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MASTER'S THESIS

HUMANITARIAN INTERVENTION AS A COLLECTIVE SECURITY PROJECT

SARKAWT JALIL IBRAHIM

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We certify the thesis is satisfactory for the award of degree of Master of Laws in INTERNATIONAL LAW

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ABSTRACT

HUMANITARIAN INTERVENTION AS A COLLECTIVE SECURITY PROJECT

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LLM, International Law Programme

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A number of diplomats and scholars are skeptics about even the existence of the category of humanitarian intervention, not to mention its inclusion into the international legal order. However, an established right to authorize intervention to guarantee international recognition of, and respect for, fundamental human rights seems plausible, taking the United Nations Charter and the wide authority of the Security Council into account. The thesis shall advocate a collective practice of humanitarian intervention through authorization of the Security Council. The maintenance of international peace and security is vested into the Security Council, most notably its permanent members, and peace shall not be maintained without co-operation of these permanent members. To include humanitarian intervention within the competences of the Security Council, it needs to be perceived as having effect on international peace and security, and thus founding the Security Council's duty to authorize use of force. The thesis will argue in favor of authorized humanitarian intervention in cases of grave violations of human rights, reflecting a collective security project. The thesis stands against the right of unauthorized or unilateral humanitarian intervention.

Keywords: Humanitarian Intervention, Human Rights, Sovereignty, the UN, Security Council, Collective Security.

ÖZ

Bir dizi diplomat ve akademisyen insani müdahale kategorisinin varlığından ve uluslararası hukuk düzenine dahil oluşundan bile şüphe etmektedir. Ancak, Birleşmiş Milletler Beyannamesi ve Güvenlik Konseyinin geniş yetkisini göz önünde bulundurarak temel insan haklarının uluslararası olarak tanınması ve saygı duyulmasını güvence altına almak için müdahale yetkisini verme konusunda kurulmuş bir hakkı makul görünmektedir. Tez, Birleşmiş Milletler Güvenlik Konseyinin yetki yoluyla insani müdahale konusunda kolektif pratiğini savunacaktır. Uluslararası barış ve güvenliğin korunması Güvenlik Konseyi için bir yatırımdır, en önemlisi onun daimi üyeleri, ve barış Güvenlik Konseyinin daimi üyelerinin işbirliği olmadan devam ettirilemez. İnsani müdahaleyi Güvenlik Konseyi yetkilerine dahil etmek için uluslararası barış ve güvenliği üzerinde bir etkiye sahip olarak algılanması ve böylece Güvenlik Konseyinin insani felaketlerde kuvvet kullanmasına izin verme yetkisinin temelini oluşturması gerekmektedir. Tez kolektif güvenlik projesi yansıtan insan haklarının ağır ihlalleri durumlarında izin verilen insani müdahaleyi savunacaktır. Tez izin verilmeyen veya tek taraflı insani müdahale hakkına karşı çıkmaktadır.

Anahtar Kelimeler: İnsani Müdahale, İnsan Hakları, Egemenlik, BM Güvenlik Konseyi, Kolektif Güvenlik.

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TABLE OF CONTENTS

ABBREVIATIONS

CIL	Customary International Law
GA	General Assembly of the United Nations
HI	Humanitarian Intervention
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IHRL	International Human Rights Law
JWT	Just War Theory
NATO	North Atlantic Treaty Organization
R2P	Responsibility to Protect
The Charter	United Nations Charter
UDHR	Universal Declaration of Human Rights
UHI	Unilateral Humanitarian Intervention
UN	the United Nations
US	the United States of America
VCLT	Vienna Convention on the Law of Treaties

CHAPTER 1

INTRODUCTION

Intervention, in any way it occurs, remains a complicated category in international law. Humanitarian intervention (HI) is also one of the most controversial issues among legal scholars, diplomats, and politicians. HI resembles a contemporary challenge to state sovereignty. For it is widely defined and referred to as use of force against the will of the targeted state, and it is widely differentiated from other sorts of action, namely, humanitarian action which is supposedly conducted with the consent of the state or maybe on its invitation.

Two questions are surrounding HI; one of legality and the second of legitimacy. According to the United Nations Charter (the Charter), the Security Council (the SC) is vested the duty of maintaining international peace and security. The nature or the content of the threat before international peace and security is not determined; it is left to the discretion of the SC member states. However, the SC in performing its duties is not absolutely free. It has to formulate its decisions in a way that will serve the interest of the international community in whole. International observance of human rights is mentioned as one of the main purposes of the United Nations. Therefore, it seems legal, even logical, to demand SC due regard to these rights while issuing a resolution, especially under chapter VII of the Charter.

The thesis is an attempt in understanding the complex controversy surrounding the concept and the practice of HI. It will study its legality and legitimacy under international law and relations. Whatever the real motive of the intervening state, a

minimum standard of humanity in the intervention is required. It is not supposed for the humanitarian purposes to be the sole motive of the intervenor(s). Rather, they are required to be the main, the primary ones.

In an attempt to avoid reducing HI to means serving the interests of the intervening states, the thesis will argue for a collective practice of any operation that is conducted under the title of humanitarianism. The best way to achieve this collectivity is to pursue authorization of the SC. Here is the troublesome point. What happens or should happen if the SC, due to whatever reasons decides not to act? Shall the other states have a right to intervene in order to halt grave violations of human rights?

This turn is not favored. Unilateral use of force, in this case unilateral humanitarian intervention (UHI), remains dangerous. For it may provide a chance of subjectivity in determining the cases which intervention is deemed necessary. The international community seems already suffering from this pattern of practice from the SC. Therefore, strengthening any unilateral discretion in use of force for humanitarian purposes is likely to aggrandize the chaotic aspect of international relations.

The SC, however, remains a political entity. Therefore, when it chooses inaction in humanitarian catastrophes it shall not violate a legal rule, it cannot be questioned. However, it remains a duty of the SC itself to further enhance the international legal order, justice, and the rule of law, especially in cases representing a threat to international peace and security. If it does not choose doing so, then other states may attempt to fill the gap made by the SC.

In concluding the thesis, the author focused on the law as it is, *lex lata*. However, the thesis will argue in favor of further collectivism in addressing and redressing human rights violations, that is HI. The work is mainly a desk and library based thesis, both published and unpublished sources are relied upon. Internet sources are also referred to. The thesis will analyze primary sources of data, such as international treaties and customs. Secondary sources are also used, such as case law and academic statements.

In chapter two, he thesis will study two cases of humanitarian crises. The both cases are widely known as cases combining genocide, crimes against humanity and war crimes. The time of the crises, the targeted states' international relations and obligations, and the reactions of the international community will be discussed so as to present a general understanding of the cases and to be aware of further considerations surrounding them. The two cases are discussed to show that the SC in certain instances and for other legal and political considerations, from time to time and in different continents is disregarding humanitarian suffering of peoples. These cases and others as well prove that the concept of HI is perceived of as a 'right' not as a 'duty'. The right holder, one can argue, is capable of simply denying its possession, while the duty bearer cannot.

The third chapter is dedicated to present a background for the history, present and to some extent, the future of human rights and HI, and it will seek the historical, philosophical antecedents of these concepts. It will be argued that the modern law of human rights and the modern practice of HI are based on natural law theory and just war theory (JWT), respectively. In these theories, individuals have universal rights, solely because of their being humans. In the same chapter, the relationship between the two notions of human rights and sovereignty is discussed. For a long time since the new age of nation-state in Europe, sovereignty is perceived as an absolute category. According to this traditional conception, state is the only active actor in the international arena. However, it will be argued that human rights do pose a real challenge and reformulation on sovereignty in such a way that it is forced to encompass human rights within its drawn borders; it shall not have to confront these rights. Rather, it has to compromise them.

The treaty-basis legality of HI will be the task of the fourth chapter. Different views over legality of humanitarian practices do exist, whether conducted by the United Nations (the UN) itself or by other regional organizations. The chapter will focus on differentiating the varied clauses of the Charter related to use of force. The Charter created a general ban on use of force. It however allowed use of force in specific instances, which are self-defense and by authorization of the SC. HI is not a practice of the right of self-defense. Therefore, the sole case of collective security measures

authorized by the SC remains. It will be argued that HI is better accepted and conducted if it is authorized by the legally relevant authorities. The thesis will argue contra advocators of UHI.

After the treaty law, the fifth chapter will study the customary right of HI. Some scholars, by depending on state practice in the 19th and 20th century, contend a right of unilateral use of force in humanitarian crises. Nonetheless, the thesis will argue contrary. The world is already suffering greater injustices. Therefore, making a room for a unilateral right of HI is likely to lead to more injustices; the strong states shall remain untouchables. By this it is meant that the SC needs to be more aware of its international responsibilities in maintaining peace and security and to include human security as a *prima facie* one of its obligations. The thesis will not deal only with the legal rules and arguments regarding the concept/practice of HI. Rather, it shall provoke the moral arguments supporting or standing against it. While doing so, the thesis will not satisfy with only moral arguments supporting the practice; it will argue for more legalizing and more institutionalizing of HI.

The thesis will end with a general conclusion, in which it shall be reaffirmed that obtaining the authorization of the SC in cases of HI is a must. It is better to be conducted with the blessing of the SC. For the latter is the world's political and security representative, maybe it cannot enact legal rules, but through its practices it can make states to act in a specific manner. It can make securing fundamental human rights, especially when these rights suffer grave violations, such as genocide and crimes against humanity, one of its priorities and to conduct HI as a project of collective security, reflecting, above all, international solidarity; *one for all and all for one*.

CHAPTER 2

HUMANITARIAN INTERVENTION IN PRACTICE: CASES OF INACTION

2.1. The Anfal Campaign

Why *Anfal*? It seems important and having much to tell, for it occurred in Iraq and during the Cold War. At that time (1998) Iraq was in war with Iran. There also was a long conflict between the Iraqi regime and the Kurds. The war with the Kurds was running since decades in Iraq. While thousands of people were killed in the Anfal campaign, still the international community did not respond properly. However, after the Cold War, and exactly in 1991, the United States of America (the US), the United Kingdom, and France intervened into Iraq so as to protect the Kurdish refugees making the first case of HI after the Cold War[1].

2.1.1. Historical Background of the Kurds in Iraq

In Articles 62-64 of the Treaty of Sevres, the Kurds were permitted to form an independent state[2]. However, the Treaty of Sevres was superseded by the Treaty of Lausanne in 1923. According to the latter, the states of Hejaz, Syria, and Iraq were

[1] For more details about the 1991 intervention or the Kurdish refugees' case, see Howard Adelman, 'The Ethics of Humanitarian Intervention: The Case of the Kurdish Refugees' (1992) 6 *Public Affairs Quarterly* [Special Issue on Refugees] 61-87.

[2] The treaty was concluded in 1920, between the Allied and Associated Powers and Turkey.

founded and the Kurdish-populated areas were annexed to Turkey, Iran, Syria, and Iraq. This caused many revolts and armed clashes between the Kurds and these countries along the whole 20th century[3]. The majority of the Kurdish population in Iraq see themselves as 'obliged' Iraqis; meaning the Kurds had no other choice only to live within the framework of the Iraqi state[4]. This can be seen as the main reason of conflict between national Arab-Sunni governments in Baghdad and Kurdish national liberation movements in Iraq. The state-formation process in the Middle East after the World War I seems problematic for the entire region, instead of bringing peace and independence to all it became a source of internal and international conflicts; it was a peace to end all peace[5].

Major crimes, such as genocide, however, do not occur between day and night. Thus, the crimes cannot be separated from their historical backgrounds. In the case of the Anfal campaign, the relationship between the central government in Baghdad and the Kurds, especially since 1958 when the regime was changed from kingdom to republican, seems important and needs to be considered.

Since the 1958 revolution, every government in Iraq sought to negotiate with the Kurds at the beginning, but later, when it felt stronger, it sought to fight the Kurds[6]. A constant pattern of war and peace over and over, was a main characteristic of relations between the Kurds and the Iraqi government; from 1961 to 1985 the Iraqi government launched eight major planned attacks against the Kurds and refused to give them autonomy, which pushed the Kurds to seek help from Iran and other allies, till 1985 when Baghdad decided to destroy all the Kurds' infrastructure in order to minimize their ability. The Kurds kept struggling, however[7].

[3] Heval Hylan, '1991 Humanitarian Intervention in Kurdistan and Iraq's Sovereignty' <http://www.kcdme.com/Humanitarian20Intervention1.pdf> accessed 11 March 2016.
[4] Gareth Stansfield, 'The unravelling of the post-First World War State System? The Kurdistan Region of Iraq and the transformation of the Middle East' (2013) 89 International Affairs, 259, 281.
[5] Ibid 262.
[6] Robert G. Rabil, 'Operation "Termination of Traitors": the Iraqi Regime through its Documents' (September 2002) 6 Middle East Review of International Affairs 14, 15.
[7] Ibid 15-17.

During the 1980s the Iraqi regime was in war with Iran. In this phase of the Kurdish insurgency, led by the two main political parties (Kurdistan Democratic Party and Patriotic Union of Kurdistan), the Kurds' relationship with Iran was intensified as a means to repel the Iraqi forces in the Kurdish populated areas. This made the Iraqi regime furious and as a result decided to launch an attack called 'Operation Termination of Traitors' in May and June 1987. In this operation thousands of villagers were captured, hundreds of villages destroyed, and some villages were attacked by chemical weapons. Therefore, as Robert Rabil concluded, there was a brutal campaign coming along as a governmental policy to terminate the Kurdish insurgency[8].

The Iraqi regime, as these documents show, was not reluctant in deploying any available way/means to force the Kurdish *Peshmerga*[9] forces to surrender and to end their insurgency. The Operation Termination of Traitors was only paving the way to the Anfal campaign, which was executed during February to September 1988.

2.1.2. The Anfal Campaign: February-September 1988

Anfal[10] is the name given by the Iraqi government to a series of military actions which lasted from February 23 until September 6, 1988 against the Iraqi Kurds. The context of *Anfal* is not separated from the precedent events since the foundation of the Iraqi state in 1921 until 1988 in which the crimes were committed.

The Iraqi regime during the whole 1980s was feeling threatened by the relationship between the Kurds and the Iran, and as a counterinsurgency to their efforts to free parts of Iraqi Kurdistan, the Iraqi regime launched an attack against the Barzanis in 1983 and

[8] Ibid 23. "Examining the official Iraqi documents dealing with anti-Kurdish operations during the 1980s provides a first step in analyzing the history of these events and the government's brutal campaign against civilians. An effort to fight the Kurdish insurgency during the Iran-Iraq war expanded into a premeditated extermination campaign to alter irreversibly Kurdish political, social, economic and cultural life in northern Iraq".

[9] A word used to describe the Kurdish troops, meaning those who are facing or racing death.

[10] Anfal literally means "the Spoils", it is the name of the eighth *sura* of the Koran.

took 8000 men and killed them[11]. Further, in March 16, 1988, the Iraqi air force conducted a massive chemical strike against the area of Halabja in which 5000 people, mostly civilians, were killed[12].

The Anfal campaign had eight stages in eight areas. The areas that the campaign was intended to deal with were the rural ones, for the purpose behind the campaign was to end the insurgency[13]. However, not only the political members or the combatants were targeted and killed, but thousands of civilians were reportedly murdered.

In the first stage of the campaign (February 23- March 21), hundreds were killed and tens of villages were razed to the ground. The second stage (22 March to 1 April) started with the most lethal chemical attacks on the villages. Many people were displaced and had to flee to the neighboring areas, while hundreds of them were captured and disappeared[14]. The third Anfal was conducted from 7-20 April; the fourth stage 3-8 May; the fifth, sixth, and seventh stage from May 15 - August 28; and the final Anfal was in Badinan (August 25- September 6).

The pattern of conducting the Anfal campaign stages is known to have two main characteristics: hitting the villages with chemical weapons, and detaining the villagers before taking and killing them[15]. As to the number of peoples killed in all the stages, there is not an adequate statistic, because of the time and the place. However, the number is about 100,000 as Ali Hassan al-Majid (cousin of Iraqi then president, Saddam Hussein and head of Northern Bureau of Ba'th Party during the Anfal campaign)

[11] Joost R. Hiltermann, 'The 1988 Anfal Campaign in Iraqi Kurdistan', (2008) Online Encyclopedia of Mass Violence <http://www.massviolence.org/PdfVersion?id_article=98> accessed 27 April 2016.
[12] Ibid.
[13] Genocide in Iraq: the Anfal Campaign against the Kurds, *Human Rights Watch* (July 1993) (Report) 10, 108-109.
[14] Ibid 122-123.
[15] Ibid 279.

stated[16]. Most of the detained people are said to be killed by shooting and then burying them in mass graves[17].

The Anfal campaign is characterized as having elements of the crime of genocide. Genocide is defined as "any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[18] In this sense, the Anfal campaign seems genocidal for two reasons: first, it was conducted against an ethnic group; the Kurds in Iraq speak a different language from Arabic (the official language of then Iraqi regime). Second, the overwhelming majority of the victims were civilians, not combatants so that the Iraqi regime can rely on a counter-insurgency argument[19]. However, the main question needs to be answered: why the international community did not take decisive steps to halt these mass atrocities? Does this 'inaction' of the SC have anything to reveal about the legality, morality, and politics of HI? It will be argued that it does and that states are no longer sovereigns in the most traditional sense. The fact that these crimes occurred in the domestic affairs of a state, does not imply that the SC is awaited to be a bystander.

2.1.3. Iraq Obligations and the Response of the Security Council

In the late 1960s and early 1970s Iraq had relatively good relations with the Soviet Union[20]. The two states could have common bases to collaborate, especially with the

[16] Ibid 384.
[17] Al-Majid said in January 1989: "what was to be done with so many captured civilians? Am I supposed to keep them in good shape? What am I supposed to do with them, these goats? Take good care of them? No, I will bury them with bulldozers". Quoted by Human Rights Watch, ibid 345.
[18] Article II of the Genocide Convention of 1948.
[19] See Human Rights Watch, *supra note* 13, 5; Joost Hilterman, (n 11); Rabil (n 6); and Vanessa Bernick, 'The Anfal Campaign: A Politically Feasible Atrocity' (2012) <https://humanrights.uchicago.edu/sites/humanrights.uchicago.edu/files/uploads/Vanessa-Bernick-Martin-Baro-Essay.pdf> accessed 1 May, 2016.
[20] Francis Fukuyama, 'the Soviet Union and Iraq since 1968' (July 1980) A Rand Note prepared for the United States Air Force, N-1524-AF.

Iraqi regime's desire to buy armaments from the Soviet Union[21]. However, the relationship between Iraq and the Soviet Union went another way during 1975-1980[22].

Twenty five years after the Anfal campaign, when the US was planning to invade Iraq in 2001 and 2002 it started focusing, *inter alia*, on Iraqi regime's crimes against its population including those committed against the Kurds. For instance, the US State Department issued a report in 2002, in which *Anfal* is mentioned as "an extermination campaign against the Kurds of Iraq, resulting in the deaths of at least 50,000 and perhaps as many as 100,000 persons, many of them women and children."[23] The US as a permanent member of the SC and then Iraqi regime's main ally did and said nothing condemning the Anfal Campaign. Nonetheless, the US was officially defending the Iraqi regime when the news of attacking Halabja with chemical weapons spread all around the world; it tried to say that Iran also used artillery shells in the fighting[24]. These US diplomatic efforts led to more skepticism about the Iraqi involvement in the chemical attacks. As a result of this, the SC condemned "vigorously the continued use of chemical weapons in the conflict between Iran and Iraq contrary to the obligations under the Geneva Protocol" and expected "both sides to refrain from the future use of chemical weapons in accordance with their obligations under the Geneva Protocol."[25] Thus, the SC remembered the chemical attacks on Halabja, but ignored the Anfal campaign.

[21] These bases could be anti-imperialism, especially the US policies; enhancing the role of the Iraqi Communist Party by the Soviet Union; keeping peace in the Persian Gulf; the Arab-Israeli Conflict, which the Soviet Union used to maintain its influence in the Arab states; the Kurds, backing the Kurds may provide influence to the Soviet Union on Baghdad, Tehran, and Ankara; and economic interests. See Fukuyama, ibid 5-12.

[22] This turn in the two states' relations is said to have some reasons, such as the Iraq's Algiers Agreement with Iran in 1975; Iraq's feeling more independent to rely on the Soviets; and the Soviets intervention and invasion of Afghanistan. See Fukuyama, Ibid, 46 and 71. Not to forget the regime change in Iran in 1979. The new Islamic regime at its very outset began troublesome relations with the US, especially with the hostages' crisis.

[23] Quoted by Bernick, *supra note* 19.

[24] See Bernick, *supra note 19.*

[25] The SC Res 612 of May 9, 1988.

As to the US relation with Iraq in the 1980s, it was based on the axiom "my enemy's enemy is my friend", for the US relations with Iran, especially after the hostages' crisis during the Iranian revolution in 1979-1980 was troublesome[26].

As to the Iraqi legal obligations under international law, at 1988 it was a party to the main relevant international treaties in both human rights and humanitarian law. Iraq signed the Universal Declaration of Human Rights (UDHR); ratified the Genocide Convention of 1948; ratified International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESC); ratified the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; also ratified the Geneva Conventions of 12 August 1949; ratified International Convention on the Elimination of All Forms of Racial Discrimination in 1970; and acceded to Convention on the Elimination of All Forms of Discrimination against Women, all before the Anfal campaign and all posing serious obligations on the states.

According to these treaties, states are obliged to respect human rights of those under their jurisdiction. As to fundamental human rights, Iraq was supposed to protect the right to life; the right not to be subjected to torture or to cruel, inhuman, or other degrading treatment; the right to housing and not to be arbitrarily displaced; and it had the obligation to bring to justice the perpetrators of human rights abuses[27]. As to the humanitarian aspect, the Genocide Convention, for instance, demands state parties to prevent and punish the crime of genocide and to call on the UN competent organs, mainly the SC, to take any step necessary to prevent and suppress acts of genocide[28].

The US as the main ally to the Iraqi regime during the 1980s has not ratified the Genocide Convention in the time the Anfal campaign was conducted. However, the

[26] For the US-Iranian relations with regard to Iraq see Anthony H. Cordesman, Peter Alsis, Adam Mausner, and Charles Loi, 'The Real Outcome of the Iraq War: *US and Iranian Strategic Competition in Iraq*' (2011) *Center For Strategic and International Studies* <www.csis.org/files/.../111221_Iran_Chapter_6-Iraq.pdf> accessed 3 May 2016.
[27] Articles 6, 7, 2 ICCPR and Article 11 ICESCR.
[28] Articles I and VIII of the Genocide Convention of 1948.

other four permanent members of the SC were parties to the convention[29]. Therefore, at least these permanent members have the 'right' to authorize or to seek authorization of the use of force on two accounts: they were parties to the Genocide Convention (not to mention other human rights treaties) and they are permanent members of the SC. Nevertheless, Iraq was a party to the Geneva Conventions of 1949. According to article 3 common to these conventions, which is applicable to the conflict between the Iraqi government and the Kurdish insurgency as it was an internal conflict, Iraq was under the obligation to refrain from attacking the civilians; persons not taking a direct part in hostilities; outrages upon personal dignity; not to pass sentences or carry out executions without previous judgement announced by a regular constituted court with judicial guarantees. Article 3 common to the Geneva Conventions is not only a treaty provision. Rather, as the International Court of Justice (ICJ) stated in the *Nicaragua* case, it is a part of customary international law (CIL)[30].

As to the practice of intervention, the permanent members of the SC, especially the US and the Soviet Union, intervened militarily in many states during the Cold War era mostly for economic, political, and ideological reasons[31].

The wars and interventions during the Cold War were basically for ideological reasons and because of these supra-structural reasons many peoples lost their lives and many countries were invaded and occupied. Even more, in a number of cases, such as the Anfal campaign, the superpowers and permanent members of the SC because of ideological rivalry condoned human suffering.

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[29] These States are Russian Federation, France, the United Kingdom, and China. The US ratified the convention after the Anfal campaign, in 25 November 1988.

[30] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* Judgement, ICJ Reports 1986, 114.

[31] The US intervened or tried to intervene in Vietnam (1954), Guatemala (1956), the Dominican Republic (1956), Chile (1971), Grenada (1983), and Nicaragua (1986). The reason behind the conflict with these states was not only the economic interests, but also ideological; the US was trying to contain the spread of communism in these countries. See Jorge I. Dominguez, 'US-Latin American Relations during the Cold War and its aftermath' in Victor Bulmer, Thomas and James Dunkerley (eds), *The United States and Latin America: the New Agenda*, (University of London: London 1999) 33, 34-45. The Soviet Union also intervened in some countries during the Cold War and before 1988, such as East Germany (1953), Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979), all for ideological reasons. See Rafael Reuveny and Assem Prakash, 'the Afghanistan War and the Breakdown of the Soviet Union' (1999) 25 Review of International Studies 693, 694.

Intervention in the time of the Anfal campaign, hypothetically speaking, by the SC would have been legal and justified upon genuine humanitarian concerns, when some 100,000 civilians lost their lives[32]. The non-intervention was for other reasons, far from human dignity or security. Samantha Power said that "special interests, economic profit, and a geopolitical tilt toward Iraq thwarted humanitarian concerns", and that "the Reagan administration punted on genocide, and the Kurds (and later the United States) paid the price."[33]

In 2010 Ali Hassan al-Majid was sentenced to death by an Iraqi court for his role in the Halabja chemical attacks and his commanding role in the Anfal campaign[34]. Even some European states, such as Britain, Sweden and Norway had recognized the "Kurdish Genocide."[35]

However, claiming a 'right' rather than an 'obligation' to intervene for humanitarian concerns will prove inactive in specific cases, where national interests of the permanent members of the SC are involved. Nonetheless, justifying HI on moral grounds or ambiguous interpretations, without being privileged with positive, rigid legal bases will likely lead to selectivity and subjectivity whether to intervene.

2.2. The Darfur Crisis

As indicated in the Anfal campaign, atrocities are likely to have historical roots. Each occurs in a specific context. However, in many cases of genocide, injustice or inequality is one of the main reasons notwithstanding religion, ethnicity, and nationality. The case of Darfur, in which tens of thousands reportedly were killed by the government-backed militias, also has such historical roots and is related to land conflicts.

[32] Kenneth Roth, 'War in Iraq: Not a Humanitarian Intervention' *Human Rights Watch* <https://www.hrw.org/legacy/wr2k4/download/3.pdf> accessed 4 May 2016.
[33] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books 2002) 178.
[34] Iraq Executes Chemical Ali, *the Guardian* <http://www.theguardian.com/world/2010/jan/25/chemical-ali-execution-iraq-kurd> accessed 11 May 2016.
[35] British Parliament Officially Recognizes 'Kurdish Genocide', *Hurriyet Daily News* <http://www.hurriyetdailynews.com/british-parliament-officially-recognizes-kurdish-genocide--.aspx?pageID=238&nID=42182&NewsCatID=351> accessed 11 May 2016.

2.2.1. Historical Background of the Darfur Crisis

In the late 19th century, during the Turco-Egyptian rule of Sudan, the Arab-Muslims domination over the power and the control of the country was preferred and well-established[36]. However, this policy changed during the Anglo-Egyptian rule of Sudan (1895-1956), in which the policy of 'divide and rule' was applied; the British colonial divided Sudan onto ethnic and geographical territories, Arab-Muslims in the north and African-Blacks in the south[37].

The governmental policies by the Sudanese authorities have produced injustices and inequalities between the citizens in north and south, which led to an insurgency by southern combatant groups in 1983. These clashes between the government and the southerners continued until the early 21st century, when the two sides decided to negotiate and settle their disputes by peaceful means[38]. The same reasons could have led to the Darfur crisis; government exploitation, manipulation, deprivation, and neglect, peoples were suffering from lacking basic materials to survive, not to mention the fear of being marginalized by the two sides of north and south after the negotiations[39].

In April 2003 the rebel forces in Darfur, the Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) launched a sudden offense on the capital of North Darfur and damaged several governmental military objectives. The government of Khartoum responded with a heavy bombing campaign, including tanks so as to avert the rebel attacks[40].

The reasons of this military crisis can be determined as Darfur's geographical and demographical position to the whole Sudan. The majority of the Darfur's populations are

[36] Thu Thi Quach, 'The Crisis in Darfur: An Analysis of its Origins and Story-lines' (2004) *Virginia Tech* <https://theses.lib.vt.edu/theses/available/etd-12242004-143603/> accessed 5 May 2016.
[37] Ibid.
[38] Michael Clough, 'Darfur: Whose Responsibility to Protect?' *Human Rights Watch* <https://www.hrw.org/legacy/wr2k5/darfur/darfur.pdf> accessed 5 May 2016.
[39] Ibid.
[40] James Fearon & David Laitin, 'Sudan' (2006) random narratives 1.2, Stanford University <stanford.edu/group/.../Random%20Narratives/SudanRN1.2.pdf> accessed 5 May 2016.

neither Arabs nor Muslims. The Arabization and Islamization of the region started with coming Omar Hassan al-Bashir (currently Sudanese president) to power in 1989 because of his party's national-religious policies. Darfur is also rich with natural resources, especially oil, which in the late 1990s became one of the main sources of Sudanese revenues[41]. After the people of Darfur were afraid of being marginalized as a consequence of the talking between the government and the southerners after a long internal conflict, they carried guns and triggered the war against Khartoum, as it was the only available way to make their voice heard.

2.2.2. Human Rights and Humanitarian Violations

The conflict between the central government of Khartoum and the rebels of Darfur initiated in 2003 after the rebels attacked some police stations in rural areas and killed some officers. The wars between the government-backed militias and Darfurian rebels caused thousands' death, millions of refugees and internally displaced peoples and other millions in need for basic stuff; it was described as the worst humanitarian crisis[42].

The Sudanese government was facing two rebel forces in Darfur. The government feared to lose, therefore, it called upon local tribes for help and to maintain control and in its so doing the government exploited the tensions between the tribes[43].

The facts of the crimes committed by the government forces and government-backed militias, *Janjaweed*[44], and the rebel forces are to some extent controversial. The government of Sudan stated that the rebels initiated the attacks first, launched tens of attacks on the governmental installations killing about 5000 peoples both military and civilians, and injuring thousands more[45]. At the same vein, the Darfurian rebels stated that the government forces and their allied militias attacked only the African tribes,

[41] Thu Thi Quach, *supra note 36*.
[42] Johan Brosché, 'Darfur: Dimensions and Dilemmas of a Complex Situation' (2008) *Uppsala University, Department of Peace and Conflict Research*
<http://pcr.uu.se/digitalAssets/18/18212_Darfur_080317.pdf > accessed 10 May 2016.
[43] International Commission of Inquiry on Darfur, (Geneva, 25 January 2005) (Report) 24.
[44] Warriors or devils on horseback.
[45] Johan Brosché, *supra note* 42, 58.

killing their members and burning their villages. According to the rebels 70,000 peoples were killed, 3200 villages were destroyed, and 2 million persons were displaced[46].

However, serious crimes under international humanitarian law and international human rights law (IHRL) were committed. Burning hundreds of villages, attacking and killing thousands of civilians indiscriminately by the government forces, killing or ill treatment of detained and wounded enemy persons are war crimes under the Geneva Conventions of 1949. Not to forget other crimes of IHRL, such as depriving people of their right to adequate housing[47]; the destruction of property and forcible transfer of civilians amounting to crimes against humanity[48]; rape and other sexual violence that may amount either to war crimes or crimes against humanity[49]; and torture as a crime against humanity[50]. The responsibility of the Sudanese authorities for these crimes against humanity is well-nigh established, as these crimes were large-scale and committed systematically against African civilians of Darfur[51]. Despite appealing reports of international non-governmental organizations about the humanitarian situation in Darfur, the response of the SC was not satisfying. Although the SC passed some resolutions relating to Darfur, it was concerned first and foremost of the peace negotiations between the government of Sudan and the southern rebellion.

2.2.3. The International Response to the Crisis

The SC first passed Resolution 1556, in which it banned selling arms and other related material to non-governmental entities and individuals, including *Janjaweed*[52], but not the government of the Sudan itself, which was accused to finance and organize Janjaweed. After 48 days the SC passed Resolution 1564, in which it declared its grave

[46] Ibid, 60.
[47] ICESC, Article 11.
[48] ICCPR, Article 12 and the Statute of the International Criminal Court (ICC), Article 7 (1) (d).
[49] ICCPR, Article 7; the African Charter on Human and Peoples' Rights, Article 5; ICESC, Article 12; and common article 3 to the Geneva Conventions of 1949.
[50] ICC Statute, Article 7 (1) (f); ICCPR, Article 7; and the African Charter on Human and Peoples' Rights, Article 5.
[51] International Commission of Inquiry on Darfur, *supra note* 43, 132.
[52] The SC Res 1556 of 30 July 2004.

concern that the Sudanese government has not fulfilled its obligations under the Resolution 1556, especially bringing to justice the perpetrators of human rights violations, and that the SC, in case the Sudanese government continued ignoring its obligations, will consider more measures, such as "actions to affect Sudan's petroleum sector and the Government of Sudan or individual members of the Government of Sudan."[53] In spite of the fact that the SC in these resolutions acted under chapter VII of the Charter and described the situation in Darfur as "threats to international peace and security", it took no decisive steps to end the atrocities or to engage deeper in the use of force against the Sudanese government.

There are several reasons behind this inaction. First, the tight economic relations between China, a permanent member of the SC and Sudan might have led to vetoing any resolution authorizing the use of force or intervention into Sudan. Second, the peace negotiations between the government of Sudan and the southern rebel forces, which were running synchronously with the Darfur crisis, made the SC focus on it and not on Darfur. Third, the US-led invasion of Iraq in 2003 created an international climate in which doubt and despair were present, especially to the US humanitarian policies, for at that time the US was the only permanent member of the SC endorsing action in Darfur[54].

At the same time the Sudanese government was under a set of obligations derived from its commitment to IHRL and humanitarian law treaties. As to IHRL the Sudan is bound by ICCPR; ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination; and Convention on the Rights of the Child. At that time (2004) the Sudan signed, but did not ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The Sudan has not signed the other human rights' treaties. It signed but not ratified Rome Statute of the ICC, which makes Sudan fall under obligation to refrain from "acts which would defeat

[53] The SC Res 1564 of 18 September 2004.
[54] Michael Clough *supra note* 38, and Cymbeline Johnson, 'What is meant by the 'responsibility to protect?' Humanitarian Intervention in Iraq and Darfur' (n. d) *the University of Technology, Sydney* <https://www.uts.edu.au/sites/default/files/com-student-work-cymbeline-johnson.pdf> accessed 12 May 2016.

the object and purpose" of the Statute[55]. However, the Sudan ratified the African Charter on Human and Peoples' Rights. These various treaties legally bind Sudan to protect, promote, and preserve human rights of those living under its jurisdiction.

According to these treaties Sudan is bound to provide for, *inter alia*, the right to life[56]; the right not to be subjected to torture or to cruel, inhuman, or degrading treatment[57]; the right to adequate housing and not to suffer forced eviction[58]; and the obligation to bring to justice the perpetrators of human rights violations[59]. The Sudan, or any other state, cannot elude from its obligations under the name of emergency, however. For the question of emergency and necessity is organized in Article 4 of ICCPR. According to which, if a state wishes to derogate from some of its obligations, two conditions have to be met: first, there must be a situation which threatens the life of the nation, second, the procedures must be in accordance with constitutional and legal provisions. Even in such a situation, according to the same Article, there are some rights that are non-derogable; they must be respected anyway. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. The Sudan had been under a state of emergency since years before the Darfur crisis and it renewed the state in 2004. However, the Sudan did not take any legal steps and obligations set in the ICCPR with respect to the state of emergency and the question of derogation[60].

As to international humanitarian law, the Sudan ratified the Geneva Conventions of 1949 and it signed, but not ratified the Statue of the ICC. Therefore, as indicated above, it is obliged to refrain from "acts which would defeat the object and purpose" of the Statue. Notwithstanding these treaty provisions, the Sudan is bound by customary rules of humanitarian law. The most noticeable among these is article 3 common to the four Geneva Conventions of 1949. This article is applicable to internal armed conflicts, that

[55] See Article 18 of Vienna Convention on the Law of Treaties (VCLT) (1969). Ratified by Sudan on 18 April 1990.
[56] Article 6(1) of ICCPR.
[57] Article 7 ICCPR and Article 5 AC.
[58] Article 11 ICESCR.
[59] Article 2(3) ICCPR.
[60] International Commission of Inquiry on Darfur, *supra note* 43, 43-44.

the state and the insurgent groups attained a degree of organization and have control over parts of the country are bound thereby. As the ICJ indicated in the *Nicaragua* case, the provisions of Article 3 common to the Geneva Conventions "constitute a minimum yardstick" applicable to any armed conflict "and reflect what the Court in 1949 [in the *Corfu Channel* case] called 'elementary considerations of humanity.'"[61]

The humanitarian situation in Darfur is still appealing, after thousands being killed, millions are displaced and thousands of sexual abuses are not treated well[62]. Even after the SC in 2005 referred the situation in Darfur to the prosecutor of the ICC[63], the latter began investigations and issued arrest warrants for five individuals for their committing serious crimes in Darfur, including the president of Sudan, Omar Hassan al-Bashir for ten counts of war crimes, crimes against humanity, and genocide on 4 March 2009 and 12 July 2010 all under Rome Statute of the ICC, but the suspect is still at large[64]. This means that Sudan not only did not comply with the demands of the SC in abovementioned resolutions to arrest the perpetrators of human rights abuses, even the head of the state is accused and wanted himself. In such a case, who will be responsible to arrest and bring him to justice?

2.3. Conclusion

Neither *Anfal* nor *Darfur* can present a comprehensive picture of what occurred in the past or what will occur in the future. The both cases are taken as samples of what sometimes occurs somewhere. As was indicated, governments are infringing human rights and humanitarian laws severely. At the time, mostly because of national interests and fear of further legal and political repercussions, the SC is incapable of acting actively to halt human rights abuses. The most imminent situation of these violations is Syria from 2011 onward, in which hundreds of thousands of people were killed; millions

[61] *Nicaragua*, ICJ Reports 1986, 114.
[62] See "Men with no Mercy: Rapid Support Forces Attacks against Civilians in Darfur, Sudan" *Human Rights Watch* (September 2015) (Report).
[63] The SC Res 1593 of 31 March 2005.
[64] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC <https://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf> accessed 13 May 2016.

fled into neighboring countries; and chemical weapons by the Syrian regime against its populations were used, but no international decisive steps towards ending human suffering therein are made so far[65].

As these cases indicate, the point of departure in dealing with any such violations is tied with the mechanisms and legal procedures available in the current international legal system. The IHRL, humanitarian law, and the way the SC functions seem connected. Therefore, despite the lack of institutional mechanisms in IHRL treaties, the veto in the international collective security system is, occasionally, a crucial legal obstacle on the way of ending human suffering worldwide.

[65] See Simon Adams, 'Failure to Protect: Syria and the UN Security Council' (March 2015) *Global Centre for the Responsibility to Protect:* <www.globalr2p.org/media/files/syriapaper_final.pdf> accessed 18 May 2016.

CHAPTER 3

HUMAN RIGHTS AND HUMANITARIAN INTERVENTION: BACKGROUND

3.1. Definition of Humanitarian Intervention

HI remains a very controversial subject, in theory and practice as well. The philosophical backgrounds of human rights and international practice of HI produced very strong adversaries. Generally speaking, the evaluation of the notion and practice of HI is located within the philosophical, political approach that one follows. The liberals are generally moral-oriented and interventionists in the case of human rights violations. At the time, Marxists and realists are opposing HI with regard to human rights violations, each one for her own reasons.

If intervention, generally, is defined as pursuing particular political objectives,[66] it is widely noticeable that the literature of HI is linking the concept with human rights' violations, or humanitarian purposes. HI is said to be conducted with purpose of protecting, preserving, and promoting these human rights. This protection, on the one hand seems as the obligation of the international community, on the other hand, it is said to be the obligation of any state towards its own citizens[67]. The right of international community to intervene, for some scholars and in some cases is observed. However, even in these instances of interventionist trends, the practice of HI remains as a posterior

[66] Deon Geldenhuys, *Foreign Political Engagement* (Macmillan Press LTD, London 1998) 6.

[67] Francis Abiew determines the obligation as of the state itself and from evaluating the performance of this duty, the right of international community to intervene should be assessed. See Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, The Hague 1999) 17.

solution to the problems at hand[68]. After all, any attempt to answer the question of what is HI remains controversial. For the term 'humanitarian' itself is open to a wide range of interpretations[69].

Generally, it is conditioned that the primary purpose of the intervening state(s), while practicing HI, must be protecting the nationals of the targeted state. HI is defined as "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights."[70] The definition adopted by the North Atlantic Treaty Organization (NATO) in 1999, with relation to its bombing campaign in Kosovo, is similarly formed, defining HI as "an armed intervention" that is done "without the consent of the targeted state" and with purpose of addressing "a humanitarian disaster….large-scale violations of human rights."[71] As these definitions show, the practice of HI invokes questions with regard to the relationship between human rights and state sovereignty. It provokes a dichotomy of interventionism and non-interventionism. Some scholars refuse to grant HI any sort of legality or legitimacy, for it presents a foreign influence upon sovereignty[72].

Far from this dualism, HI has been radically, by Marxist thinkers, described as only a tool at the hand of the Western superpowers to intervene in other, poor, developing countries whenever and for whatever reasons deemed necessary[73].

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[68] See J. L. Holzgrefe & Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge 2003) 52. "If states are unwilling or unable to protect lives and liberties of their citizens, if they degenerate into anarchy or tyranny, then the duty to safeguard these rights reverts to the international community".

[69] Pierre Hassner, 'From War and Peace to Violence and Intervention' in Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, (Rowman & Littlefield Publishers, Lanham Maryland 1998) 9, 16.

[70] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, Philadelphia 1996) 12.

[71] CSS *Strategic Briefing Papers*, 'Humanitarian Intervention: Definitions and Criteria' 3(1) (June 2000) <http://www.victoria.ac.nz/hppi/centres/strategic-studies/publications/strategic-briefing-papers/HI.pdf> accessed 26 May 2016.

[72] Stephen Krasner, 'Compromising Westphalia' (1995) 20 International Security 115, 116.

[73] See Slavoj Zizek, 'Against Human Rights' (2006a) <http://libcom.org/library/against-human-rights-zizek> accessed 11 March 2016 and Slavoj Zizek, 'The Obscenity of Human Rights: Violence as Symptom' (2006b) <https://libcom.org/library/the-obscenity-of-human-rights-violence-as-symptom> accessed 11

Human rights are conceived in different ways. According to the traditional approach of international relations state sovereignty is absolute, while the modern ethics is attempting to, at least, settle human rights within the ambit of sovereignty; a new form of legitimacy[74]. The traditional one is a negative ethics with the principle of non-intervention, while the modern ethics is positive with an interventionism "in which human rights are primary and no longer secondary normative considerations."[75]

Accordingly, if the modern international ethics is such interventionist or oriented into defending human rights wherever violations occur, as it shall be shown later, the international order seems not to be too much interventionist. Even though, when intervention occurs it is a post-conflict solution. In this sense, it is always late. In a complex world, including a lot of states, having different viewpoints, representing varied ideologies that serve the states' interests, it will, or better to say should not, be shocking if one is witnessing the failure of attempts to unify states under one title or one slogan, in this case, the meaning of human rights and the scope of HI. However, the practice of HI needs to be done by the SC and under chapter VII of the Charter.

3.2. Historical Background of Humanitarian Intervention

Although the concept of HI has been stipulated under different names throughout the history of [political] philosophy, it has a tight linkage with the JWT. In a nutshell, under the title of 'just war' one is allowed to intervene in other countries to rescue suffering peoples, after meeting certain criteria of course[76]. Therefore, the theory seems to set rules of *jus ad bellum*, namely, when it is just to resort to armed forces. The literature on

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March 2016. "Humanitarian politics of human rights is the ideology of military interventionism serving specific economic-political purposes".

[74] Jack Donnelly, 'Human rights, humanitarian crisis, and humanitarian intervention' (1993) 48 International Journal 607, 615-620.

[75] Robert H. Jackson, 'Armed humanitarianism' (1993) 48 International Journal, Humane Intervention 579, 582.

[76] Jean Bethke Elshtain, 'Just War and Humanitarian Intervention' (2001) 95 Proceedings of Annual Meeting (American Society of International Law) 1-12 <https://www.athenaeum.edu/pdf/Just%20War%20and%20Humanitarian%20Intervention.pdf> accessed 26 May 2016.

HI seems close to the one of the JWT, especially its liberal, interventionist version. Thus, it seems significant to lay down notes regarding the JWT.

3.2.1. Reflections on Just War Theory

The ancient Greeks and Romans, later on, Christians, were the first who have created the JWT. Early philosophers, such as Plato believed that war is evil, but it is necessary to provide peace. However, it should not be extreme or indiscriminate[77]. Aristotle, *the philosopher*, was the first who used the term 'just war' [*dikaios polemos*][78]. For him war is just if it was as a means of self-defense; if it was to help men not to become enslaved; if it was to help our allies who have been wronged (a primary stipulation of collective self-defense); and if it was going to lead to peace[79]. Cicero believed in natural law, as to be a set of eternal rules derived from the eternal reason. Since then natural law theory has been a dominant paradigm in the Western political theories, from which the natural rights derived. While natural law emphasized on society and state, natural rights focused on individuals, providing them means so as to claim and protect their rights against the state[80]. This is what some modern scholars advocate with respect to human rights and their defense in the face of states' violations, elevating human rights to natural, universal, eternal rights.

For St. Ambrose war is just in a few instances, most notably if it was a 'divine command'[81]. For Augustine war is just if the intervention was based on 'other-interest, *caritas*, and not self-interest, *libido*', while Thomas Aquinas puts the political rulers under the obligation to bring peace, prosperity and justice to their peoples. As he also made the famous criterion of 'double effect': if an action results evil and good effects, in

[77] Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (3rd edition, Prentice Hall, New Jersey 1999) 9-10.
[78] In *Nichomachean Ethics*, cited by Paul Christopher, ibid.
[79] Paul Christopher, ibid.
[80] L, Strauss, *Natural Right and History* (University of Chicago Press, Chicago and London 1953); M, Roshwald, 'The Concept of Human Rights' (1959) 19 Philosophy and Phenomenological Research 354-379.
[81] J. Eppstein, *The Catholic Tradition of the Law of Nations* (Burns, Oates & Wahsbourne, London 1935) 61.

this case, HI, it will be permitted if the good is greater than the evil[82]. This latter consequentialist view is essential. For if the purpose of HI in its modern practice is, say, to protect human rights violations, it seems not a radical solution. However, it is mostly a foreign solution for a domestic problem, which may have deep historical roots that cannot be solved by merely deploying armed forces[83].

With the emergence of the new political theory, namely, liberalism, which emerged at the hand of Thomas Hobbes's *Leviathan*, and later elaborated by other liberal icons, such as John Locke with his *Two Treatises of Government*. These philosophers asserted a set of rights the most prominent ones were the right to life (Hobbes) and the right to property (Locke). At the same time, the natural rights theory was, to some extent, secularized. This was achieved by Vitoria, Grotius, and Vattel, who all believed in foreign intervention in support of mistreated peoples[84]. Grotius, for one, believed in HI as an exception to the principle on non-intervention, against rulers who are brutalizing their subjects. The justifications for his opinions were the general sentiments of humanity and the law of nature[85]. The discourse of HI is philosophically based on natural law/rights, which are moral appeals rather than concrete rules, ethical rather than rational, and posterior rather than prior solutions to the problems.

3.2.2. From Just War Theory to Humanitarian Intervention

International law and order remained state-centered. However, after the two revolutions of America 1776 and France 1789 and issuing some instruments about the 'rights of man and citizen', individuals gained more constitutional rights and significance. Thus the

[82] H. Lee, Thomas, 'The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention' (2004) 28 Fordham International Law Journal 754, 756.
[83] An attractive instance for this case is the intervention into Libya in 2011. It led to toppling the entire regime of Muammar Qaddafi, while the country is still suffering from war and local tribalism, which can be theorized as problems of justice and distribution from within the country.
[84] I. A. D. Draper, 'Grotius' Place in the Development of Legal Ideas about *War*', in H. Bull and others (eds), *Hugo Grotius and International Relations* (Clarendon Press, Oxford 1990) 18, 25.
[85] Hugo Grotius, *On the Law of War and Peace*, A.C. Campbell (tra) (Batoche Books Kitchener, Ontario 2011) 244-248.

way any state treats its people was no longer a domestic affair. Therefore, HI was seen as legitimate[86].

Since the most elaborative attempts in defining or expanding HI during the 19th century, the intervening state was doing so only after the explosion of domestic affairs in neighboring countries. In the early 19th century, then European powers intervened occasionally into the territory of the Ottoman Empire depending on a HI doctrine, most notably to rescue mistreated Christians therein[87]. Consequently, the European states and the Ottoman Empire concluded the Treaty of Berlin of 1878, by which Turkey was obliged to safeguard minimum standards of the rights of religious minorities under its jurisprudence[88]. However significant this step appears, the question of priority of human, minority rights remain. States are interest-oriented entities, though at some point this selfish policy seems abandoned, the question of legitimacy stands still[89].

The European tradition of intervention during the 19th century did not amount to a duty of intervention, or of rescue. However, it "was merely a legitimate option."[90] It was with the Hague Regulations of 1899 and 1907, the establishment of the League of Nations, issuing covenants about the rights of colonized people and minorities, establishing the International Labor Organization, which helped in improving the rights of individual workers, that the reality of human rights improved more[91]. However, the most

[86] Thomas Buergenthal, Dinah L. Shelton & David P. Stewart, *International Human Rights in a Nutshell* (4th edn, West Publishing Company, Minnesota 2009) 4.

[87] In areas such as Greece 1827, Syria and Lebanon 1960, Crete 1868, the Balkans 1875 and Macedonia 1903.

[88] See Article LXII of the treaty: "In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil or political rights" *National Library of Australia*: <http://trove.nla.gov.au/newspaper/article/18830646> accessed 20 May 2016.

[89] For a discussion about the politics and the legal outcome of this period see James H. Robinson & Charles A. Beard, *Readings in Modern European History* (vol 2, Ginn & Company, Boston 1908). For a discussion of these 19th century interventions by the European powers into the Ottoman Empire see Tonny Brems Knudsen, 'The History of Humanitarian Intervention: The Rule or the Exception?' (2009) Paper for the 50th ISA Annual Convention, New York, February 15-18: <http://citation.allacademic.com/meta/p_mla_apa_research_citation/3/7/0/8/0/pages370801/p370801-1.php> accessed 26 May 2016.

[90] Tonny Brems Knudsen, ibid.

[91] Makau Mutua, 'Standard Setting in Human Rights' (2007) 29 Human Rights Quarterly 547, 551-552.

significant steps towards a universal law of human rights were made after the establishment of the UN in 1945.

The UN issued the UDHR in 1948, which consists of a set of universal rights. The UDHR resembles the cornerstone of today's IHRL[92]. Though, as an effect of these treaties, nowadays individuals enjoy more strong legal protection, till states are at the very heart of international law and relations, or at least they are the most prominent actors therein. States are both the violator and the protector of human rights at the same time, as Jack Donnelly stated, human rights' treaties do not imply obligation to respect these rights automatically[93].

3.2.3. Humanitarian Intervention after the UN: the Cold War Era

In this era (1945-1990) a number of military interventions that occurred, were justified as defending national security and interests. The intervening states, however implying protecting or addressing gross violations of human rights[94], have justified their actions on the ground of self-defense, not upon humanitarianism[95].

[92] Which consists of a number of multilateral conventions: the ICCPR; the ICESCR both in 1966; the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) in 1966; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979; Convention against Torture and other Cruel, Inhuman, or degrading Treatment or Punishment (CAT) in 1984; and Convention on the Rights of the Child (CRC) in 1989.

[93] Jack Donnelly, *supra note* 74, 623 "The mere existence of international norms and obligations, however, does not imply that any international actor is authorized to implement or enforce those obligations. Just as in domestic politics, governments are free to adopt legislation with extremely weak, or even non-existent, implementation measures, states are free to create and accept international legal obligations that are to be implemented entirely through national action. And this is in fact what states have done with international human rights. None of the obligations to be found in multilateral human rights treaties may be coercively enforced by any external actor".

[94] Such as Belgium's intervention into the Congo (1960), the US intervention into the Dominic Republic (1965), India's intervention into East Pakistan (1971), Vietnam's intervention into Cambodia (1978), France's intervention into Central Africa (1979), Tanzania's intervention into Uganda (1978), the US intervention into Grenada (1983).

[95] Robert H. Jackson *supra note* 75, 588, and Anne Noronha dos Santos, *Military Intervention and Secession in South Asia: the Cases of Bangladesh, Sri Lanka, Kashmir, and Punjab* (Praeger Security International, London 2007) 23-41.

During this period, use of force for any ideological cause, such as spreading communism or liberal democracy was highly rejected. As it happened in the *Nicaragua* case, while the US tried to justify its military activities in Nicaragua on the respect to human rights and democracy, the ICJ stated:

> While the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect[96].

Despite the public and formal statements, human rights were not the only cause for intervention during the Cold War era. States are likely to have other objectives in mind, and "strong states which are, for reasons of good or bad, determined to intervene in a weak state have no shortage of legal rationalizations for their actions."[97]

In spite of this spectrum of acting, states during the Cold War have not intervened in all the cases of human rights' violation. The reason behind this dualism can be understood in the light of the political rivalry; each intervening state may have been afraid of counter reaction from the other bloc[98]. Maybe if national interests of the permanent members of the SC are threatened, only then "will forces under the UN command be used if necessary to enforce the observance of human rights."[99] It was only after the end of this era that the SC has been more activated, and much more cases of intervention for the sake of human rights occurred[100].

[96] *Nicaragua*, ICJ Reports 1986, 268.
[97] International Commission on Intervention and State Sovereignty (ICISS), *the Responsibility to Protect* (the International Development Research Centre, Ottawa 2001) (Report) 67.
[98] Beatrice Heuser, 'Sovereignty, Self-Determination, and Security' in Sohail H. Hashmi (ed), *State Sovereignty: Change and Persistence in International Relations* (Pennsylvania University Pres, Pennsylvania 1997) 91.
[99] Beatrice Heuser, ibid, 92.
[100] Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and The Third World* (Cambridge University Press, Cambridge 1990) 160.

3.2.4. Humanitarian Intervention after the Cold War

The fall of the Soviet Union in 1990 had its repercussions on the concept of humanitarianism. The main features of the new era can be summarized in three: firstly, the co-ordination between the former protagonists became more possible, and the principle of non-intervention was almost eliminated. Secondly, the option of non-alignment was undermined, and the Third World countries could not find any support from the superpowers anymore. Thirdly, individual rights became more important as international norms[101]. The notion of sovereignty is also said to change, which appears with the willingness of the SC to authorize use of force in cases which were previously seen as exclusive domestic jurisdiction[102].

It seems like the Pandora box was opened, for after the Cold War, especially during the 1990s a large number of intra-state, ethnic conflicts occurred. The SC has authorized use of force in several occasions, like in North Iraq (1991), Somalia (1992), Bosnia (1992), and Rwanda (1994). Furthermore, unauthorized operations were conducted, Sierra Leone (1998) and Kosovo (1999) being its most prominent instances[103]. Although dramatic changes became part of reality, the interests of the states, especially the permanent members of the SC also are undeniable. As Barry Posen put it:

> For the foreseeable future, the Security Council's decision to intervene or not to intervene in a particular conflict will reflect not internationally agreed-upon objective criteria, but the domestic imperatives of the major powers[104].

The same is true for addressing or redressing human rights' violations. The claim of their being universal as such does not mean that they are actually universally applied. The SC lacks a political will, the reasons behind which lay in the systematic mechanisms on which it is based, namely, the veto system. One can consider the case of Rwanda in 1994. The Organization of African Unity commissioned an investigation, in which the

[101] Robert H. Jackson, *supra note* 75, 589.
[102] ICISS, *supra note* 97, 118.
[103] Lee F. Berger, 'State Practice Evidence of the Humanitarian Intervention Doctrine: the ECOWAS Intervention in Sierra Leone' (2000) 11 IND. INT'L & COMP. L. REV 605-632.
[104] Barry R. Posen, 'Military Responses to Refugee Disasters' (1996) 21 International Security 72, 94.

SC and its members were condemned, especially the US, for their role in blocking efforts been made to deploy more forces so as to prevent the genocide, at a time this was achievable[105].

By reading the literature about HI, as was indicated, it reveals that the majority of scholars while defining or describing the concept, link it with the concept of human rights. However, the ultimate use of force in cases of HI is supposedly to defend human rights. Therefore, it may be important to provide some reflections with respect to human rights, its foundations, and its relationship with state sovereignty.

3.3. Reflections on Human Rights

3.3.1. Human Rights as Universal Rights

Human rights are mostly viewed as, and supposed to be, universal rights. This is well-nigh obvious in many definitions set forth by scholars. Human rights are universal moral rights that everybody has, regardless of their sub-identities, but by virtue of being humans[106]. Moreover, R. Wasserstrom set four requirements for any right to be seen as human right: first, it must be possessed by all human beings, theoretically at least. Second, it must be possessed equally by all human beings, regardless of their background or personality. Third, it must be possessed in particular statuses. Fourth, it must be maintainable and defensible when facing the whole human society[107]. The claim of universality has not come from nothing, it has a long history. As was indicated in the previous section, human rights are usually perceived by philosophers as synonymous to the natural rights[108]. Though other scholars observe differences between human rights

[105] Organization of African Unity, 'Rwanda: The Preventable Genocide' (7 July 2000) (Report) para, 10.
[106] M, Cranston, *What Are Human Rights?* (2nd edn, Bodley Head, London 1973) 36.
[107] R, Wasserstrom, 'Rights, Human Rights, and Racial Discrimination' in D. Lyons (ed), *Rights* (Wadsworth Publishing Company, California 1979) 46, 50.
[108] Jack Donnelly, *The Concept of Human Rights* (St. Martin's Press, New York 1983) 10; R, Wasserstrom, ibid.

and natural rights, still the tight connection between the two is admitted; the formers are described as 'offspring' of the latter[109].

However, not only the far philosophical history has participated in the formulation of the modern IHRL. Rather, the twentieth-century sorrow events also contributed in emphasizing these rights. Scholars are regarding the ill-treatment of individuals and ethnic groups and dehumanizing techniques they were imposed in the World War II as a main source of the UDHR[110]. The sorrow ethnic conflicts in the World War II forced the world not to focus on groups, but on individuals' rights. For may otherwise lead to renewing of the conflicts[111].

The Charter in its preamble reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." One of the purposes of the UN is to achieve international co-operation in solving international problems of, *inter alia*, human rights and fundamental freedoms[112]. From these clauses one can spell out that HI is perceived as a way to defend, promote these human rights, although the question remains, whether it is the best way in doing so. The UDHR has been seen as "the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement... the single most invoked human rights instrument."[113]

The universality of human rights in general and of the UDHR in particular is criticized as westernization of other cultures. The American Anthropological Association, a NGO body, noted in 1947 that setting global standards for human rights is not an easy work,

[109] Alison Dundes Renteln, 'The concept of human rights' (1988) 4 Anthropos 343, 348.
[110] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia 1998) 36; and Makau Mutua, *supra note* 91, 551.
[111] Joel E. Oestreich, 'Liberal Theory and Minority Group Rights' (1999) 21 Human Rights Quarterly 108, 113; Summer B. Twiss, 'History, Human Rights, and Globalization' (2004) 32 The Journal of Religious Ethics 39, 42; and Warren Lee Holleman, *The Human Rights Movement* (Praeger, New York 1987) 1.
[112] Article 1(3) of the Charter.
[113] Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, Oxford University Press, Oxford 1996) 102.

as it has "to recognize too many different ways of life."[114] It is said that the normative regime of international human rights law is originated in liberal theory therefore human rights law is essentially recognized as an internationalization of the obligations of the liberal state, and it has to be more expanded[115].

However, some of the UDHR rights seem universally accepted. These are the right to life; to property; and to freedom from torture, slavery, and arbitrary detention, while other rights are not[116]. This means that, as a matter of factual implementation and the clash between different rights, human rights can attain special treatment, in which to advocate a 'relative' universality. Although the enforcement of human rights is left to sovereign states, still some abuses are quite serious and need more attention, most notably genocide, crimes against humanity, certain war crimes, and perhaps torture and arbitrary execution[117].

The moral agreement about human rights or any other issue is at stake. One of the problems threatening these rights and their true essence is the globalized power of finance, for human rights sometimes appear to be as a means to enforce the free market policy, the liberal economy. Michael Ignatieff said that "there is no reason to believe that economic globalization entails moral globalization". That is why we need to think of human rights "as creating the basis for deliberation, as the bare human minimum from which differing ideas of human flourishing can take root."[118]

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[114] American Anthropological Association, 'Statement on Human Rights' (1947) 49 American Anthropologist 539, 539.

[115] Makau Mutua, *supra note* 91, 551. To mention few of these theoretical-practical issues, Article 17 of the UDHR provides for the right to property, which may provoke disagreement of socialist states, for these states do not provide for such a right. See E. J. M. Zvobgo, 'A Third World View' in D. P. Kommers & G. D. Loescher (eds), *Human Rights and American Foreign Policy* (University of Notre Dame Press, Notre Dame 1979) 90, 95. "Article 21 seeks to universalize Western-style elections"; Abdullahi Ahmed An-Na'im, *Human Rights in Cross-Cultural Perspectives* (University of Pennsylvania press, Philadelphia 1995) 2-4.

[116] Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 The Annuals of the American Academy of Political and Social Science, Human Rights around the World 10, 15.

[117] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 281.

[118] Michael Ignatieff, 'The attack on Human Rights' (2001) 80 Foreign Affairs 102, 115-116.

The standardized criteria of human rights lead to one of the two: the deployment of enforcement measures, or to reconsider the course once again. Human rights appear as contradictory with state sovereignty. While since the Treaty of Westphalia of 1648 state sovereignty is absolute, the modern human rights seek to put limits and to impose further restrictions on it. Therefore, in the next section some reflections regarding the relationship between the two will be made.

3.3.2 Human Rights and State Sovereignty

Since the Treaty of Westphalia in 1648 states have been the only prominent legal actors of international law and state sovereignty was absolute. With respect to this treaty, notwithstanding the traditional definition of sovereignty, a few points are noteworthy[119]. First, while the dominant idea of state sovereignty was 'nonintervention', still interventions occurred, whether unilaterally as in the case of the British, France, and Russian interventions into the Ottoman Empire, or multilaterally, as in the case of the mandate system of the League of Nations, all conducted upon human rights justifications. Second, the mere existence of treaties in particular and international law in general, including those of human rights, is a sign of limited sovereignty, for all these legal bodies pose restrictions upon states. Finally, as related to globalization, there are a lot of transnational corporations and agencies, all forcing states to work, act, and react in co-operation with others, including in the field of IHRL. This latter law has shifted attention from state sovereignty to individual sovereignty.

Sovereignty, however, has been described as an absolute authority, with which no other sovereigns in the political community can exist[120]. This implies, at least theoretically, that there cannot be two sovereigns at the same time in the same community. Nonetheless, others contend that sovereignty is not a quite fixed category or absolute; it

[119] Michael W. Doyle & Anne-Marie Gardner, 'Introduction: Human Rights and International Order' in Jean-Marc Colcaud, Michael W. Doyle & Anne-Marie Gardner (eds), *The Globalization of Human Rights* (UNU Press, Tokyo 2003) 9; Zehra F. Kabasakal Arat, 'Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights' (2006) 28 Human Rights Quarterly 416, 427-428.

[120] F. H. Hinsley, *Sovereignty* (2nd edn, Cambridge University Press, Cambridge 1986) 26.

is changing. Theoretically, it is believed that the rights of sovereigns are limited and variable "it is widely accepted that no subject is irrevocably fixed within the reserved domain of sovereign prerogative."[121] The Permanent Court of International Justice while determining what is within the jurisdiction of any state in 1923 adopted this restrictionist approach by stating that sovereignty "is relative…. it depends upon the development of international relations."[122]

Sovereignty is perceived not only as limited, but as well as "steadily being eroded" by various forces, including the "ideology of human rights,"[123] which are "the most powerful critiques of sovereignty."[124] One way in forcing human rights standards against the will of the sovereigns is through HI. Human rights instruments impose obligations on states in two ways. One is to respect citizens' rights who live in other countries, which promotes interventionism and shapes a new notion of international legitimacy[125].

3.4. Humanitarian Intervention and Collective Security

Human rights seem individualistic, in the sense that confronts individuals with society as a whole. However, by securing these rights through a collective project one can accord these rights a higher level of collectivity. The idea of collective security can be traced back to the years before the League of Nations. The League of Nations was established in 1919, and in its Covenant it created a collective security system to be followed and applied in cases of aggression. In the League of Nations every nation, large or small, has

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[121] Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, Oxford 2003) 291.

[122] *Nationality Decrees Issued in Tunis and Morocco*, Permanent Court of International Justice, Series B, no. 4 (Advisory Opinion of 7 February 1923).

[123] Abdullahi A. An-Na'im and Louis Henkin, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 95, 102

[124] Kathryn Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) 47 International Organization 411, 411.

[125] See Jack Donnelly, *International Human Rights* (2nd edn, Westview Press, Colorado 1998) and 'State Sovereignty and Human Rights' (n. d) Denver University on Human rights and Human Welfare: <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.125.7201> accessed 10 March 2016.

the right to veto against any decision to address the illegal use of force[126]. This led some diplomats to call the collective system of the League of Nations as weak and inactive, as it was very respectful of sovereignty[127].

Instead of banning aggression among states, the League of Nations' strong states invaded a number of small states. The inevitable result of these policies was the collapse of the system itself and the states dealt with different cases of aggression having their national interests, or sometimes some realistic equations in mind, such as the invasion of Ethiopia by Italy, invasion of Bulgaria by Greece and invasion of Manchuria by Japan[128]. This signals the free choice of sovereign states, the subjectivity in evaluating the matters at hand; no state was ready to compromise its sovereignty.

With the establishment of the UN the collective security system much improved. A general ban on the use of force was set forth in Article 2(4) of the Charter. However, the SC was created in chapter V of the Charter. Accordingly to chapter VII of the Charter, the SC can determine whether a threat to international peace or security exists, and if so, to take non-military and also military measures necessary to address the threat and every permanent member of the SC is accorded a right to veto non-procedural resolutions. Thus, the new system of collective security came into effect[129].

The concept of collective security in international relations is basically bound to aggression. It is defined as "a plan for maintaining peace through an organization of sovereign states, whose members pledge themselves to defend each other against attack."[130] Thus, collective security is to address or reverse aggression against any member of the concerned organization. Still, it will be argued that the promotion of human rights, through the practice of HI can be a collective security project. This may be achieved when these rights are perceived as universal rights and their grave violation

[126] League of Nations Covenant, Articles 8, 10, 11, and 12.
[127] Michael R. Fowler & Jessica Fryrear, 'Collective Security and the Fighting in the Balkans' (2003) 30 N. Ky. L. Rev 299, 306.
[128] Ibid.
[129] Articles 39, 41, and 42 of the Charter.
[130] Joseph P. Ebegbulem, 'The Failure of Collective Security in the Post Wars I and II international System' (2011) 2 Transciense 23, 24.

pose a threat to international peace hence the SC can address these violations wherever occurred. For the main idea behind collective security is that one for all and all for one.

However, the purpose is not to advocate arbitrary intervention into domestic affairs of states. Rather, the idea is to include HI into the limits of collective security to be conducted or at least authorized by the SC.

A legal framework for such inclusion can be made with reading different articles of the Charter altogether. Promoting human rights is within the purposes of the UN and the SC while discharging its duties, shall act in accordance with these purposes[131]. It is true that the SC is granted wide authorities in Article 39 of the Charter, still its power and decisions shall not be made arbitrarily. The International Criminal Tribunal for the Former Yugoslavia stated that:

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization… in any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* [unbound by law][132].

The responsibility of the SC to maintain international peace and security is a dual responsibility. On the one hand, while enforcing measures to restore international peace and security under chapter VII of the Charter, the SC needs to pay due regard to human rights, especially the right to life[133]. Also when human rights are violated, the SC has the primary right to authorize use of force to secure international recognition for these rights.

[131] Articles 1 and 24 of the Charter.
[132] ICTY Appeals Chamber *Tadić* Decision 1995 IT94-1-AR72, para, 28.
[133] Eugenia Lopez-Jacoiste, 'The Un Collective Security System and its Relationship with Economic Sanctions and Human Rights' (2010) 14 Max Planck Yearbook of United Nations Law 273, 332.

3.5. Conclusion

Though human rights norms are significant, they are seen as inactive in reality and dynamics of international politics[134]. These norms at least lack procedural back up, they suffer implementation. Despite all the efforts, both philosophical and procedural, still HI in situations of grave violations of human rights seems the only available solution. Even though, as was indicated, in some cases of violations characterized as genocide or crimes against humanity, no immediate, proper redress followed.

[134] Stanley Hoffmann, 'Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal' (1983) 112 Daedalus 19, 22.

CHAPTER 4

TREATY LAW AND HUMANITARIAN INTERVENTION

4.1. The UN Charter and the Use of Force: the Prohibition

The international community, neither before the UN nor thereafter could eliminate war totally. The best can be said is that war and actions therein are legally regulated. The current international order, starting with the establishment of the UN, has put a general ban on the use of force in international relations echoed in Article 2(4) of the Charter. Still force is employed under varied names and for varied reasons, one of which is for humanitarian purposes. Therefore, the main question of this chapter is to find out whether there is any treaty-basis for HI.

In order to discuss any sort of use of force in international law, one has to consider the provisions of the Charter as the main treaty regulating the case among states in the international order.

The Charter contains two kinds of principles relating to the use of force unilaterally: one is prohibiting it, and another is setting exceptions to this prohibition. As to the case of using force collectively, the Charter makes it within the competences of the UN itself, and in case any state wishes to act in the name of this collective security system, it has to obtain authorization of the SC.

The pre-Charter period of international relations did not have any general prohibition on the use of force. In the period 1648-1914 the customary law did not prohibit the use of

force, for the European sovereigns had no superior and in any case of using force they were invoking justifications from the law of nature and the law of nations, both from their articulation, so as to assume the war as just[135]. Even the League of Nations and the Kellogg-Briand Pact despite prohibiting war of aggression, they allowed use of force in many other instances[136]. In contrast, at founding the UN, the people of the United Nations determined "to save succeeding generations from the scourge of war" and it is for this purpose that they laid down a general prohibition on the use of force in Article 2(4), which in fully reads:

> 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.

One of the UN purposes is to achieve international cooperation in solving international problems, including in the field of human rights. The UN, however, does not have the right "to intervene in matters which are essentially within the domestic jurisdiction of any state" only for sake of "application of the enforcement measures under chapter VII."[137] From this, two possibilities emerge: if human rights are determined as absolute domestic affairs, then the UN cannot enforce them by force. If it is conceived otherwise, then it can.

4.1.1. The Content and the Nature of the Prohibition

The prohibition on the use of force in Article 2(4) is said to be a rule of CIL, as it was asserted by the ICJ in the *Corfu Channel* case[138]. This conclusion is accepted by the

[135] Andrea Gioia, 'The End of the Conflict and Post-Conflict Peace Building' in Michael Bothe, Mary Ellen O'connell & Natalino Ronzitti (eds), *Redefining Sovereignty: the Use of Force After the Cold War* (Traditional Publishers, Inc, New York 2005) 161.

[136] Natalino Ronzitti, 'The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force' in Michael Bothe, Mary Ellen O'connell & Natalino Ronzitti (eds), ibid, 91, 92.

[137] Article 2(7) of the Charter.

[138] *Corfu Channel Case*, (Albania v. the United Kingdom), Judgement, ICJ Reports 1949, 35.

legal scholars, as it was considered to have a 'comprehensive nature' binding on all states and to be part of *jus cogens*[139].

Seeing the prohibition on the use of force as a *jus cogens* imposes a question: is it permissible for any other contradicting norms to come into existence? In this case, if this prohibition is admitted, is it possible to tackle a right of intervention in other states in cases of violation of human rights, providing that these rights, at least some of them, become part of *jus cogens*? According to Article 53 of VCLT, a *jus cogens* can be modified only by another rule having the same nature. Unilateral practice of states cannot change or challenge a *jus cogens*. The question is about collective action of states. However, there appears that the prohibition on the use of force is of a customary nature, not a *jus* cogens[140]. The ICJ in the *Nicaragua* case distinguished "the grave forms" of use of force (those constituting an armed attack) from "other less grave forms", and indicated that the prohibition on the use of force has become part of customary law[141]. As will be indicated below, the question of grave uses of force, namely, aggression is about infringing political independence and territorial integrity of the state. Therefore, a room is left for arguing that HI, as it is not, supposedly, directed against independence or integrity of the state, is a 'less grave' form of use of force. The main difference between aggression and HI is the intent of the intervening state: in aggression it is to invade and occupy the targeted state or a part of it, while HI is about saving suffering peoples' lives.

4.2. The Exceptions to the Prohibition on the Use of Force

This ban on the use of force is not absolute, however. Exceptions do exist. Use force in a few instances is lawful, which are two: (1) self-defense[142], individual and collective

[139] *Jus cogens* or peremptory norms are those rules of international law, from which no derogation is allowed. See VCLT, Articles 53 and 64; and Bruno Simma, 'NATO, the UN and the Use of Force' (1999) 10 EJIL 1, 2-3.

[140] Natalino Ronzitti, *supra note* 136, 93-94.

[141] *Nicaragua*, ICJ Reports 1986, para, 191-192.

[142] In determining the legal nature of HI, self-defense will not be covered. For the right to self-defense is provided for only in the case of a material armed attack on the state. In this sense, HI is a counter

according to Article 51 of the Charter; (2) if it is authorized by the SC under chapter VII of the Charter.

4.2.1. Authorized Use of Force

The second exception to Article 2(4)'s prohibition on the use of force is collective security measures authorized by the SC. According to Article 24 of the Charter the members of the UN have conferred "on the Security Council primary responsibility for the maintenance of international peace and security." The SC is comprised of fifteen members, five permanent (the US, the United Kingdom, France, Russia, and China) and ten others to serve on the SC for a term of two years. Decisions in non-procedural matters require at least nine affirmative votes of its fifteen including "the concurring votes of the five permanent members."[143]

The SC pursuant to Article 39 of the Charter "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and in such circumstances it shall decide what measures to take in accordance with Articles 41 and 42. While Article 41 is about taking "measures not involving the use of armed force,"[144] Article 42 of the Charter empowers the SC to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

All members of the UN "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Consequently, Chapter VII determinations of the SC are legally binding on all UN member states. Moreover, the

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operation; the intervening state will not be defending itself or its own population. Rather, it will work against another state's regime and defending its suffering population. Thus, HI cannot be read as a self-defense case, but it can be authorized by the SC. Therefore, this latter one will be studied. See Ahmad M. Ajaj, 'Humanitarian intervention: Second Reading of the Charter of the United Nations' (1993) 7 Arab Law Quarterly 215, 216-217.

[143] Articles 23 and 27 of the Charter.

[144] These may include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

Charter provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[145]

The use of force under this collective system is favorable, for it is not a unilateral right. Rather "recourse to such measures is to be the exclusive prerogative of the United Nations, acting in concert."[146] However, considering the permanent members right to veto, any authorization of the use of force can be achieved only when there is unanimity between these members. The SC may authorize measures, including the use of force, merely in the face of "threats" to international peace and security, as it "may wield force to counter any type of aggression, not necessarily amounting to an armed attack, and it may even respond to a mere threat to the peace."[147] These threats may include those not yet imminent[148]. The SC, moreover, has largely unrestricted power to determine what events and developments constitute such a threat, inasmuch as "the degree of latitude bestowed upon the SC by the Charter is well-nigh unlimited."[149]

The authority of the SC is well admitted. However, there are a number of cases, which can be labelled as the 'grey-zone' cases. For the Charter neither prohibits nor permits them clearly. Rather, they are built upon posterior interpretations of the Charter, HI being one[150]. This leads to claim that there is a range of legal contentment and state practice in favor of HI in the post-Charter era of international law.

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[145] Articles 25 and 103 of the Charter.

[146] Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, Cambridge 2002) 2.

[147] Yoram Dinstein, *War, Aggression and Self-Defense* (4th edn, Cambridge University Press, Cambridge 2005) 250.

[148] Christopher Greenwood, 'International law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego International Law Journal 7, 19.

[149] Yoram Dinstein, *supra note* 147.

[150] Other cases include: use of force against terrorism; against threats of Weapons of Mass Destruction (WMD); anticipatory self-defense; reprisals involving armed force; intervention for facilitating self-defense; intervention for protecting nationals abroad; collective intervention without SC authorization. For a discussion of these cases see Allen S. Weiner, 'The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?' (2006) 59 Stanford Law Review 415, 429-441; and NaItalino Ronzitti, *supra note* 136, 99-104.

4.3. The UN Charter and Humanitarian Intervention

Article 2(4) of the Charter draws a general prohibition on the use of force. This prohibition, *prima facie*, looks like ignoring the purpose behind the action. Following this logic the article outlaws both the *use* of force and the *threat* of its use[151]. Considering the historical context in which the Charter was concluded, this prohibition on the use of force appears not to be an accident. This happened because the international political will at that time (1945) wished to ban, restrict war and aggression as much as possible, therefore these regulations in the SC were necessary to apply that ban and to punish any violators[152]. According to Ian Brownlie, HI to defend other nationalities abroad may have been understood as legally defensible prior to the Charter, but it could not survive the legal regime of the Charter in 1945. The language of Article 2(4), he contends, is clear; even the *travaux preparatoirs* of the Charter assert, reinforce the ban not restrict it[153]. For if HI is perceived as not infringing the territorial integrity and political independence of the targeted state, Oscar Schachter argues, may demand "an Orwellian construction of those terms."[154] This seems plausible, for HI is basically conducted against the will of the political regime, hence challenging its independence and integrity. The focus, instead, should not be idealizing HI in this sense, as it confronts nothing eligible in the targeted state. However, the light should be shed on its conduct as a collective security project.

It is clear that the illegality, or any other argument, is based on interpretation of these relevant treaties and clauses. The main case of illegality of HI is when it is conducted without the authorization of the SC. Classicists made a set of arguments against the case of HI. They presume that the parties to any treaty have an "original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired

[151] Nikolas Sturchler, *The Threat of Force in International Law* (Cambridge University Press, Cambridge 2006).

[152] See Ian Hurd, *After Anarchy: Legitimacy and Power in the UN Security Council* (Princeton University Press, Princeton 2007).

[153] Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) 267.

[154] Oscar Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 AJIL 645, 649.

or has been replaced by mutual consent."[155] Following this argument, the illegality of unauthorized HI is clear.

The prohibition on the use of force, despite its legal situation, has been eroded and it well-nigh lost its power. The reason is the frequent violation of Article 2(4), the practical use of force among states. If Article 2(4) is dead, who killed it?[156] This dramatic change in the pre-Charter era is supposedly for two goals, national interests and defending human rights through HI. The prohibition "has been eroded beyond recognition."[157] The unilateral[158] use of force increased, it seems like states are unwilling to abide by these rules anymore, as if the use of force regime of Article 2(4) collapsed,[159] as states do not consider these rules as obligatory anymore.

Although Article 2(4) may be interpreted as forbidding use of force only if it was directed against "the territorial integrity or political independence" of a state[160] and as a genuine HI is not directed against territorial integrity or political independence of the targeted state so "it is a distortion to argue that it is precluded by Article 2(4)"[161] still it is better to admit that, if the SC functioned properly states may have not been able, or obliged to resort to force unilaterally[162].

Moreover, Article 39 of the Charter gives the SC authority to use force in response to "any threat to the peace, breach of the peace or act of aggression." It is possible for a humanitarian catastrophe, human rights violations, to become a threat to, or a breach of the peace. Hence, the SC has authority to determine whether these violations form such

[155] J. L. Holzgrefe & Robert O. Keohane, *supra note* 68, 38.
[156] Thomas M. Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809-837.
[157] Thomas Franck, ibid, 810.
[158] In both meaning of the word: whether by one state, or a group of states but without authorization of the SC.
[159] Michael Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25 Harvard Journal of Law and Public Policy 839.
[160] Julius Stone, *Aggression and World Order: A Critique of United Nations' Theories of Aggression* (Stevens, London 1958) 95.
[161] Fernando Teson, *Humanitarian Intervention: an Inquiry into Law and Morality* (2nd edn, Transnational Publishers, Irvington-on-Hudson, 1997) 151.
[162] W. Michael Reisman, 'Criteria for the Lawful Use of Force in International Law' (1985) 10 Yale Journal of International Law 279.

a threat, and accordingly to use force to address/redress them, even if the threat they pose does not have transboundary effects[163]. Thus, the SC is endowed the authority to include HI or human rights grave violations as cases threatening international peace and security. In case it chooses to do so, it seems unlikely that its action becomes a target of political condemnation or scholarly criticized. Historically speaking, it is in the cases of inaction that the SC is most criticized, as in the case of Rwandan genocide in 1994, to mention one.

The SC itself has relied upon its authority under Chapter VII of the Charter to address violations of human rights in several occasions. Its Resolutions 688, 794, 925, 929 and 940 acting under chapter VII of the Charter, which addressed the cases of Iraq, Somalia, Rwanda, and Haiti, respectively, are evidence of this trend[164]. The SC in these resolutions determined that the civil war in Somalia as "a threat to international peace and security." It has also considered the "massive exodus of refugees"; "acts of Genocide"; "the ongoing violence"; "the continuation of systematic and widespread of killings of the civilian population" and "internal displacement of some 1.5 million people" in Rwanda as "a threat to peace". In Haiti, the SC determined that "the continuing escalation of systematic violations of civil liberties" constitutes "a threat to peace." These cases reaffirm that SC did not count merely on their transboundary effects in determining the range of threats they may pose on international peace and security. At least the recent practice of SC does support the legal realist contextual contention that humanitarian interventions if authorized by the UN are lawful exceptions to the Charter's general ban on the use of force. The International Commission on Intervention and State Sovereignty (ICISS) concluded that the concepts of international peace and security are very wide and their interpretation seems to hold no limits[165]. Apparently, the SC is left with a wide legal, textual and contextual authority to determine the nature of the cases and to authorize use of force for humanitarian purposes. However, the question

[163] Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' (2000) 3 Yearbook of International Humanitarian Law 3, 8-9; and J. L. Holzgrefe & Robert Keohane, *supra note* 68, 40-41.
[164] See the SC Res 688 (1991) of 5 April 1991; Res 794 (1992) of 3 December 1992; Res 925 (1994) of 8 June 1994; and Res 929 (1994) of 22 June 1994.
[165] ICISS, *supra note* 97, 159.

about the political will of the SC remains and this is the biggest impediments on the way of doing so.

4.4. Unilateral Humanitarian Intervention

UHI means use of force by a state or a group of states without authorization of the SC, even if for humanitarian concerns. This type of interventionism is seen unlawful by the majority of states and legal scholars, for it is not backed up by any basis in the Charter or by a wide range of state practice. UHI does not have a well-established basis in international law[166]. UHI whatever its justifications, is still considered as dangerous and selfish. The General Assembly (GA) of the UN during the Cold War, especially 1960s and 1970s, issued many resolutions in which it rejected the idea of intervention and use of force under whatever justifications. It stood against any form of intervention, whether directly or indirectly, for whatever reasons, by a state or a group of states and considered such an action as crime of aggression, thus unlawful under international law[167]. However, it is noteworthy that despite these pacific resolutions, the GA maintained a room to use of force under chapter VII of the Charter. This means that the GA preferred maintenance of international peace and security over sovereignty and its related categories, namely, territorial integrity and political independence, which again leaves a wide space for the SC to determine whether the situation at hand resembles a threat.

The foreign ministers of the Non-Aligned Movement have met in Cartagena, Colombia in 2000 after the NATO intervention in Kosovo, in which they reiterated a "firm condemnation of all unilateral military actions including those made without properly

[166] Christine Gray, *International Law and the Use of Force* (2nd edn, Oxford University Press, Oxford 2004) 49.

[167] The GA Res 2131 of 21 December 1965 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty'; Res 2625 of 24 October 1970 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'; Res 3314 of 29 November 1974 'Definition of Aggression'; Res 36/103 of 9 December 1981 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States'; and Res 42/22 of 18 November 1987 'Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations'.

authorization from the United Nations Security Council" and rejected "the so-called 'right' of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law."[168] Adam Roberts explained why some states rejected UHI by stating a few reasons: the intent of the intervening state, whether it is purely humanitarian; the fear of the weak states, which are most vulnerable to be intervened into by the strong ones; and the desire of the oppressing regimes to keep in power in their countries[169].

The GA in 2005 World Summit Outcome Document addressed HI under the title "responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and stated that only inability or unwilling of national authorities to protect their populations from grave violations is not sufficient. Rather, the collective action needs to be through the SC under chapter VII of the Charter[170].

These paragraphs show that the GA reaffirmed the opinion that the only way to use force legally is through authorization of the SC. The majority of leading international legal scholars and governments have rejected any attempt to legalize UHI. They invoke the fear of using humanitarianism by aggressive states as a pretext to wage wars on one hand, and justifying their wars under that title on the other[171].

Once again, the Genocide Convention of 1948 in its Articles IV, V, and VI enacted the liability of "constitutionally responsible rulers, public officials or private individuals" for the crime of Genocide, that they will be tried and punished. Article VIII stated "any contracting state may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide." Although the phrase came out without

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168 Movement of Non-Aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, Final Document (April 8-9, 2000): <http://www.nam.gov.za/xiiiminconf/index.html> accessed 25 March 2016.
169 Adam Roberts, *supra note* 161, 32.
170 World Summit Outcome Document, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) para, 139.
171 See Ryan Goodman, 'Humanitarian Intervention and Pretexts for War' (2006) 100 AJIL 107-141; and Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publication, Boston 1991) 126.

referring to a specific organ of the UN, the SC is most powerful among those especially if the crime, which is genocide, is taken into account.

There are regional organizational treaties, such as the treaties establishing the Organization of African Unity, in which a right of intervention for human rights and in cases of mass killing is possibly concluded. The African Union's Constitutive Act creates a "right of the Union to intervene in a Member State pursuant to a decision of the [AU's] Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity."[172]

4.5. Conclusion

Human rights, Thomas Pogge says, are not directed to individuals as such. Meaning that, the ordinary relations between ordinary citizens cannot be taken as cases of human rights. Rather, to engage human rights, the conduct must be in some sense formal, bureaucratic, it is about the state and its officials[173]. Thomas Pogge presents an 'institutional' understanding of human rights. He bases his assumption on Article 28 of the UDHR, accordingly he concludes "postulating a human right to X is tantamount to declaring that every society (and comparable social system) ought to be so organized that all its members enjoy secure access to X. Human rights are moral claims on social institutions."[174] Understanding the human rights this way entails every individual to claim rights, and thus to demand institutions that may provide for these rights. Consequently, the UN and the SC are the primary international institutions which have to fulfil this duty. The UN through its competent agencies and the SC through taking IHRL more seriously and not to risk human lives because of lack of political will. Although state sovereignty is a serious impediment in human rights discourse and law, which made scholars to contend these rights and even their redressing as a "national, not

[172] Constitutive Act of The African Union, Article 4(h).

[173] Thomas Pogge, 'The International Significance of Human Rights' (2000) 4 The Journal of Ethics: Rights, Equality, and Liberty Universidad, Torcuato Di Tella Law and Philosophy Lectures 1995-1997, 45, 47.

[174] Ibid, 52.

international issue,"[175] still grave violations of peoples' lives in cases of genocide and crimes against humanity cannot be fully pulled back from international law and politics as merely domestic affairs.

As was indicated, giving an exact answer to textual legality of HI is, *prima facie*, controversial. However, the majority of states and legal scholars contend and agree to include grave violations of human rights into chapter VII of the Charter, which the SC can consider and decide to use force in addressing/redressing the situation. The practice of HI through the SC as it represents the whole international community, is much preferred than the regional organizations, which are representing only a relatively small proportion of the international community.

[175] Jack Donnelly, *supra note* 125, 259.

CHAPTER 5

CUSTOMARY INTERNATIONAL LAW, UNILATERAL HUMANITARIAN INTERVENTION, AND LEGITIMACY

5.1. Customary International Law: Theoretical Background

Writing this chapter was synchronous with the 13th anniversary of the US-led invasion of Iraq in 2003, in which the occupying states relied, *inter alia*, on humanitarian ends to be obtained while invading the country and toppling the political regime (Saddam Hussein) entirely. This invasion was conducted without explicit SC authorization. Therefore, it may contribute in further enhancing a customary right of unauthorized HI, or UHI[176].

Custom is a main source of international law, which along with treaties produced a set of rules regulating the inter-state relationships. Generally speaking, states do adhere to these rules with conviction that they are legally obligatory. This obligatory nature of custom is admitted in the Statute of the ICJ[177]. Accordingly, the ICJ determined the "international custom, as evidence of a general practice accepted as law" as one of the sources which shall be applied while deciding on disputes. Custom is defined as consisting of two elements: state [general] practice and an *opinio juris*.

[176] Eric A. Heinze, 'Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice' [2006] Parameters 20, 30.
[177] Article 38(1) of the ICJ Statute.

State practice is referred to as the quantitative, objective, or material element, *opinio juris* is referred to as the qualitative, subjective, and psychological element. The presence of both elements may make any practice an international customary rule and thus binding all the states[178].

The time element seems essential in the formation of customary rules; the passage of a specific period of time may be required before the rule can exist. The French jurisprudence required the passage of at least forty years, while the German jurisprudence required thirty years to allow the emergence of an international custom[179]. Although the formation of a custom demands a specific period of time, it is more or less related to the conviction of international actors, i.e., states, that the action is necessary and there needs some sort of unanimity of the concerned actors[180]. With respect to human rights and HI, for instance, states can do revolutionary works, if they are convinced of the legal binding nature of these categories.

The ICJ in the *Asylum* case referred to state practice as "constant and uniform usage."[181] State practice is significant in interpreting the already existing rules, it is considered as an important way to determine the meaning of any treaty[182].

With the formation of customary rules, till the early 20th century, only the head of state and government and the minister of foreign affairs considered relevant to state practice,

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178 Vincy Fon & Francesco Parisi, 'Stability and Change in International Customary Law' (2003) George Mason University, Law: <http://www.law.gmu.edu/pubs/papers/03-21> accessed 8 April 2016.

179 Vincy Fon & Franscesco Parisi, 'The Formation of Customary Law' (2000) (George Mason University, Law: <http//www.law.gmu.edu/assets/files/publications/working_papers/02-24.pdf> accessed 9 April 2016.

180 *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgement, ICJ Reports 1969, 74. "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked".

181 *The Asylum* Case (Colombia v. Peru), Judgement, ICJ Reports 1950, para, 14.

182 VCLT, Article 31(3)(b).

but this changed; other organs can participate[183]. To make clearer what state practice means to human rights and HI, only the practice of the state's constitutional organs (executive, legislative, and judicial) and the practice of intergovernmental organizations shall be determined as such[184]. The SC, because of its legal authorities, can contribute widely in the formation of CIL in the field of human rights violations, as it did with the case of Economic Organization of West African States' unauthorized intervention in Sierra Leone in 1998[185].

Despite a wide incompatibility with regard to the nature and content of state practice[186], after considering the grave violations of human rights and because of the positive nature of intervention itself, one has to assume that only direct action matters, however not necessarily use of force. Statements, claims, verbal acts, and omissions may be significant, but they always remain the negative action. Although this may appear as opening a wide gate to use of force unilaterally, but the plea is for the SC, it is what has to act in times of violations.

Opinio juris sive necessitatis, or simply *opinio juris*, has been called as "the philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules."[187] Deriving from the ICJ diagnosis, *opinio juris* is the belief that the conduct is legally binding or at least necessary[188].

Moreover, *opinio juris* helps to remove the ambiguities surrounding state practice, it helps to differentiate acts which are merely comity or courtesy from those possible to

[183] Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20 ILSA Journal of International & Comparative Law 305, 320.

[184] International Law Association, Committee on Formation of Customary (General) International Law, London Conference, 2000, 16-19.

[185] See Lee F. Berger, *supra note* 103.

[186] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) 15 EJIL 523, 524; and International Law Association, Committee on Formation of Customary (General) International Law, (n 184) 14-15.

[187] International Law Association, Committee on Formation of Customary (General) International Law, (n 1184) 29-30.

[188] *North Sea Continental Shelf*, 1969, 77.

produce customary rules[189]. How state practice can participate in forming any new customary rule, if they already believe that such a rule does exist? The voluntarist approach sees states as sovereigns, as free from abiding any rule without consent. Therefore, *opinio juris* is only a manifestation of this consent. While for the belief theory custom is binding because of states' belief in the legal necessity or permissibility of the practice, i.e., it is law or is becoming law[190]. If a state or a group of states, in this case the SC, believe in the significance of human rights and at the same time do nothing to halt grave violations of these rights, their *opinio juris* remains negative. However, if they respond to the violations without considering human rights purely, or at least primarily, i.e., when they act for other reasons, then they will not contribute to a harmonious international trend in promoting these rights. This is what occurred when the SC for whatever reasons remained inactive in responding to many humanitarian catastrophes, while doing to others.

5.2. Human Rights and Customary Law

The body of human rights which became part of CIL and thus binding on all states may be disputed. While on the one hand the IHRL or at least the rights enshrined in the UDHR have been seen entirely as part of CIL[191], on the other hand a more moderate view of the subject has been that of American Law Institute's *Restatement*, according to which something like a "hard core" of human rights obligations exists as customary

[189] Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20 ILSA Journal of International & Comparative Law 305, 322; and *North Sea Continental Shelf*, ibid.

[190] Malcolm N. Shaw, *International Law* (5th edn, Cambridge University Press, Cambridge 2003) 82-83.

[191] J. P. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in Ramcharan B. G (ed), *Human Rights: Thirty Years after the Universal Declaration* (1979) 21, 37; and Louis John, 'The Human Rights Law of the Charter' (1977) 12 Texas Int. LJ 129, 133.

law[192]. However some human rights have become customarily binding rules, they are part of general international law, as norms recognized by the civilized countries[193].

Notwithstanding the fact that the UDHR has no legally binding character and it is only a moral and political appeal, some of human rights are decided as part of CIL: genocide, slavery, torture, mass killings, prolonged arbitrary imprisonment, and systematic racial discrimination, or any continued gross violations of internationally recognized human rights[194].

This seems as an attempt to describe the law as it is; *lex lata*. However, the ought-to-be is also significant. One has to consider the frequent violations of human rights, which may signal that human rights are not wholly part of CIL and maybe much enhancement is required. At least one can assume that human rights are part of "general principles of law recognized by civilized nations."[195] The ICJ in a number of cases relied on tackling obligations "based on general and well-recognized principles" and "fundamental general principles."[196] Nonetheless, by reflecting all practical abuses of human rights, one has to assume that these ICJ cases do not render a customary basis for human rights[197]. However, taking human rights as a matter of *jus cogens* surely leaves a great impact in their presence and recognition.

[192] American Law Institute, *Restatement (Third) Foreign Relations Law of the United States*, (1987) Vol. 2, 161; and Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 Recueil des Cours 333.

[193] Bruno Simma, & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Australian Year Book of International Law [1992] 85.

[194] Oscar Schachter, *supra note* 171, 335; and American Law Institute, *Restatement*, *supra note* 192, para, 72.

[195] Article 38 of the ICJ Statute; and Bruno Simma & Philip Alston, *supra note* 193, 108.

[196] *Corfu Channel* case, 1949, 22; and *Nicaragua*, 1986, para, 218.

[197] Bruno Simma & Philip Alston, *supra note* 193, 106.

5.3. Human Rights and *Jus Cogens*

The question of whether there are human rights which can be seen or rendered the status of peremptory norms, *jus cogens*, is significant. The formal, modern definition of *jus cogens* can be found in VCLT[198]:

> 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.

This definition does not answer all the questions regarding the emergence of *jus cogens* or changing it. However, the category is said to be useful, for "without the box, it cannot be filled."[199] At least it is known that *jus cogens* is on the top of the international legal hierarchy, from which no derogation is allowed, and even no treaty shall have effect if at the time of its conclusion, it contradicts a *jus cogens* rule[200]. Further, *jus cogens* resemble a real exception to the old notion of international law that it is a craft of states and dependent on their will[201]. Therefore, human rights and their enforcement mechanisms, if endowed with the status of *jus cogens*, shall present a real challenge to state sovereignty and will be protected more seriously.

The obligations deriving from *jus cogens* are presumably conducted vis-à-vis others, they are not for ones' self. Logically, every *jus cogens* "compelling law" shall impose an obligation *erga omnes* "flowing to all."[202] In the *Barcelona Traction* case, the ICJ distinguished between the obligations of a state towards 'the international community as a whole' and those 'arising vis-à-vis another state'. The ICJ stated that "the former are

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[198] Article 53 of VCLT.

[199] Georges Abi-Saab, 'The Third World and the Future of the International Legal Order' (1973) 29 Revue Egyptienne de Droit International 27, 53.

[200] Articles 53 and 64 of VCLT.

[201] Predrag ZenoviĆ, 'Human Rights Enforcement via Peremptory Norms: a Challenge to State Sovereignty' Riga Graduate School of Law Research Paper, no. 6, 2012 <http://www.rgsl.edu.lv/uploads/files/RP_6_Zenovic_final.pdf> accessed 30 May 2016.

[202] M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes (1996) 59 Law and Contemporary Problems 63, 72.

the concern of all states" and that all states are entitled a legal interest in protecting the rights involved "they are obligations *erga omnes*."[203]

Although it seems vague how *jus cogens* arise at the first place, but one can assume that by universal acceptance of the principle embodied by *jus cogens* and consistent state practice accompanied, of course, by *opinio juris*, any norm shall become *jus cogens*[204]. Thus, by adopting human rights universally, defending, advocating them by states, with proper means and in proper time, the IHRL shall improve. For *jus cogens* will restrict state sovereignty domestically, and shall force international community to carry out its duty in protecting human rights. Thomas Hobbes in his *Leviathan* articulated sovereignty as absolute, whether vested in one man or in an assembly of men. This was the prevailed perception of sovereignty for centuries. However, after the end of the Cold War, sovereignty seems redefined, from both civil and political forces, i.e., economic globalization and further international co-operation in different fields, e.g., human rights[205].

Evan Criddle and Evan Fox-Decent have developed a theory of sovereignty, in which sovereignty is conceived as fiduciary relations between state and its people. Thus, all individuals shall be equal persons, having equal beneficiaries "the fiduciary state must protect every individual against all forms of arbitrary discrimination."[206] Therefore, a set of human rights, prohibitions actually, may be considered as *jus cogens*: prohibition of genocide, slavery, arbitrary killing, torture, apartheid,[207] if they are committed widely, that is, not against individuals, but against peoples collectively. The responsibility to provide for these rights is not restricted to the state. Rather, the responsibility need to be

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[203] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962-Second Phase) (Belgium v. Spain)*, Judgement, ICJ Reports 1970, para, 32.

[204] M. Cherif Bassiouni, *supra note* 202.

[205] Michael Bothe, Mary Ellen O'connell & Natalino Ronzitti (eds), *Redefining Sovereignty: the Use of Force After the Cold War* (Traditional Publishers, Inc., New York 2005); and Kofi Annan, 'Two Concepts of Sovereignty' *The Economist* (London 18 September 1999) <http://www.un.org/News/ossg/sg/stories/kaecon.html> accessed 22 April 2016.

[206] Evan J. Criddle and Evan Fox-Decent, 'Deriving Peremptory Norms from Sovereignty' Proceedings of the Annual Meeting (American Society of International Law, March 25-28, 2009) 72 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1370510> accessed 30 May 2016.

[207] Evan J. Criddle and Evan Fox-Decent, ibid; American Law Institute, *Restatement*, *supra note* 116, para, 73 and 74. The positive side of these rights is: the right to life, to freedom, to security, and equality.

expanded, strengthened in a way that encompasses the international community as whole. Even though, the role of the SC specifically cannot be neglected. Genocide, to mention a case, regardless of its horrible outcomes, still the responsibility to prevent it is to be with competent UN organs[208] the most notable one the SC.

The prevention of genocide is, to some extent, placed within the Charter. The ICJ in the *Genocide* case made it clear that "every State may only act within the limits permitted by international law."[209] However, prevention of genocide should not be limited to the cases occur within the state parties of the Genocide Convention of 1948. For genocide may occur in and out of those countries. In cases of genocide as in any other 'threat to international peace and security', the SC can authorize use of force to rescue lives in a proper time.

The inclusion of all human rights as *jus cogens* is highly controversial and non-realistic. However, right to life, as enshrined in almost all international instruments of human rights is the most significant, for no right shall be enjoyed if life is taken. Thus, protecting people of arbitrary killing, especially when it occurs in a large-scale number seems urging.

5.4. Humanitarian Intervention and Customary Law

The question of whether a customary right of HI at least in cases of genocide exists cannot be answered in a yes-or-no fashion, or in any mathematical way. The legal scholars differ in determining the existence and the scope of such a right.

The cases of intervention for humanitarian purposes occurred in the 19th century are, for some scholars, evidence of such a customary right[210]. This right, it is argued, has

[208] Article VIII of the Genocide Convention of 1948.
[209] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, the ICJ Reports 2007, para, 430.
[210] Richard B. Lillich, 'Forcible Self-help by States to Protect Human Rights' (1967) 53 Iowa Law Review 325, 334.

survived the creation of the UN, it has not been affected and it still exists[211]. The 19th century cases include Britain, France and Russia's intervention in Greece (1827); France in Syria (1860); Russia in Bosnia-Herzegovina and Bulgaria (1877); the US in Cuba (1898); and Greece, Serbia and Bulgaria in Macedonia (1903). Further, a few cases in the 20th century also are included, such as India's intervention in East Pakistan (1971); Vietnam in Kampuchea (1978); Tanzania in Uganda (1979); ECOWAS in Liberia (1990); France, Britain, and the US in Iraq (1991); ECOWAS in Sierra Leone (1998); and NATO in Kosovo (1999)[212].

Opponents of a customary right of HI argue that these cases are insufficient to establish such a right, and that other humanitarian catastrophes occurred in the pre-Charter period in which the international community remained silent. As Simon Chesterman contends, HI occurred in the 19th century, but it was far from being a coherent legal right. Rather HI "existed as a lacuna in a period in which international law did not prohibit recourse to war"[213]. Chesterman contends further that those 19th century cases can be dismissed as opportunistic and optimistic instances of HI[214].

In contrast, proponents assert the existence of enough cases in the pre-Charter era to establish a right of UHI, whether grounded on the Charter or CIL[215]. The US-led coalition invaded Iraq in 2003 without explicit authorization by the SC. Some scholars say that the invasion was based on a customary right of UHI, especially after the NATO intervention in Kosovo in 1999 which set a precedent for such a right[216]. The opponents

[211] W. Michael Reisman, 'Criteria for the Lawful Use of Force in International Law' (1985) 10 Yale Journal of International Law 279-285.
[212] J. L. Holzgrefe & Robert O. Keohane, *supra note* 68, 45-46.
[213] Quoted by Jennifer M. Welsh, 'Review Essay: From Right to Responsibility: Humanitarian Intervention and International Society' (2002) 8 Global Governance 503, 505.
[214] Ibid.
[215] Nicholas J. Wheeler, 'Review Article: Humanitarian Intervention after Kosovo: Emergent Norm, Moral Duty or the Coming Anarchy?' (2001) 77 International Affairs (Royal Institute of International Affairs 1944-) 113, 115; Christopher Greenwood, 'Humanitarian Intervention: the Case of Kosovo' in *2002 Finnish Yearbook of International Law* (Kluwer Law, Helsinki 2002)141, 162; Eric A. Heinze, *supra note* 176; and Lee F. Berger, *supra note* 103.
[216] Thomas Juul Dyhr, *Just War in Iraq* (University of Copenhagen, Copenhagen 2003) 39-40.

rely on the contestation of several major states all around the globe against the legality of the two interventions as indications that they do not serve as such[217].

This ambiguity surrounding human rights, their content and their enforcement, and the uncertainty surrounding the criteria of HI can lead to "striking inconsistencies," which happens mainly in deciding the humanitarian nature of cases; some cases are included, while others are not[218]. However, the authorized use of force in cases of HI is much preferred. It shall resemble more strongly the collective security system of the Charter. During a few last years a number of states, representing approximately 80 percent of the world population, rejected the legalization of UHI[219].

The GA in 1999 with respect to NATO campaign in Kosovo, reaffirmed that no state may use coercive measures against the will of another state, and rejected unauthorized coercive measures "with all their extraterritorial effects as tools for political or economic pressure against any country."[220] The GA during its long history, as was indicated, has stood against any self-interpreting right of intervention. In its Resolutions during and after the Cold War, the GA defended friendly relations between states and always attempted to hold the frameworks founded by the Charter. Although some regional organizations establish a customary right of intervention in member states,[221] the GA, once again, rejected any right of authorization of the use of force for humanitarian purposes under the auspices of such regional organizations; it reserved such a right to the SC exclusively[222].

[217] Nicholas J. Wheeler, *supra note* 215) 118.
[218] Oliver Ramsbotham, 'Humanitarian Intervention 1990-5: A Need to Reconceptualize?' (1997) 23 Review of International Studies 445, 451-452.
[219] Ryan Goodman, *supra note* 96, 109.
[220] The GA Res 54/172 of 1999. Even NATO itself in defending its campaign, relied on an implied authorization by the SC in Resolutions 1160, 1199, and 1203, see Enrico Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status' (2003) 14 EJIL 999–1022.
[221] Constitutive Act of The African Union, Article 4(h).
[222] World Summit Outcome Document, *supra note* 170, para, 138-139.

5.5. Beyond Legality: Why to Intervene?

Cosmopolitanism remains the most prominent source of moral arguments advocating human rights and HI. Accordingly, liberal societies have a duty to affirm civil and political rights wherever infringed[223]. Human rights are essential inasmuch that "no government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples."[224] Based on natural law/rights and JWT, there need to be another interpretation of the Charter in a way that permits more concrete protection of human rights in humanitarian catastrophes. The JWT criteria can provide a moral basis for contemporary HI, for the idea of just war is about saving innocent strangers who are incapable of helping themselves[225]. Therefore, there is a chance for HI to be legitimate among scholars adopting the JWT. Hugo Grotius, building on what he calls *societas humana*, the universal community of humankind, argued that if tyrants "provoke their people to despair and resistance by unheard of cruelties" other states have a right of HI against them, for "they [tyrants] lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations."[226] The opponents argue specifically against UHI. Any legalizing of UHI, they say, shall not serve the fairness in the application of international law, for the weak states are likely to suffer from such a right, while the strong ones are not[227]. They go on to contend that, such a legal right of UHI may increase the likelihood of resort to armed force without authorization of the SC[228]. This may lead to chaos. That is why Simon Chesterman reaffirmed "the danger of an international rule of law being subverted to legitimating the interests of the Great Powers is still preferable to the unregulated exercise of that power."[229]

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[223] Daniele Archibugi, 'Cosmopolitan Guidelines for Humanitarian Intervention' (2004) 29 Alternatives: Global, Local, Political 1, 18.
[224] Kofi Annan, *supra note* 205.
[225] Jean Bethke Elshtain, *supra note* 76. "In our time, this saving of the innocent is usually referred to as humanitarian intervention".
[226] Hugo Grotius, *supra note* 85, 247.
[227] David Lefkowitz, 'On Moral Arguments against a Legal Right to Unilateral Humanitarian Intervention' (2006) 20 Public Affairs Quarterly 115, 125.
[228] Ibid, 127.
[229] Quoted by David Lefkowitz, ibid, 129.

Natural law theory considers HI a 'right', not a 'duty' as such; which leaves the states free to decide whether to intervene. Other liberals focus on a duty to intervene, however. This duty-oriented morality determines "the entire international community" as responsible and obliged to protect the victims of human rights violations[230]. Consequently, wherever grave violations of human rights occur, other individuals, governments, and organizations have a right or maybe a duty to defend those rights. Although the moral compassion is admired with respect to human rights, human dignity, and human society, still what is needed is more institutionalization of such rights and their enforcement. Instead, one can argue in favor of enhancing the constitutional role of the SC, in a way that the permanent members shall not veto resolutions in cases of grave violations of such rights.

After all, the decisions made by the SC will be more legitimate, including those to use force. The collective security system provided for in the Charter is a significant point, which holds the whole international security together, keeping it away from a descent into a chaotic, unstable, and dangerous world, in which the political interests shall prevail over the legal necessity[231].

5.6. The Responsibility to Protect

The history of the notion of the Responsibility to Protect (R2P) can be traced back to the 1990s. After the Cold War, many crimes of genocide and crimes against humanity reportedly committed, in some of them the UN intervened, such as in Somalia, while in others it did not, such as in Rwanda[232]. After the Cold War, a new perspective of sovereignty emerged in the academic circles and among politicians. Francis Deng was the first who defined Sovereignty as *Responsibility*; one of inherent responsibilities in

[230] Carla Bagnoli, 'Humanitarian Intervention as a Perfect Duty: A Kantian Argument' (2004) 47 Nomos 1, 9.

[231] Allen S. Weiner, 'The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?' (2006) 59 Stanford Law Review 415, 504.

[232] See Chelsea O'Donnell, The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention' (2014) 24 Duke Journal of Comparative & International Law 557, 560-563; and Amitai Etzioni, 'Sovereignty as Responsibility' [2006] Orbis 71-85.

sovereignty is the state's duty to protect its citizens from violence. If a state fails to provide such protection, Deng goes on, the international community has not only the right, but the responsibility to provide for it, after which the state 'forfeits' its sovereignty[233]. After the NATO intervention in Kosovo, then UN Secretary-General Kofi Annan talked about a redefined sovereignty and that "States are now widely understood to be instruments at the service of their peoples, and not vice versa."[234]

These reflections of sovereignty, human rights, and HI emerging from the new international legal and political environment were asserted by the report of the ICISS, *The Responsibility to Protect*[235].

The ICISS identified three elements of the R2P. First, the responsibility to prevent,[236] under which there must be enough knowledge about the crisis, its root causes, and the policy measures available to such situations. Under the second, the responsibility to react,[237] states must redress human security/protection through coercive political, economic, or judicial measures and in extreme cases "but only extreme cases, [these coercive measures] may include military action." The third element is the responsibility to rebuild,[238] under which states must help the state recovering from a humanitarian crisis and coercive measures. These R2P elements are applicable to situations involving crimes that shock the conscience of mankind, also known as the extreme cases, such as genocide, crimes against humanity, and ethnic cleansing[239].

The ICISS tackled the question of legality in its report, as it acknowledges varied sources of a legal right to HI that includes, *inter alia*; fundamental natural law principles; the human rights provisions of the UN Charter; the UDHR together with the

[233] Cited by Chelsea O'Donnell, ibid, 561.
[234] Kofi Annan, *supra note* 205.
[235] The ICISS was initiated by the government of Canada under the auspices of the UN and it issued its report in 2001.
[236] ICISS, 2001, 19-28.
[237] Ibid, 29-38.
[238] Ibid, 39-46.
[239] Ibid, 31.

Genocide Convention; the Geneva Conventions and Additional Protocols on international humanitarian law; and the statute of the ICC[240].

The question of legality is not the only matter covered by the ICISS. Rather, the legitimacy of HI is also tackled. This appears when the ICISS poses a question about the unwillingness, or inability of the SC in intervening. As a solution to this, the ICISS suggests two alternatives: first, through voting on a resolution in the GA agreed on by the overwhelming majority of states, for such a procedure "would provide a high degree of legitimacy" for the intervention. Second, the intervention is to be pursued by regional or sub-regional organizations acting within their defining boundaries[241]. As to UHI, the ICISS disfavored it. The doubt of self-serving basis of UHI remains valid, and the two alternatives the ICISS sought appropriate in case the SC favored inaction show that the ICISS put them in the sense of 'collective security.' As the ICISS indicated "if collective organizations will not authorize collective intervention… then the pressures for intervention by ad hoc coalitions or individual states will surely intensify." These unilateral efforts must be avoided, for it may run the risk that such interventions, without the UN authorization, will not be conducted for the right reasons or with the right intention or commitment to the necessary required principles[242]. Another aspect of legitimacy is the criteria set by the ICISS to put any military intervention under the R2P. These are: just cause; right intention; last resort; proportional means; reasonable prospects, and proper authority[243].

Sovereignty in this sense has a dual meaning: internally, to respect the citizens' rights, and externally, to respect the rights of the other states[244]. Despite the formal adoption of the ICISS report by the GA in World Summit Outcome Document, which was called as

[240] Ibid, 16.
[241] Ibid, 53-54.
[242] Ibid, 54-55.
[243] Ibid, 32-37. The language of the ICISS with regard to these criteria is close to those provided for in the JWT. See Lenka Eisenhamerová, 'Legitimacy of Humanitarian Military Intervention (PhD thesis, Maastricht University 2011) 48-53.
[244] Gareth Evans, 'The Responsibility to Protect: Rethinking Humanitarian Intervention' 98 Proceedings of the Annual Meeting (American Society of International Law, March 31-April 3, 2004) 78, 83 <http://www.crisisgroup.org/en/publication-type/speeches/2004/the-responsibility-to-protect-rethinking-humanitarian-intervention.aspx> accessed 31 May 2016.

"the really big step forward in terms of formal acceptance of R2P,"[245] the GA made a further restricted approach in legitimizing HI. The authorization and conduct of HI are bestowed to the SC exclusively. Other organizations may operate HI, however, but after obtaining the authorization of the SC. Which means that, authorizing HI by the GA or by regional organizations is ruled out[246].

5.7. Conclusion

The wide legalizing/legitimizing of HI made by the ICISS was not adopted entirely. As to the content of the ICISS report "there are no institutional obligations, other than those that pre-existed the declaration."[247] Therefore, the appealing question is does this ambiguity about the meaning, content, and enforcement of the R2P mean more unilateral interpretation and selectivity in mass atrocity cases? One response to this question is in affirmative. As Noam Chomsky says, by fear of power relations and selectivity, the R2P is waited to have almost the same fate of the UDHR; with a large number of signatories and adherents, but remains only an ideal to be appealed to in educational organizations[248]. However, the responsibility to protect in general, and to prevent particularly, laid down in the ICISS report seems quite significant. For in order to prevent any conflict, or to prevent its renewing in the future, the concerned sides have to know its roots. Despite its significance, the R2P adds nothing new to the legal reality of the predated period[249]. Even though, the GA chose a right path when it rejected the wide space of legitimacy provided for in the report, by which it retained the old collective security system to be carried out by the SC.

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[245] Gareth Evans, cited by David Chandler, 'Unravelling the Paradox of "The Responsibility to Protect"' (2009) 20 Irish Studies in International Affairs 27, 28.

[246] World Summit Outcome Document, *supra note* 170, para, 30.

[247] David Chandler, *supra note* 245, 31.

[248] Noam Chomsky, 'Statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect, United Nations, New York' (2009) <http//www.un.org/ga/president/63/.../protect/noam.pdf> accessed 23 April 2016.

[249] Lenka Eisenhamerová, *supra note* 243, 36-38.

CONCLUSION

Despite its universal, cultural-crossing significance, human rights are lacking institutional entities through which they can have a better chance of recognition. State sovereignty, as was indicated, is still an impediment on the way of achieving these rights in reality. Realistically speaking, for a lot of states, which are led by despotic leaders human rights do represent a real challenge.

The reporting system provided for in the ICCPR and ICESCR is up to date the only available mechanism that the international community could reach in observing and implementing human rights. However, this system and the responsible committees proved inactive. States still need to be appealed to sign, ratify, and finally, apply these human rights[250]. The point of view here is not to intervene into every state which infringes human rights such as the right to free speech and free worship. Rather, it needs to be held exclusively to cases of grave, massive violations of human rights, most notably the right to life and security of person.

The traditional perception of sovereignty as an absolute category seems to some extent not realistic. Thus, the traditional principle of non-intervention into states seems also relative. Although there is a fear that the new perception is likely to lead to more interventions, the SC should be bound by the legal boundaries drawn in the Charter. After the Cold War, the SC authorized many military operations on humanitarian concerns. There is a new trend in international law and relations that sees sovereignty as fiduciary relations, as responsibility to protect. Of course, this responsibility encompasses the SC members as well. This new understanding of sovereignty and

[250] See Maryam Javaherian, 'Women's Human Rights in Iran: What Can the International Human Rights System Do?' (1999) 40 Santa Clara L. Rev. 819-861.

human rights is endorsed by state practice including the practice of the SC itself. International law and relations are not static, the nature and definition of concepts change therein and the way the international community puts its standards and priorities is also changeable.

HI as a means in enforcing human rights criteria when they are violated has come to the fore of international law and relations since many decades, most notably after the Cold War. As was indicated, some objective criteria need to be met to authorize any HI. These criteria provide a legal, legitimate ground for the action. The first and foremost among these criteria is that the violation must be large-scale, grave, or massive. Notwithstanding the fact that under the title of humanitarianism, many states were occupied, societies torn, and thousands were killed. At a time in many occasions of humanitarian catastrophes, the SC proved and repeated its inactivity. That is why setting objective standards for HI may be blunt, if the SC is not willing to deal with violations more actively. Despite these objective criteria and these legal bases, the international community, represented by the SC, does not seem to have a common comprehensive idea of HI. This is reflected in the cases of inaction. In both *Anfal* and *Darfur*, as in others as well, the SC chose not to act because of other considerations.

The SC, according to the Charter is vested a wide political power. Accordingly, it can decide whether a situation at hand represents a threat to international peace and security. The SC in some occasions authorized the use of force, whether the UN forces or other organizations'. In other humanitarian crises, however, it was only monitoring, meaning that it failed peoples.

The former international order of power politics and *realpolitik*, the age of imperialism and colonialism till the mid-20th century made a large proportion of peoples and countries all around the globe to fear their new-established political entities and perceive the human rights discourse as a new wave of colonialism. Especially with the practice of HI, their suspicions increased. However, this fear of invasion or occupation of the weak states should not, in any way, be used as a pretext for the oppression of one's own people or allowing them to do so.

The SC can fulfil much with this regard. By abandoning its self-interested policies, by enhancing international justice through enhancing international peace and security against any grave threat whatsoever, it can fulfil its constitutional obligations more actively than it does now. For it must be proven that the purpose behind human rights discourse and its enforcement is the happiness of peoples, not simply seeking external dominance; the moral, political, and practical paradoxes need to be reduced[251]. After all, UHI is disfavored and all great expectations are waited from within the SC itself.

As was indicated, the thesis attempted to prove the constitutional competences accorded to the SC by the Charter. In doing so, the thesis viewed different relevant articles from the Charter and exhibited them in a way so to reach this conclusion. The thesis showed that although the meaning and the scope of collective security is about addressing aggression exclusively, there can be a chance for HI to be included within this system and to be recognized as a matter of 'all' and not only of 'one'.

However, the question of the veto system, the SC and justice, the mechanisms that the SC is relying on, the real practice of use of force and its authorization, the historical backgrounds of events of intervention, all with relation to conceptualization and realization of human rights through authorizing HI appears to be a good analysis of how to improve international justice by, for instance, reforming the SC.

[251] See Doborah M. Weissman, 'The Human Rights Dilemma: Rethinking the Humanitarian Project' (2003) 35 Colum. Hum. Rts. L. Rev. 259, 309-314.

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