Thus, on January 30, 1999 NATO threatened to use force to bring the conflict to a resolution and authorized its Secretary General to order air strikes at his discretion.[251] This did not deter Milosevic from playing his deadly game.

As the massacres[252] escalated, the international community moved to find a peaceful solution to the conflict. Initial negotiations were held in Rambouillet from 6 to 23 February 1999 with the aim of reaching an agreement on withdrawing Serb forces from Kosovo and a NATO occupation of the province; at the end of the second round of talks, the Kosovar Albanian delegation signed the proposed peace agreement, but talks broke up without the signature of the Serbian delegation. On March 23, NATO ordered commencement of air strikes.[253]

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[249] S/1999/991 (letter from the charge d'affair of the United States to the United Nations addressed to the Security Council President which included as an annex a copy of the agreement between NATO and FRY to establish the NATO Kosovo Air Verification Mission).

[250] S/RES/1203, adopted October 24, 1998.

[251] Press Release Jan. 30, 1999.

[252] The massacre at Racak left 45 civilians, including women and children, dead. An autopsy mission established the responsibility for the massacre lay with the military or paramilitary forces of FRY. Argued by Mr. Ergec, member of the Belgian team, during the hearings on Legality of the Use of Force (Yugoslavia v Belgium), Public Sitting 10 May 1999.

[253] NATO resolved that the crisis in Kosovo remained a threat to peace and security in the region and that its strategy is to halt the violence and support the completion of negotiations on an interim political settlement of Kosovo to avert a humanitarian catastrophe.

NATO justified the air strikes as having been caused by the refusal of FRY to enter into the negotiated peace settlement in Rambouillet and the latter's inability to comply with UNSCR 1160 and UNSCR 1199, specifically with the provisions limiting Serb Army deployment and those calling for an end to the use of force against the Kosovar Albanian civilian population.

Some States condemned the strikes as a unilateral use of force[254] while others approved of the NATO action. By a vote of 3 in favor to 12 against, the Security Council rejected a draft resolution demanding immediate cessation of the use of force against FRY.[255] The relentless bombing of military and communication facilities and infrastructure in Serbia and Kosovo finally took its toll on FRY. Milosevic beaten and humiliated agreed to comply with the demands of the UN and NATO. On June 2, 1999, the Federal Republic of Yugoslavia agreed to, among others, the withdrawal of Serb forces in Kosovo and the deployment of an international peacekeeping force in the war-torn region.[256]

On June 10, 1999, the SC adopted Resolution 1244,[257] condemning all acts of violence against the Kosovo population, reaffirming the right of all refugees and displaced persons to return to their homes in safety, and determining that the situation continues to affect not only the region but also that it constitutes a threat to international peace and security. The Council decided to deploy in Kosovo, under U.N. auspices, international civil and security presence and authorized Member States and relevant international organizations to establish the international security presence in Kosovo with "all the necessary means to fulfill its responsibilities." One of these responsibilities is the establishment of a secure environment wherein refugees and displaced persons can return home in

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The order further stated that NATO is ready to take whatever measures are necessary in light of both parties' compliance with the international commitments and requirements, and that the Council has agreed that the NATO Secretary-General may authorize air strikes against targets on territory of FRY. Letter dated 30 January 1999 from the Secretary-General of the NATO addressed to the President of FRY. S/1999/107, p. 4.

[254] Russia saw the NATO air strikes as a challenge to the current system of international relations and a real threat to peace and stability in Europe and the world in general. Declaration adopted by the Inter- Parliamentary Assembly of States Members of the Commonwealth of Independent States concerning military operations of NATO in the territory of FRY, S/1999/461, p.3.

[255] Press Release SC/6784, 2.

[256] *See* UNSCOR 1244.

[257] S/RES/1244, adopted by the Security Council on June 10, 1999.

safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered. Furthermore, the U.N. Secretary General was authorized to establish an international civil presence[258] in Kosovo in order to provide an interim administration under which the people in Kosovo can enjoy substantial autonomy, and provide subsequent transitional administration.[259]

8. East Timor

East Timor was administered by Portugal when it was placed by the United Nations General Assembly in its list of Non-Self- Governing Territories. In 1974, Portugal sought to establish a provisional government and a popular assembly which would determine the status of East Timor. There started what would turn out to be, a long fight between those who favored independence and those who campaigned for the integration with Indonesia. On July 17, 1976, the statute of integration was promulgated, legally formalizing through Indonesian constitutional processes the incorporation of East Timor as Indonesia's 27th

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[258] One of the responsibilities of the international civil presence is organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.

[259] To date, Yugoslavia has filed a case with the International Court of Justice questioning the legality of the use of force. Ian Brownlie, arguing for FRY, claimed that: (1) the attack on the territory of Yugoslavia involves a continuing breach of art. 2, para. 4 of the United Nations Charter; (2) the attack cannot be justified as individual or collective self-defense and is not authorized by any SC resolution; (3) humanitarian intervention is in any case invalidated by the unlawful modalities of the aerial bombardment, and the means adopted by the respondent States are extremely disproportionate to the declared aims of the action. He explained further that the attacks on Yugoslavia cannot qualify as humanitarian intervention because of the following reasons: (a) there was no genuine humanitarian purpose because the action against Yugoslavia forms part of an ongoing geopolitical agenda unrelated to human rights; (b) the modalities selected disqualify the mission as a humanitarian one because bombing the populated areas of Yugoslavia and using high performance ordnance and anti-personnel weapons involve policies completely inimical to humanitarian intervention; (c) the selection of a bombing campaign is disproportionate to the declared aims of the action because in order to protect one minority in one region, all the other communities in the whole of Yugoslavia are placed at risk of intensive bombing; and (d) the patterns of targets and the geographical extent of the bombing indicates broad political purposes unrelated to humanitarian issues.

See PUBLIC SITTING, MAY 10, 1999, INTERNATIONAL COURT OF JUSTICE, LEGALITY OF THE USE OF FORCE.

province.[260] The United Nations never recognized this integration and both the Security Council and the General Assembly called for Indonesia's withdrawal. Force has always been used by contending East Timorese political factions maneuvering for power, one of which was the FRETILIN, a radical organization modeled after the black nationalist movements in Portugese Africa[261]. It was not until late 1978 to 1979 that the guerilla ceased to be a threat to Indonesia.

International concern over the status of East Timor probably would not have been as great if such massive suffering by the general population had not been attendant upon the transfer of sovereignty.[262] There is no question that human disaster took place in East Timor between 1974 and 1978[263], but no one can give hard facts as to how many died and were displaced. There was only a reliance on the difference in number in census figures throughout the years. The East Timor conflict has all the necessary ingredients of defeat – exposure, famine and non-stop violence. In the forum of the United Nations, it has been the tactical linking of the humanitarian issue to the political question of self-determination that has enabled the sponsors of successive resolutions on East Timor.[264] Beginning in 1982, successive talks with Indonesia and Portugal were held to resolve the status of the territory. The question was not the association of East Timor with Indonesia, but the absence of an internationally acceptable act of self-determination.[265]

Indonesia has not only subjected the East Timorese to continuous violence, it has also crippled East Timor financially, with the economy existing to serve the military. After taking over, Jakarta canceled the local currency, wiping out people's life savings. The military took over coffee plantations. Eighty percent of the population survived on subsistence farming and there is no industry.

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[260] Donald Weatherbee, *The Indonesianization of East* Timor, *mimeographed copy*, 3rd World Studies Program, College of Arts and Sciences, University of the Philippines, *reprinted* from *Contemporary Southeast Asia*, June, 1981.

[261] *Id.* at 1.

[262] Perhaps 15% of the population died between August 1974 and the end of 1978.

[263] Weatherbee, *supra* note 260.

[264] *Id.* at 3.

[265] *Id.* at 2.

This was the situation when Indonesia and Portugal authorized the Secretary-General[266] to organize and conduct a "popular consultation" in order to ascertain whether the East Timorese will reject a special autonomy for East Timor within the Republic of Indonesia. The Security Council established the UN Mission in East Timor (UNAMET)[267] to carry out the consultation, to decide whether the East Timorese wished to accept special autonomy within Indonesia, or reject such autonomy.[268] On August 30, 1999, some 78.5% of registered voters decided to reject the proposed autonomy and begin a process of transition towards independence.[269]

Pro-integration militia renewed a bitter campaign of murder, looting and arson throughout the territory. The militia threatened to kill, and actually did kill, people who voted for independence.[270] The Security Council and the Secretary-General, trying desperately to suppress the violence, pressed Indonesia to meet its responsibility to maintain security and order in East Timor. A Security Council Mission visited Jakarta and Dili, and the Secretary-General worked to rally support among Governments for a multinational force authorized by the Security Council to bring the situation under control. As the mission concluded its visit on September 12, 1999, the Government of Indonesia agreed to accept the deployment of an international force in East Timor.[271]

Three days later, the Security Council adopted UNSCR 1264.[272] The Council expressed its concern with the deterioration in the security situation in East Timor and with the continuing violence against and large-scale displacement and relocation of East Timorese civilians. The resolution was a response to reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor. Once again acting under its authority granted by Chapter VII of the U.N. Charter, the

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[266] On May 5, 1999 the two Member States signed a set of agreements in New York.

[267] S/RES/1246, adopted on June 11, 1999.

[268] The resolution also stressed the Indonesian government's responsibility to maintain peace and security in East Timor and to ensure the integrity of the consultation and the security of international staff and observers.

[269] By a margin of 94,388 (21.5%) to 344,580 (78.5%).

[270] . As many as 500,000 East Timorese were displaced from their homes.

[271] White House sources believed that Indonesia was ultimately swayed by the potential loss of billions from IMF and WB. TIME, Sept. 27, 1999 at 21.

[272] S/RES/ 1264, adopted on 15 September 1999.

SC determined that the situation in East Timor constituted a "threat to peace and security."

Thus, the first elements of the multinational force (INTERFET) arrived in East Timor on September 20, 1999, to restore peace and security, to protect and support UNAMET in carrying out its tasks to facilitate humanitarian assistance operations, including airdrops of food, aid convoys and the provision of shelter and basic services. As humanitarian assistance continues, the Indonesian People's Consultative Assembly formally recognized the result of the consultation, thereby creating the domestic legal framework for East Timor's separation from Indonesia.

IV. INTEGRATION OF RECENT STATE PRACTICE AND CONCLUSION

The survey above reveals the vitality of the doctrine of humanitarian intervention as an effective remedy against large-scale violations of human rights. Critics of the doctrine asserting the lack of adequate State practice confirming the doctrine's viability[273] cannot ignore the prevalence of interventions for humanity in the last decade of this century.[274] Indeed, these instances signal the decline of the practice of strict adherence to the principle of sovereignty and the recognition of the duty to protect individual rights.

The instances surveyed are virtual snapshots of the status of the doctrine of humanitarian intervention in the waning years of the 20th century. They reveal a distinct pattern that may govern future humanitarian interventions. From the foregoing, three major observations may be made.

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[273] BROWNLIE, USE OF FORCE, *supra* note 179, at 339 – 340.

[274] The survey given above is by no means exclusive.

First and foremost, there is now a predisposition by the international community to U.N.-led or at least U.N. sanctioned humanitarian interventions.[275] This trend is most desirable since the mechanisms under the Charter can assure that the interventions have a true humanitarian purpose and that the doctrine will not be used to pursue the selfish interests of individual States.[276] The preference for U.N. action addresses the criticisms regarding the inherent colonialist and imperialist potential of the doctrine.[277] Though it is true that it is impossible to assure that States have a purely humanitarian motive[278] for intervening in behalf of a beleaguered people, the Security Council can at least assure that the primary motive behind the use of force against a sovereign State is generally humanitarian.[279]

Furthermore, the active participation of the U.N. in alleviating conditions violative of fundamental human rights gives a chance for the weaker member States to participate in the actions according to what they are able to provide.

The multilateral preference does not mean, however, that the military forces that undertake humanitarian interventions are always under U.N. control. As pointed out earlier, the Security Council has still to make use of its powers under Art. 43. It has contented itself with a system of "contracting out" humanitarian interventions. The British and American action in Iraq to protect the Kurds in North Iraq is a prime example.[280] This was done through a general authorization by the Council to all States to enforce the goals of a specific resolution. Though criticized as being vague and overbroad,[281] these authorizations

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[275] Nowrot & Schabacker, *supra* note 245, at 341, Reisman, *supra* note 50, at 187 – 193.

[276] The same can be said for the preference for actions by regional organizations such as ECOMOG in the Sierra Leone case. *See* Nowrot & Schabacker, *supra* note 245, at 400.

[277] Asserted by Brownlie, *see* notes 182 – 184 and accompanying text.

[278] Kritsiotis, *supra* note 26, at 1034 – 1039.

[279] Symes, *supra* note 1, at 600 ("Only an international, multilateral perspective can ensure that humanitarian justifications for intervention in traditionally domestic concerns of nations are more than self-serving pretexts of interested nations.").

[280] Lobel & Ratner, *supra* note 207, at 124 – 125.

[281] *Id.* ("Problems with authorization method surface in several areas. First, states might use force on the basis of actions by the Security Council that could impliedly be interpreted to authorize force, but where its intent to do so was unclear...Second, states acting under the authorization of the Council might interpret their mandate to be broader than it had

have proven to be effective in marshaling support for valid humanitarian interventions.

The above observation is qualified by the acceptance of the international community of the necessity of unilateral action in cases where immediate response to a burgeoning crisis is called for.[282] In Somalia, for example, the unilateral intervention by United States was not only greeted with approval by the U.N but the Security Council thereafter authorized the deployment of an international contingent under U.S. leadership. In Kosovo, NATO, suspecting that Russia might delay enforcement action by the Security Council, did not wait for U.N. authorization for the bombing of Serbian military installations. Considering subsequent Russian action calling for a condemnation of the NATO air raids, NATO's actions cannot be said to have been precipitate. Indeed, as already mentioned, this Russian proposal was rejected by the Council itself.[283]

Reisman's formulation of a similar mechanism in carrying out humanitarian intervention is instructive. Discussing the preferred agents of humanitarian intervention he states:

> A number of fundamental policies are obvious. First, action within the framework of an authorized organization is most preferable; such action would include direct organizational intervention as well as delegated organizational intervention. Second, barring organizational action, a collective intervention is preferable to intervention by a single State. There are obviously advantages and disadvantages to collective forces of a global, regional, unilingual or multilingual composition and so on. Where circumstances require a unilateral humanitarian intervention, the operation should be submitted to inclusive authoritative appraisal as soon as possible.[284]

Second, the Security Council has made liberal use of its powers under Chapter VII, specifically, the determination of the existence of threats to peace and security. There is no arguing that situations of severe human rights violations warrant humanitarian intervention. The U.N. Charter allows the Security Council

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intended...Furthermore, when authorizations are not temporarily limited, questions arise about their termination.").

[282] Reisman, *supra* note 50, at 178.

[283] *Supra* note 257 and accompanying text.

[284] Reisman, *supra* note 50, at 188.

to authorize use of force "as may be necessary to maintain or restore *international* peace and security."[285] But as pointed out earlier, some of the instances considered by the Council as threatening peace have not really had an impact on regional, much less international stability and security. The case of Haiti seems very much in point. Yet, the Council, using a liberal has deemed that resort to Chapter VII necessary.

It is said that insertion of statements such as "threat to peace and security in the region" is likely done to go around the requirement in Chapter VII of the U.N. Charter of authorizing "extraordinary" measures, i.e. use of force, only to restore international peace and security.[286] After all, *in strictu senso*, until there has been a determination that a situation requires use of force – which situation is necessarily rooted in a threat to or breach of peace on an international scale – no authorization for such use of force may issue. Because of the recent actions by the Security Council, it can be concluded that "unique" situations of severe human rights violations necessarily affect other States directly or indirectly, whether they pay attention or not, and therefore will constitute each time a threat to international peace and security. This effect is tied to each State's obligation to "take joint and separate action in co-operation with the Organization"[287] for the achievement of the U.N. duty to promote "universal respect for, and observance of human rights and fundamental freedoms for all."[288] It can even be said that whenever severe human rights violations are perpetrated, the duty of each state to act to promote universal respect for and observance of human rights is called to the fore. Each state is thus affected by every shocking and ruthless human rights violation, thereby causing friction in international relations and, often where the violation crosses borders, endangers international peace and security.

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[285] U.N. Charter, art. 41.
[286] Teson, *supra* note 51, at 353.
[287] U.N. Charter, art. 56.
[288] U.N. Charter, art. 55.

The final observation that can be made from the spate of humanitarian interventions in the past decade is that the international community has finally accepted the right to democratic governance as a fundamental human right.[289] Though decisions to undertake humanitarian interventions to restore democratic governments were definitely selective and somewhat tainted by political expediency, it cannot be denied that in clear instances where the right to self-determination and democracy were threatened, the U.N. or certain individual States have responded.

The recent developments concerning the doctrine of humanitarian intervention show the necessity of the doctrine to preserve human rights throughout the international community. Although the centuries-old principles of sovereignty and non-interventionism, still permeate almost every area of international law, the rise of universal respect for individual rights has clearly modified such principles. It may be worthwhile to recall D'Amato's poignant analogy when he defended the US invasion of Panama as a valid instance of humanitarian intervention:

> In the 19th century, United States courts refused to intervene when wives applied for judicial help for beatings inflicted by their husbands. Some judges repeated the saying, "A man's home is his castle." Simple prudence, according to the judges required a judicial policy of abstention from domestic problems...Courts now recognize that battered wives need and deserve judicial protection. Historians look back at the end of the 19th century and speculate about how much brutality, how much horror women had to endure...[290]

The historians of the next century will probably be appalled at how much suffering the peoples of the world had to endure from the hands of their very governments. They will observe with utmost incredulity how the so-called

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[289] Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L. J. 443, 445 (1997). ("The range and nature of resolutions passed by the Security Council since 1989 leave no doubt that the council has adopted an expanded interpretation of its mandate in the changed conditions of the post Cold War era. In particular, the Council now appears willing to treat the failure to guarantee democracy or protect human rights as either a symptom, or cause, of threats to peace and security.").

[290] Anthony D'Amato, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Invasion of Panama was a Lawful Response to Tyranny*, 84, AM. J. INT'L L. 516, 517 (1990).

civilized States that make up the community of nations failed to take immediate remedial measures to end the abuses. Fortunately, the United Nations and the individual States of the international community have, in recent years, awoken to their responsibility to the peoples of the world. The last decade of the 20th century will be acknowledged in international legal history as the turning point for the establishment of a real and effective enforcement of the human rights of every individual of every nationality. Though respect for territorial integrity and sovereignty of States is still generally demanded by international law, it is evident that the past decade has at the very least, sown the seeds for a more critical conception of such principles.

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