

# Legitimacy, Legality and Lawfulness: Questioning Humanitarian Military Intervention in a Changing International Political Milieu

Araştırma

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## ÖZET

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### MEŞRUIYET, YASALLIK VE HUKUKA UYGUNLUK: DEĞİŞEN ULUSLARARASI POLİTİK ORTAMDA İNSANCIL ASKERİ MÜDAHALENİN SORGULANMASI

Her ne kadar insancıl sebeplerle güç kullanımı (diğer bir deyişle insancıl askeri müdahale) üzerine tartışmalar yeni olmasa da, bunlar Soğuk Savaş döneminden bu yana insan haklarının uluslararası boyutta korunmasına verilen önemin artmasıyla zenginleşmiştir. 1990larda yaşanan büyük ölçekli insan hakları ihlalleri karşısında yapılan müdahaleler ve zaman zaman tepkisiz kalınması sonucunda uluslararası hukuk ve politika literatüründe önemli bir yer edinen insancıl müdahale tartışmaları koruma sorumluluğu kavramının ortaya çıkmasıyla yeni bir yön kazanmıştır. Halihazırda koruma sorumluluğu çerçevesinde Güvenlik Konseyi yetkilendirmesiyle ve son çare olarak uygulanacak bir yöntem olarak nitelendirilen insancıl müdahale hala devletlerce bireysel ya da kolektif olarak uluslararası platformda bir araç olarak kullanılmaktadır. Bu bağlamda gerek akademik gerekse de siyasi platformda tek taraflı olarak ya da Güvenlik Konseyi yetkilendirmesi olmaksızın gerçekleştirilen insancıl müdahaleler ikilik yaratmaya devam etmektedir. İlk olarak Bosna-Hersek'e ve Kosova'ya, yakın zamanda da Libya'ya yapılan müdahaleler sonucunda insancıl müdahale doktrininin meşruiyeti, yasallığı ve hukuka uygunluğuna dair tartışmalar hız kazanmıştır. Tüm bu gelişmeler ışığında, bu makalede insancıl müdahale doktrini uluslararası hukuk çerçevesinde, hukuka uygunluk ile yasallık yönünden analiz etmektedir. Bu amaçla ilk olarak insancıl sebeplerle askeri müdahale yapma fikrinin normatif kökenleri sorgulanmakta, daha sonra da mevcut uluslararası hukuki düzen incelenmektedir. Son olarak Birleşmiş Milletler Sözleşmesi sonrasındaki dönem esas alınarak ortaya çıkan olayların genel bir resmi çerçevesinde devlet uygulamalarının ve mevcut hukuki anlayış ve tartışmaların koruma sorumluluğunun inşasına nasıl yön verdiği ortaya konmaya çalışılmaktadır.

#### **Anahtar Kelimeler**

Meşruiyet, yasallık, hukuka uygunluk, insancıl müdahale, koruma sorumluluğu.

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## ABSTRACT

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Albeit the debate on the use of force for humanitarian purposes (i.e. humanitarian military intervention) is not new, it has been flourishing since the early years of the Cold War as a result of the increasing importance placed on the international protection of human rights. After gaining a prominent place in the international law and politics literatures, with cases of action and inaction/indifference in the 1990s, the question of (and the need for) undertaking intervention to stop mass atrocities took a new turn with the introduction of the "responsibility to protect" (RtoP) understanding. Now also enlisted as a measure within the RtoP framework but only as a last resort and to be undertaken with Security Council authorisation, humanitarian (military) in-

tervention continues to be adopted individually or collectively by states in their international conduct. In this vein, its unilateral or unauthorised practices continue to create controversy in the political and academic platforms.

Primarily with the military interventions in Bosnia-Herzegovina and Kosovo, then most recently with the intervention in Libya, the debates on the legitimacy, legality and lawfulness of the controversial doctrine of humanitarian intervention once again gained momentum. In the light of these developments, this article analyses the doctrine of humanitarian intervention in relation to international law with a specific focus on the questions of lawfulness and legality. To this end, it first traces the normative roots of the idea of undertaking military intervention on humanitarian grounds, and then, analyses the current legal framework. Finally, through an overview of cases in the post-Charter era, it tries to reveal how state practice alongside the legal understandings and debates led to the construction of the RtoP norm.

### Keywords

Legitimacy, legality, lawfulness, humanitarian intervention, responsibility to protect.

## Introduction

Albeit the debate on the use of force for humanitarian purposes (i.e. humanitarian military intervention) is not new, it has been flourishing since the early years of the Cold War as a result of the increasing importance placed on the international protection of human rights. After gaining a prominent place in the international law and politics literatures, with cases of action and inaction/indifference in the 1990s, the question of (and the need for) undertaking intervention to stop mass atrocities took a new turn with the introduction of the “responsibility to protect” (RtoP) understanding. Now also enlisted as a measure within the RtoP framework but only as a last resort and to be undertaken with Security Council authorisation, humanitarian (military) intervention continues to be adopted individually or collectively by states in their international conduct. In this vein, its unilateral or unauthorised practices continue to create controversy in the political and academic platforms.

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### 1. Normative Roots

Certain features of just war principles, specifically to *jus ad bellum*, hint at just causes for undertaking interventions in the name of humanity. In this regard, earlier works in Christian political theology constitute a starting point for analysis, and an introductory example is the writings of St. Augustine (354-430). St. Augustine believes that “[f]or every man even in the act of waging war is in quest of peace, but no one is in quest of war when he makes peace.”<sup>1</sup> The similarity between the just war understanding of St. Augustine and contemporary humanitarian interventions lies in the fact that the latter as a coercive act undertaken through use of force as a means to re-establish the order and human rights within a country, which also results in the reestablishment of (domestic and international) peace although this is not an explicitly pronounced objective. In the waging of just wars, St. Augustine differentiates between the wise man and the other, and asserts that it is the injustice done by the other that necessitates the undertaking of a just war:

1 ST. AUGUSTINE, *City of God*, Vol. VI, Book xix, (translated by W.C. Greene), William Heinemann Ltd., Great Britain, 1969, p. 165.

The wise man, they say, will wage just wars. As if he would not all the more, if he remembers his humanity, deplore his being compelled to engage in just wars; for if they were not just, he would not have to wage them, and so a wise man would have no wars. For it is the injustice of the opposing side that imposes on the wise man the necessity of waging just wars.<sup>2</sup>

Consideration of war as a necessity under certain circumstances emanates from the injustice or the wrong done. As a just war arises from injustice, in ideationally parallel terms, the need to undertake a humanitarian intervention in the contemporary world arises from an unjust act of the man –that is gross and systematic violations of human rights.

In this vein, a perspective on legitimate interventions against unjust acts can be seen in the writings of St. Augustine. As for the idea of responsibility, the roots can be traced back to Thomas Aquinas who talks about the existence of a notion of responsibility all over the Christian Republic. Aquinas (1225-1274) while defining the system of *Respublica Christiana* claims responsible “every prince [...] for the welfare of the total *Respublica* as well as his own specifically defined territory.” He accordingly posits that a prince “may be called upon to resist aggression or unjust treatment of subjects any place in the *Respublica Christiana*.”<sup>3</sup> Though in a limited manner, what Aquinas put forth is parallel to the idea of a “responsibility to react”<sup>4</sup> of the doctrine of the responsibility to protect. In the responsibility to react, the responsibility pertains to the international community where it has to display a collective response to grave violations of human rights whereas in the responsibility of Aquinas the community concerned is limited to the *Christian Republic* and the primary responsibility is that of the princes.

2 ST. AUGUSTINE, 1969, p. 151.

3 KUSANO, Hiroki, “Humanitarian Intervention: the interplay of norms and politics”, **International Intervention in the Post-Cold War World: moral responsibility and power politics**, (eds. Michael C. Davis, Wolfgang Dietrich, and Bettina Scholdan), 2003, 125.

4 This is the second aspect of the RtoP doctrine as established by the ICISS, consisting of coercive measures (such as political, economic and military sanctions) up to and including military intervention. For purposes of this article, the details of the RtoP understanding will not be studied.

This also stands for a moral duty to maintain common good in response to unjust treatment. Following St. Augustine’s line of thinking, Thomas Aquinas adds that “[t]rue religion looks upon as peaceful those wars that are waged not for motives of aggrandisement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good.”<sup>5</sup> One similarity between the ancient and contemporary theories in terms of undertaking just wars concerns the “securing of peace.” As proponents of humanitarian intervention and/or interveners argue, humanitarian interventions serve to “secure peace”, which can be peace within a country as well as international peace and security. Nevertheless, what is meant by the “good” may vary depending on the interpretation of the theorist/philosopher. In general terms, it can be a social order (whether religious, moral, economic or political, etc.) or as in the case of humanitarian interventions and RtoP something concrete (since it is the lives of human beings and the protection of their fundamental rights that is the main concern). Thus, from the spectacle of RtoP, Aquinas’s proposition of a responsibility of the rulers to “uplift the good” if necessary through military means, constitutes a basis for a more restricted interpretation of the RtoP notion. Such view, rather than focusing on a general social order, confines it to ensuring human rights as established by international law and stopping mass atrocities against humanity.

Its theological roots providing the moral basis, just war notion has been elaborated within the natural law tradition. Although some legal scholars consider humanitarian intervention as a “relatively new doctrine,” it is possible to trace its legal roots back to philosophers of law like Alberico Gentili (1552-1608), Francisco Suárez (1548-1617) and Hugo Grotius (1583-1645).<sup>6</sup> Similar lines of thought are apparent in the arguments of Gentili and Suárez since both of them make reference to the responsibility towards the human race in cases of inhuman treatment against people that occur in another sovereign’s land.<sup>7</sup> For

5 AQUINAS, Thomas, **Summa Theologica**, II-II, Cambridge University Press, Cambridge, 2006, pp. 40, 1.

6 MERON, Theodor, “Common Rights of Mankind in Gentili, Grotius and Suarez,” **American Journal of International Law**, 85(1) (January 1991): p. 115.

7 Cited in MERON, 1991: p. 115.

example, Gentili “raise[s] the notion of sovereign accountability, noting that there must be some mechanism to remind the sovereign of his/her duty towards his people and hold him in restraint, ‘unless we wish to make sovereigns exempt from the law and bound by no statutes and no precedents.’”<sup>8</sup> This understanding is, for instance, prevalent in the responsibility to protect doctrine where sovereignty is understood as the responsibility of the sovereign state towards its citizens.

Hersch Lauterpacht posits that Grotius<sup>9</sup> made “the first authoritative statement of the principle of humanitarian intervention -the principle that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.”<sup>10</sup> Grotius maintains that there may be a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands.<sup>11</sup>

[I]f the wrong is obvious, in case some Busiris, Phalaris, or Thracian Diomedes should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of their right vested in human society is not precluded.<sup>12</sup>

It is therefore up to another state/sovereign to take the necessary measures “to help the persecuted” since the subjects themselves are incapable of taking action.<sup>13</sup>

Based on historical examples, Grotius acknowledges that the claim of “taking up arms” to this end is prone to be used as a cover for an act of invasion of others’ territories. Nevertheless, he adds that the abuse or misuse of a right does not necessitate the annulment of that right.<sup>14</sup> In his *De Jure Praedae*, Grotius argues: “the protection of infidels from injury (even from injury by

Christians) is never unjust.”<sup>15</sup> As can be inferred from Grotius’s statement, his main emphasis is the justness of an act rather than its lawfulness, and although an act can be just, this does not mean that it is also lawful.<sup>16</sup> Samuel Pufendorf (1632-94) following a similar line of thought, in an attempt to establish a just principle for undertaking action asserts: “we cannot lawfully undertake the defence of another’s subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superiors.”<sup>17</sup> With this argument, Pufendorf brings in lawfulness of the act alongside its justness.

Similar lines of reasoning for justification of intervention in the name of humanity in the domestic affairs of another state followed in the later centuries. An example from the eighteenth century is the arguments of Emmerich de Vattel (1714-1767), who posited that

if the prince, attacking the fundamental laws, gives his people legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance.<sup>18</sup>

In the light of the referred assertions, it is possible to argue that although not essentially named as humanitarian intervention in the then times, philosophers of law have articulated just reasons for undertaking action in order to stop atrocities against humanity. Moreover, it can be observed that they have provided moral arguments based on ethical constraints rather than legal ones, fending rather for legitimacy than legality or lawfulness.

8 Quoted in CHESTERMAN, Simon, **Just War or Just Peace: Humanitarian Intervention and International Law**, Oxford University Press, Oxford, 2001, p. 14.

9 Hugo Grotius’s *De Jure Belli Ac Pacis* (1625) is an example of the works where Grotius makes reference to the notion of humanitarian intervention.

10 LAUTERPACHT, Hersch, “The Grotian Tradition in International Law,” **British Yearbook of International Law**, 23 (1946), p. 46.

11 Quoted in MERON, 1991: p. 111.

12 Quoted in CHESTERMAN, 2001, p. 15.

13 MERON, 1991: p. 11, and Chesterman, 2001, p. 15.

14 GROTIUS, Hugo, **Savaş ve Barış Hukuku (De Jure Belli Ac Pacis): Seçmeler**, (translated by S.L. Meray), Ankara Üniversitesi Basımevi, Ankara, 1967, p. 171.

15 Quoted in NARDIN, Terry / WILLIAMS, Melissa S. (eds.), **Humanitarian Intervention**, New York University Press, New York, 2006, p. 15.

16 Here, it is important to make a distinction between the notions of lawful and just. Although both suggest an ethical content, lawful stands for “according to or acceptable to the law”, whereas just means “fair and/or morally correct” (PROCTER, Paul (ed.), **Cambridge International Dictionary of English**, 2005, pp. 774, 801).

17 Quoted in CHESTERMAN, 2001, p. 15.

18 Quoted in FONTEYNE, Jean-Pierre L. “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter”, **California Western International Law Journal**, Year: 1973-1974, Volume: 4, (p. 215).

In a similar way, some of the contemporary scholars from strands of liberal internationalism develop their arguments on moral aspects while talking about a duty to intervene. Their inspiration is the cosmopolitan arguments of Immanuel Kant, a philosopher who argues for the authority of moral law over that of the sovereign state. Kant notes:

For Hugo Groius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in *justification* in of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint. Yet there is no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men. This homage which every state pays (in words at least) to the concept of right proves that man possesses a greater moral capacity, still dormant at present, to overcome eventually the evil principle within him (for he cannot deny it exists), and hope that others will do likewise. Otherwise the word *right* would never be used by states which intend to make war on one another.<sup>19</sup>

Such idea of moral capacity provides a basis for the universality of human rights. Accordingly, Kant posits:

The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace.<sup>20</sup>

Kant, while establishing that a cosmopolitan right and a moral capacity exists, does not make authoritative statements regarding intervention in the internal affairs of states on grounds of humanity, but lays the possible grounds for such understanding. Nevertheless, a nineteenth century international lawyer Henry Wheaton presents a detailed discussion of the "right to intervene" where he arrives at the conclusion that "[n]oninterference is the general rule, to which cases of justifiable interference form exceptions limited by the necessity of each particular case."<sup>21</sup> In this vein, by suggesting that it is unlikely to have a definitive statement/judgement about the absolute-ness of non-interference, Wheaton, on the basis of historical examples, argues for the possibility of recognition of legitimacy for unilateral practices on the basis of a right to intervene as an exception to the general rule of non-intervention.<sup>22</sup>

An intellectual of the same century, John Stuart Mill, presents his thoughts regarding the issue of non-intervention on a more general background. In his short essay entitled "A Few Words on Non-Intervention" Mill asserts:

There seems to be no little need that the whole doctrine of noninterference with foreign nations should be reconsidered, if it can be said to have as yet been considered as a really moral question at all. [...] To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory of revenue; for it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect. But there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases are. There are few questions which more require to be taken in hand by ethical and political philosophers, with a view to establish some rule or criterion whereby the justifiableness of intervening in the affairs

19 REISS, H.S. (ed.), "Perpetual Peace," *Kant: Political Writings*, Cambridge University Press, Cambridge, 2000, p. 103.

20 REISS (ed.), 2000, pp. 107-8.

21 KNUDSEN, Tonny Brems, "The History of Humanitarian Intervention. The Rule or the Exception?" Paper for the 50<sup>th</sup> ISA Annual Convention, New York, February 15-18, 2009, p. 7.

22 KNUDSEN, 2009: p. 7.

of other countries, and (what is sometimes fully as questionable) the justifiableness of refraining from any intervention, may be brought to a definite and rational test. Whoever attempts this, will be led to recognise more than one fundamental distinction, not yet by any means familiar to the public mind, and in general quite lost sight of by those who write in strains of indignant morality on the subject.<sup>23</sup>

While raising the controversial issue of interference in the domestic affairs of states, Mill raises the question on what grounds an intervention, (for instance in case of a civil war or in terms of providing assistance for the people of another country in struggling for liberty), can be justified. He also mentions intervention on the basis of the imposition "on a country any particular government or institutions, either as being best for the country itself, or as necessary for the security of its neighbours."<sup>24</sup> The traces of Mill's rationalisation can be found in the contemporary understanding of "failed states." Furthermore, a resemblance with the principles emanating from the UN Charter can be seen in Mill's question since he raises the issue of the security of neighbours. On the basis of Chapter VII of the UN Charter, threats to or breaches of international peace and security may create situations where non-interference is no longer prioritised and states may intervene for the maintenance of international peace and security. In this respect, threats to or breaches of regional security, as is valid in contemporary cases, may provide legitimate grounds to intervene in the domestic matters of states.

Mill asserts that the principle of non-intervention prevails in the case where a "government which needs foreign support to enforce obedience from its own citizens" as he considers intervention of this sort as a support for despotism. Nevertheless, in case "of protracted civil war" which is considered "injurious to the permanent welfare of the country," Mill talks about the possibility of an intervention that receives "general approval, that is [to say] legitimacy may be considered to have passed into a maxim of what is called international law."<sup>25</sup>

In the absence of delineation between the understandings of humanitarian war and humanitarian intervention in its contemporary sense, ascendant humanitarian concerns (which also led to the conclusion of Geneva Conventions) have marked the end of the nineteenth century. Following the natural law tradition, in the following century some scholars argued for a right of humanitarian intervention. Writing during the pre-Charter period, Edwin Bouchard posits that

where a state under exceptional circumstances disregards certain rights of its own citizens over whom presumably it has absolute sovereignty, the other States of the family of nations are authorized by international law to intervene on grounds of humanity.<sup>26</sup>

It should be noted that the invocation of "humanity" for undertaking action is also likely to constitute a point of criticism. For instance, Carl Schmitt argues against wars waged in the name of humanity as he suggests that

humanity as such cannot wage war because it has no enemy, at least not on this planet. [...] When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy. The concept of humanity is an especially useful ideological instrument of imperialist expansion.<sup>27</sup>

Nonetheless, differing from the just causes that have been put forth by philosophers of law in the earlier centuries, Bouchard touches upon the lawfulness of coercive action undertaken for humanitarian purposes. He further maintains that when these "human rights" are habitually violated, one or more States may

23 MILL, John Stuart, "A Few Words on Non-Intervention," *Foreign Policy Perspectives*, Year: 1859, Volume: 8, (p. 4).

24 MILL, 1859: p. 5.

25 MILL, 1859: p. 5.

26 DUKE, Simon, "The State and Human Rights: Sovereignty versus Humanitarian Intervention," *International Relations*, Year: 1994, Volume: 12, (p. 33).

27 SCHMITT, Carl, *The Concept of the Political*, The University of Chicago Press, Chicago, 2007, p. 54.

intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled.<sup>28</sup>

Bouchard's assertions, which are based on the conditions of the pre-Charter period, reflect only one faction of the legal positions regarding humanitarian intervention, and these lie at the far end of the counter-restrictionist side of the spectrum.

Malcolm N. Shaw argues that in the nineteenth century there is an acceptance, at least in appearance, of "a right of humanitarian intervention, although its range and extent were unclear."<sup>29</sup> Likewise, Ulrich Beyerlin indicates an acceptance of "the idea of lawful humanitarian intervention" while emphasizing the doctrinal confusion concerning "the legal foundation and the extent of that institution."<sup>30</sup> Nonetheless, neither prior to World War I nor in its immediate aftermath, there is any substantial evidence (i.e. consistent and accepted state practice) to suggest that humanitarian intervention was a soundly established principle of customary international law.<sup>31</sup>

Olivier Corten posits that basing the conduct of humanitarian intervention on an existent "right to intervene" places the doctrine and related discussions

within the legal sphere and not in the realms of ethics or politics. [...] The term 'right' also denotes the idea of an autonomous legal basis: a 'right' of humanitarian intervention, it can be surmised, would justify a military action independently of the classical foundations for such justification such as the host State's consent, Security Council authorisation, or even self-defence.<sup>32</sup>

In this regard, the argument for the existence

of a right to intervene allowing for unilateral or unauthorised collective humanitarian interventions is highly contested in the post-Charter period. The assessment of the validity of such argument requires a deeper analysis of the international legal framework and the debates within international law literature, which is in order.

## 2. Restrictionist and Counter-Restrictionist Approaches to Humanitarian Military Intervention

Especially after experiencing two major wars, states have tried to find ways to avoid large scale armed conflicts. To this end, in the aftermath of World War I and particularly World War II, different legal rules on the basis of the customary rules of international law of the then days have been adopted. Following the end of the First World War, recognising the cruelty of war, states engaged in developing norms, for instance of *jus in bello*,<sup>33</sup> like the 1929 Geneva Convention. Norm development continued in the aftermath of the Second World War with the conclusion of multilateral agreements, such as the 1949 Geneva Convention revising its predecessor.

The second line of rules emerged under the UN framework through the establishment of the Charter as well as the adoption of decisions and resolutions by the relevant organs of the Organisation. On this basis, war and aggression were outlawed while "non-use of force" and "non-intervention" have become two fundamental principles of international law as well as a part of *jus cogens* norms in interstate relations. This was a fundamental change that took place since recourse to force in the conduct of international affairs was not prohibited in the pre-Charter period. Within the context of the post-Charter period, to argue for the existence of a right to intervene means assuming that unilateral or collective humanitarian interventions undertaken without Security Council authorisation can be accepted as lawful. The

28 DUKE, 1994: p. 33.

29 SHAW, Malcolm N., *International Law*, 5<sup>th</sup> Edition. Cambridge University Press, Cambridge, 2005, p. 252.

30 BEYERLIN, Ulrich, "Humanitarian Intervention," *Encyclopaedia of Public International Law*, Rudolf Bernhardt, (ed.), Vol. II, 926-36, North-Holland, Amsterdam, 1992, p. 927.

31 Cited in BERNHARDT, 1992, p. 927.

32 CORTEN, Olivier, *The Law Against War: The Prohibition of Use of Force in Contemporary International Law*, Hart Publishing, Oxford, 2010, p. 496.

33 It can be observed that philosophers of law of the earlier centuries who focused on just causes of war, or helped the evolution of the just war theory for that matter, mainly directed their attention to *jus ad bellum*. Distinctively, the Geneva Convention brought in the *jus in bello* aspect to international law. This is the "Convention relative to the Treatment of Prisoners of War" signed at Geneva on 27 July 1929 and entered into force on 19 June 1931.

fundamental challenge to such assertion comes from restrictionist scholars.

## 2.1. Sovereignty, Non-Intervention and Non-Use Of Force

The core of the restrictionist arguments lies in the Westphalian notion of national sovereignty, according to which States are not legally permitted to intervene in the internal affairs of another state for any reason. According to the terms of Article 1 of the 1933 *Montevideo Convention on the Rights and Duties of States*, which as a model is also reflected in the UN Charter, “[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Such qualities of statehood are also connected with the understandings of territorial integrity and political independence.

In this context, as it can be observed from its several resolutions throughout the years, the Security Council has expressly reaffirmed its “commitment to the sovereignty, territorial integrity and political independence of” states, and underlined this as a priority while taking action. There are numerous examples of such resolutions, like for instance Resolution 688 (1991) concerning Iraq, Resolution 1079 (1996) concerning the Republic of Croatia, Resolution 1802 (2008) concerning Timor-Leste, and Resolution 1858 (2008) concerning Burundi. Although it is placed as a higher value, from an international law point of view it is important not to confuse sovereignty by considering it an equivalent of “unlimited power” on the part of a state; it is rather “the fact of not being subject to any higher authority, or to any obligation to which the sovereign has not consented.”<sup>34</sup> Therefore, as H el ene Ruiz Fabri suggests it can be conceived as a freedom, naturally having its limitations.

The notion of sovereignty is interconnected with the principle of non-intervention, which is laid out in Article 2(7) of the UN Charter as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

Although this paragraph neither defines the principle of non-intervention nor is directed towards organizing interstate relations, it identifies the boundaries of action within the framework of the UN. Therefore, it is of importance when it comes to discussing actions to be undertaken by the Organisation as well as the expected behaviour in upholding general principles of the UN Charter.

The UN General Assembly, in its 1408<sup>th</sup> plenary meeting on 21 December 1965, by a resolution confirmed this principle in the following words:

No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, or cultural elements are condemned.<sup>35</sup>

This provision not only reaffirms the sanctity of state sovereignty and the principle of non-intervention, but also carries these two principles to the level of interstate relations.<sup>36</sup> Although a direct reference by the Security Council in its resolutions to Article 2(7) is not very common, an example of this can be seen in Resolution 688 on Iraq dated 5 April 1991 where the Council explicitly recalls “the provisions of Article 2, paragraph 7 of the Charter.”<sup>37</sup>

In addition, the judgements of the International Court of Justice (ICJ) provide precedents as well as confirmation of fundamental principles. For instance, in the Judgement of the Case Concerning the Military and Paramilitary

34 FABRI, H el ene Ruiz, “Human Rights and State Sovereignty,” **Human Rights, Intervention, and the Use of Force**, Philip Alston and Euan MacDonald (eds.), Oxford University Press, Oxford, 2008, p. 34.

35 General Assembly, A/RES/2131 (XX), **Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty**, 21 December 1965.

36 The same principle is established also in Article 3, paragraph 2 of the Additional Protocol II to the Geneva Conventions.

37 Security Council, **Resolution 688** (1991), preambular paragraph 2.



Activates in and Against Nicaragua (Nicaragua v. United States of America) dated 27 June 1986, the ICJ in paragraph 241 found that giving support of any sort to the opposition (military and paramilitary forces and activities, and in this case the *contras* whose aim was to overthrow the Government of Nicaragua) signals intervention and also falls contrary to Article 2(4). As indicated in the summary of the judgement under the section entitled *the principle of non-intervention* (paras. 239 to 245), the Court

considers that if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow its government, that amounts to an intervention in its internal affairs, whatever the political objective of the State giving support.<sup>38</sup>

Therefore, this sort of an act is taken as an undisputed breach of the customary law principle of non-intervention.

Restrictionists also argue that humanitarian intervention falls contrary to the principle of the prohibition of the threat or use of force, which is established in the UN Charter by Article 2(4). This provision, in principle, requires that "all members in their international relations shall refrain from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purposes of the UN," (e.g. providing assistance to one of the parties during the course of a civil war, engaging in humanitarian violations, or getting involved in acts of aggression, etc.). It prohibits war and any sort of aggression.<sup>39</sup> Moreover, Resolution 2625 (XXV), entitled the Declaration

38 "Case Concerning the Military and Paramilitary Activates in and Against Nicaragua" (Nicaragua v. United States of America), **Summary of the Judgement of the Court**, 27 June 1986.

39 Two explicit references to this principle with almost exact wording are present in Resolutions 573 (1985) and 611 (1988) concerning the conflict between Israel and Tunisia (Resolution 573 concerning Israel-Tunisia dated 4 October 1985. An implicit reference to non-use of force can be seen in Resolution 1318 (2000) on "ensuring an effective role for the Security Council in the maintenance of international peace and security, particularly in Africa", where the Security Council under Paragraph 1 of the Annex "[r]eaffirms the importance of adhering to the principles of the non-threat or non-use of force in international relations in any manner inconsistent with the Purposes of the United Nations, and of peaceful settlement of international disputes" (S/RES/1318 (2000)).

on Principles of International Law (24 October 1970) establishes: "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."<sup>40</sup> The wording of the Resolution strengthens the principle laid out in Article 2(4) of the Charter. Likewise, a number of Security Council resolutions<sup>41</sup> and presidential statements<sup>42</sup> make affirmative references to this principle. Despite the fact that this provision addresses only the Member States in a direct manner, also covers non-Member States since it has become an *erga omnes* principle of law as well as a *jus cogens* rule. Paragraph 6 of Article 2 also reads that "the Organisation shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."<sup>43</sup> Therefore, this provision acquires a binding nature also upon non-Member States as far as international peace and security are concerned.

40 General Assembly, **Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations**, 6<sup>th</sup> Committee, 25<sup>th</sup> session, 2625 (XXV), 24 October 1970, pp. 122-3.

41 For instance, a Security Council resolution reaffirming this principle is S/RES/884 (1993) on Armenia-Azerbaijan dated 12 November 1993, which in its 7<sup>th</sup> preambular paragraph states "the inviolability of international borders and the inadmissibility of the use of force for the acquisition territory. Another example is Resolution 748 (1992) dated 31 March 1992, which reaffirmed "that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force."

42 Some examples of these presidential statements are as follows: S/21418 of 31 July 1990; S/22176 of 30 January 1991; S/22862 of 31 July 1991, S/23495 and S/23496 of 29 June 1992, S/23597 of 14 February 1992, S/23610 of 19 February 1992, S/23904 of 12 May 1992, S/23945 and S/23946 of 18 May 1992, S/23982 of 20 May 1992, S/24241 of 6 July 1992 and S/24362 of 30 July 1992. S/25185, para. 2; S/26183, para. 2; S/PRST/1994/5, para. 2; S/PRST/1994/37, para. 2; S/PRST/1995/4, para. 2; S/PRST/1995/35, para. 2.

43 An example of such an attempt can be observed in Resolution 558 (1984) on South Africa dated 13 December 1984, where the Council "[r]equests all States, including States not Members of the United Nations, to act strictly in accordance with the provisions of the present resolution."

General Assembly Resolutions 2131 (1965) and 2625 (1970), which do not have legally binding effect but can be interpreted under certain circumstances as evidence of state practice, are also taken as references in support of the restrictionist approach. Resolution 2131 (UN Doc. A/6220) states that “[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.” To this, Resolution 2625 (UN Doc. A/8028) adds that “armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

Restrictionists like Ulrich Beyerlin argue that humanitarian intervention is, “clearly enough, in conflict with the prohibition on the use of (armed) force in Article 2(4) of the Charter.”<sup>44</sup> Disagreeing with this, Reisman argues that Article 2(4) “should be interpreted in accordance with its plain language, so as to prohibit the threat or use of force *only when directed at the territorial integrity or political independence* of a State.”<sup>45</sup> Since humanitarian interventions are directed neither at the territorial integrity nor the political independence of a state, Reisman posits, “this specific modality of the use of force is “not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter.”<sup>46</sup> In support of this view, Garrett notes that the purpose of humanitarian intervention is “to compel the state to observe fundamental international norms of human rights.”<sup>47</sup> On the other hand, Olivier Corten criticises these *contrario* interpretations of the UN Charter by asserting that

no provision of the Charter provides for a right of humanitarian intervention, whether in its parts on armed action or those on human rights. Then because article 2(3) of the Charter very generally compels States to

settle their disputes peacefully. As humanitarian intervention invariably follows from a disagreement between the intervening State and the State that is the target of allegations about human rights’ violations, and so from a ‘dispute’ in the legal sense of the term, such an intervention can hardly be considered compatible with the UN Charter.

Furthermore, in objection to Reisman, Fonteyne argues that Article 2(4) is not necessarily concerned with the intentions of the states involved in the action. Any sort of intervention, even though temporary, constitutes a breach of the territorial integrity and political independence of the state, as long as it is undertaken without the consent of that state. Moreover, in the specific case of humanitarian intervention, Fonteyne notes that this is a far serious breach since an effective long-term solution to the issue often times rests in the “change of government or even a secession.” Therefore, the intervention eventually ends up with a vital impact on the domestic political and/or legal order of the state that has been subjected to the humanitarian intervention.<sup>48</sup>

## 2.2. Possible Legal Grounds under the UN Framework

Despite the fact that the principles of sovereignty, non-intervention and non-use of force have been widely recognized by the international community, the aftermath of World War II brought about new challenges to the implementation of these principles. First, with the drafting of the Charter of Nuremberg Tribunal in 1945, “crimes against humanity” were recognized in international law. Then, especially after genocide was officially defined to be a crime by the “Convention on the Prevention and Punishment of the Crime of Genocide” in 1948, humanitarian concerns and human rights became paramount issues of international law. It was within such a context that states have begun to assume a right or (to put more mildly) a responsibility to take action, up to and including use of force, against atrocities towards people.

Such direct connection is seen in the formulation of the responsibility to protect understanding by paragraphs 138 and 139 of the World Summit Outcome Document (A/RES/60/1), which talks

44 Cited in DUKE, 1994: p. 34.

45 Quoted in FONTEYNE, Jean-Pierre L. “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter” **California Western International Law Journal**, Year: 1973-1974, Volume: 4, (p. 253).

46 Quoted in FONTEYNE, 1974: p. 254.

47 GARRETT, Stephen A., **Doing Good and Doing Well: an examination of humanitarian intervention**, Praeger Publishers, Westport, 1999, p. 47.

48 FONTEYNE, 1974: p. 255.

about a “Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity”, establishing the notion within the limits of the four grave crimes. In this vein, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and the Rome Statute of the International Criminal Court of 1998 constitute the two key documents where the four grave crimes are defined. Additionally, for war crimes, International Humanitarian Law establishes the legal basis.

Article I of the Genocide Convention states that both in times of war and peace, genocide<sup>49</sup> is considered as a crime under international law. In addition, Article VIII states: “Any Contracting Party may call upon the competent organs of the United Nations to take such action [that is granting extradition] under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”<sup>50</sup> In this vein, UN involvement can be made possible on the basis of the international criminal law –that is to say in case the crimes defined under this law are committed– which in the end may invoke a military intervention under the auspices of the UN upon the observance of a gross violation of human rights. It is important to note that, in general terms, humanitarian interventions are not authorised on the basis of international criminal law itself, but rather the crimes that are defined by this law fall under the scope of humanitarian intervention and RtoP.

Also given the exception to the general rule implied under Chapter VII<sup>51</sup> as well as the exceptions<sup>52</sup> of cases listed under Article 2(7), towards the end of the twentieth century the principles

of sovereignty and non-use of force validated by the UN Charter under Article 2 began to lose their solid character due to substantial infringements of human rights taking place in Yugoslavia and in some African States. These post-Cold War events<sup>53</sup> weakened the idea that humanitarian intervention is an indisputably unlawful act.<sup>54</sup> In this vein, the question of what to do in cases of mass humanitarian atrocities and the legal basis of taking action once again became a prominent area of concern.

According to counter-restrictionist scholars, the UN Charter leaves room for legitimacy and/or lawfulness of humanitarian interventions, although, as Sean D. Murphy asserts, “the language and intent behind the UN Charter does not provide an express legal basis for the conduct of humanitarian intervention by States or by regional organisations.”<sup>55</sup> Olivier Corten in his criticism of a *contrario* interpretation of the UN Charter asserts that the wording of the Charter, in terms of its prohibition of the use of force, was

devised to strengthen and not weaken the stringency of the prohibition. Allowance for context argues along the same lines. First because no provision of the Charter provides for a right of humanitarian intervention, whether in its parts on armed action or those on human rights. Then because article 2(3) of the Charter very generally compels States to settle their disputes peacefully. As humanitarian intervention invariably follows from a disagreement between the intervening State and the State that is the target of allegations about human rights’ violations, and so from a ‘dispute’ in the legal sense of the term, such an intervention can hardly be considered compatible with the UN Charter.<sup>56</sup>

49 The term genocide is defined in Article II of the Convention as well as in Article 6 of the Rome Statute, which deals with the crime of genocide, war crimes, and crimes against humanity. For a detailed definition of crimes against humanity see Article 7, for war crimes see Article 8(2).

50 Article III states the following acts as punishable: “(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”

51 Article 51 of the Charter defining self-defence also constitutes an exception to the general rule of non-use of force. Nonetheless, it is outside the context of humanitarian intervention, and thus not a relevant reference as a cause for undertaking such an intervention.

52 Reference to Article 2(7) as a legal basis is especially made in cases of intervention in civil wars for humanitarian purposes.

53 Robertson posits: “the first clear-cut abandonment of the pure sovereignty doctrine in favour of humanitarian intervention was probably the UN action in Iraq after the Gulf War of 1991 to protect both the Kurds in the north and the Marsh Arabs in the south” (ROBERTSON, David, **A Dictionary of Human Rights**, 2<sup>nd</sup> Edition, Europa Publications, London, 2004, p. 199).

54 GRIFFITHS, Martin / O’CALLAGHAN, Terry, **International Relations: The Key Concepts**, Routledge, NewYork, 2002, p. 146.

55 MURPHY, Sean D., **Humanitarian Intervention: The United Nations in an Evolving World Order**, University of Pennsylvania Press, Philadelphia, 1996, p. 83.

56 CORTEN, 2010, p. 501.

In this vein, Corten argues against any claim for justification of humanitarian intervention doctrine on the basis of the UN Charter. Addressing the same aspects of the legal context, Hersch Lauterpacht defines humanitarian intervention as an act signifying “dictatorial interference of the State,” involving threat or use of force.<sup>57</sup> Nevertheless, he considers intervention as permissible in legal terms when a state commits atrocities against fundamental human rights.<sup>58</sup>

In this regard, counter-restrictionist scholars take the Preamble to the Charter as well as Articles 1, 13, 55 and 56 as a legal basis for humanitarian intervention.<sup>59</sup> In other words, the arguments in favour of the legitimacy and/or lawfulness of humanitarian intervention are based on the purpose of the promotion and protection of human rights, which are indicated in the Charter among the purposes of the UN. Both the Preamble and Article 1(3) of the Charter place human rights<sup>60</sup> as a higher value. The referred paragraphs, in a consecutive order, read as follows:

We the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...] have resolved to combine our efforts to accomplish [the stated] aims.

The Purposes of the United Nations are to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 13 establishes that “the General Assembly shall initiate studies and make

recommendations for the purpose of [...] assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” More importantly, Article 55(c) reads: “the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. In this vein, Article 56 establishes that “[a]ll Members pledge themselves to take joint or separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

In addition to what has been stated in the UN Charter, the 1948 Universal Declaration of Human Rights in Article 28 recognizes for everyone the right “to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Moreover, Article 30 aims to assure that nothing in the content of the Declaration “may be interpreted as implying for any State, group or person any right to engage in any activity to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” Although these provisions by themselves do not necessarily constitute exceptions to the prohibition of the use of force, they can be interpreted as complementary to what has been established by the Charter regarding respect for human rights.

In this vein, as an exception to the dictates of Article 2(7), proponents of humanitarian intervention argue that human rights standards are not simply matters of domestic jurisdiction of states if states are parties to the related international treaties. It is as a result of these legal bonds that human rights matters need to be considered as part of the international duties of states leading to or allowing “for the supervision and possible sanction of the international community.”<sup>61</sup> For instance, Oppenheim acknowledges that although it might be possible for a state to get around its legal –but not moral– responsibility towards its subjects in certain cases through changing parts of its municipal law, the same is not necessarily true concerning the state’s legal responsibility in so far as its international duties are concerned.<sup>62</sup>

57 Cited in GARRETT, 1999, p. 4.

58 DUKE, 1994: p. 33.

59 DUKE, 1994: p. 35.

60 There are also references in Security Council resolutions. An example of this can be seen in Annex I of Resolution 1318 (2000) where it is stated that the Security Council “[p]ledges to uphold the Purposes and Principles of the Charter of the United Nations, **reaffirms** its commitment to the principles of sovereign equality, national sovereignty, territorial integrity and political independence of all States, and **underlines** the need for respect for human rights and the rule of law.”

61 GARRETT, 1999, p. 47.

62 OPPENHEIM, L.F. Lawrence, **International Law: a treatise**, Vol. 1 Peace, ed. Hersch Lauterpacht. Longmans, Great Britain, 1955, pp. 336-7.

There is general agreement that, by virtue of its personal and territorial authority, a state can treat its own nationals according to discretion. But a substantial body of opinion and of practice has supported the view that there are limits to that discretion and that when a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, the matter ceases to be of sole concern to that state<sup>63</sup> and even intervention in the interest of humanity might be legally permissible.<sup>64</sup>

Evaluated from this perspective, RtoP as established by the Outcome Document does not leave much of a leeway for States since it defines sovereignty primarily as responsibility,<sup>65</sup> in which the international society is to monitor and assist states in keeping up with this duty. In this regard, the protection of the fundamental rights of populations is placed in the international realm rather than the domestic one.

Concerning the principle of non-use of force, Richard B. Lillich argues for "a right of forcible humanitarian intervention"<sup>66</sup> and makes reference to the argument, also cited by Brownlie, that "Article 2(4) does not constitute an absolute prohibition against all unilateral humanitarian interventions."<sup>67</sup> On the other hand, Ian Brownlie

argues that the "position taken up by Lillich is completely outside the general consensus of state practice and the opinion of experts of various nationalities,"<sup>68</sup> and that no such right exists.

As Corten notes, on the basis of the UN Charter one may possibly talk about lawful use of force in relation to humanitarian intervention only under the three circumstances of self-defence, State consent, or Security Council authorisation. He adds that "in all cases where there is genuine use of force, the protection of nationals cannot be considered as a distinctive argument but must be connected up with others such as the consent of the State in question, self-defence or Security Council authorisation."<sup>69</sup> Nevertheless, self-defence when invoked on the basis of the protection of nationals, in general terms, does not qualify as a humanitarian intervention.<sup>70</sup>

Oppenheim draws attention to the fact that the unilateral character of an intervention tends "to weaken its standing as a lawful practice" since it can be a conduct of abuse by a state.<sup>71</sup> Nonetheless, he adds, such a case is not applicable to collective interventions,<sup>72</sup> because "the growing involvement of the international community on both a global and a regional basis, with the protection of human rights diminishes any need for states to retain or exercise an individual right of humanitarian intervention."<sup>73</sup> In this vein, what is legally contested by default is the existence of

63 For instance, in the case of *Duško Tadi*, "the Appeals Chamber (in considering jurisdictional issues) concluded that article 3 of its Statute, which gave it jurisdiction over 'violations of the laws or customs of war', provided it with jurisdiction 'regardless of whether they occurred within an internal or international armed conflict'" (SHAW, 2005, p. 1070).

64 OPPENHEIM, L.F. Lawrence, *Oppenheim's International Law*, vol. 1 Peace, Sir Robert Jennings and Sir Arthur Watts (eds.), Longman, Harlow, 1992, p. 442.

65 Sovereignty as responsibility understanding can be summarised as follows: "First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission" (ICISS, 2001a, p. 13).

66 BROWNLIE, Ian, "Humanitarian Intervention," *Law and Civil War in the Modern World*, John Moore (ed.), The Johns Hopkins University Press, Maryland, 1974, p. 218.

67 LILLICH, Richard B., "Humanitarian Intervention: A Reply to Ian Brownlie and Plea for Constructive Alternatives," *Law and*

*Civil War in the Modern World*, John Moore (ed.), The Johns Hopkins University Press, Maryland, 1974, p. 241.

68 BROWNLIE, 1974, p. 227.

69 CORTEN, 2010, p. 547.

70 An example in this regard is the US intervention in Grenada, where the US failed to receive support from the Security Council although it based its intervention on "an invitation from the Grenadan Governor General to restore order to the island, a request from the Organization of East Caribbean States for collective security action in Grenada, and the need to protect US nationals in Grenada" (Murphy, 1996, p. 109). The intervention was debated in the Security Council and a draft resolution that condemned the US's action failed due to a veto by the US itself (ICISS, 2001b, p. 65). Therefore, in a sense, the Security Council process was hindered by Washington. Nevertheless, the US was not able to prevent the drafting of a General Assembly resolution condemning the intervention as a "flagrant violation of international law" (MURPHY, 1996, p. 111).

71 OPPENHEIM, 1995, p. 443.

72 An example of a UN authorised multilateral intervention is the July 1994 intervention in Haiti.

73 OPPENHEIM, 1995, pp. 443-4.

a right for unilateral intervention. Furthermore, Bruno Simma argues that the availability of Security Council authorisation for a humanitarian intervention that would take place through threat or use of force is of vital importance in order to assess whether this act violates international law or not.<sup>74</sup> In this vein, Security Council authorisation provides the parties involved with the legal grounds to undertake a lawful military intervention.

The basis for such authorisation may be found in the last part of Article 2(7), where it is stated the principle of non-intervention “shall not prejudice the application of enforcement measures under Chapter VII.” In this vein, a fundamental exception to the dictates of Article 2(4) is Chapter VII of the Charter dealing with “action with respect to threats to the peace, breaches of the peace, and acts of aggression.” Despite the fact humanitarian intervention has so far not been legalised, as can be inferred from a review of the literature, international law scholars seem to agree that the UN Security Council is legally capable—but not necessarily morally obliged—to authorize humanitarian interventions given Article 39 of the Charter vesting the power on the Security Council “to determine the existence of any threat to the peace, breach of the peace, or act of aggression, [...] to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” If there is a case of gross violation of human rights that constitutes a threat to international peace and security, Brownlie notes, then action can be undertaken within the terms of Chapter VII. “Such action may relate to Articles 40 (provisional measures), 41 (economic sanctions), or 42<sup>75</sup> (military sanctions).”<sup>76</sup> Provisions of this Chapter comprise of measures (up to and including use of force) to be adopted in order to ensure international peace and security, specifically

74 SIMMA, Bruno, “NATO, the UN, and the Use of Force: Legal Aspects,” *European Journal of International Law*, Year: 1999, Volume: 10, (p. 4).

75 “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

76 BROWNLIE, 1974, p. 226.

in cases of “threats to the peace, breaches of the peace, and acts of aggression”.

Despite all the disagreements between the restrictionist and counter-restrictionist legal scholars, there is one point of clear consensus, that is, on the basis of the UN Charter the Security Council stands out as the organ with the power to authorize lawful use of force. In this vein, humanitarian interventions, whether unilateral or collective, undertaken without Security Council authorisation have always been contested in terms of legality as scholars have failed to reach a consensus at the theoretical level about the existence of a right to intervene. As Ian Brownlie posits: “a jurist asserting a right of forcible humanitarian intervention has a very heavy burden of proof”.<sup>77</sup> If such proof exists, it is to be found in state practice. The subsequent brief historical overview of past conducts of humanitarian interventions prior to the introduction of RtoP serves to (1) question the existence of a right to intervene; (2) understand the stance of the international community towards humanitarian interventions, and (3) outline the remaining constraints about the lawfulness of military interventions that needs to be tackled within the RtoP framework.

### 3. Overview: Practice vs. Theory

The subsequent overview on practices of humanitarian intervention focuses on two main periods: the Cold War-era, and the 1990s. The reason for differentiating between these two periods is to reflect the change in state behaviour as well as the evolution of a sense of moral responsibility within the international community, which paved the way for the construction of RtoP. Among scholars three cases in the Cold War-era, namely those of East Pakistan, Cambodia, and Uganda came to be widely accepted as primary examples of humanitarian intervention. Despite the fact that in these cases the intervening states justified their actions on grounds of self-defence,<sup>78</sup> and “humanitarian” concerns, when (and if) mentioned, were not claimed to be the main motives for action, the humanitarian results of these unilateral acts constituted the foundations of the contemporary debate on humanitarian intervention from

77 BROWNLIE, 1974, p. 218.

78 ICISS, 2001b, p. 47.

various aspects. On the other hand, “[s]ince 1990 there haven been many precedents of military operations conducted essentially in the context of internal conflicts formally motivated by humanitarian interventions. In this sense, humanitarian intervention has without contest taken on a new dimension compared with the Cold War years.”<sup>79</sup>

Speaking about a right of humanitarian intervention, state practices as well as the debates<sup>80</sup> within the UN in the period between 1945 and 1990 reveal neither a foundation of nor support for it.<sup>81</sup> The evidence suggests an adherence to the principles of state sovereignty, non-intervention and non-use of force more rigidly than before. The period was characterised by the ideological differences between the two blocks, which frequently resulted with the use of the veto right by one or more of the five permanent members during the Security Council meetings. As a consequence, there were no examples of humanitarian interventions authorised by the Security Council or undertaken by the UN itself during the Cold War.<sup>82</sup>

In numerous cases of the Cold War the Council was made inoperable by the use of the veto. The end result was a deadlock which was followed by a call –through a General Assembly resolution, based on the authorisation of the Uniting for Peace Resolution, and Article 10<sup>83</sup> of the UN Charter– for an immediate withdrawal of all foreign forces, which in nature implicitly addressed

the intervening state itself but none other. A prominent example of this was the Indian intervention in Pakistan, which followed the civil war that erupted in March 1971 in East Pakistan. During the war, the actions of the West Pakistani troops led ten million people to take refuge in India, which in the end caused tension between India and Pakistan. Following its occupation of the province of former East Pakistan, India in a Security Council session presented its main justification as an act of self-defence, and claimed that “the influx of 10 million refugees amounted to ‘refugee aggression’ and represented such an intolerable burden that it constituted a kind of ‘constructive’ attack.”<sup>84</sup> A minor point of justification raised was the necessity to aid the “Bengali victims of the Pakistani Army’s onslaught.”<sup>85</sup>

In the Security Council meeting, India’s justifications of self-defence and humanitarian action for its use of force against Pakistan found support from the Soviet Union. The United States and China objected to the claimed justifications and “condemned India’s action as ‘an unjustified move that could lead to international anarchy’.”<sup>86</sup> During the discussions, the United States argued for an “immediate ceasefire” and China repeated its condemnation of India many times, whereas the Soviets asked for a “ceasefire as part of a political settlement.” Later on, the Soviet Union vetoed the Security Council draft resolutions asking for an “immediate ceasefire,” and caused a deadlock.<sup>87</sup> Upon the pressure of the non-aligned group, the issue was brought before the General Assembly for a discussion, and as a result Resolution 2793 (XXVI) which called for the withdrawal of all military forces was adopted.<sup>88</sup> Nevertheless, this resolution was a compromise between the superpowers, as it was a decision calling for an immediate ceasefire without a condemnation on India.<sup>89</sup>

A similar situation existed in the 1978 intervention of Vietnam in Cambodia where the UN Security Council was yet again made inoperable

79 CORTEN, 2010, p. 537.

80 For instance, “on the occasion of the armed action by the USA in Lebanon in 1958, Ethiopia stated in the GA [General Assembly]: ‘Ethiopia strongly opposes any introduction or maintenance of troops by one country within the territory of another country under the pretext of national interest, protection of lives of citizens or any other excuse. This is a recognized means of exerting pressure by stronger Powers against smaller ones for extorting advantages. Therefore, it must never be permitted (see GAOR, 3<sup>rd</sup> Emergency Special Session, 742<sup>nd</sup> Plenary Meeting, 20 August 1958, para. 75). On the same occasion Poland argued that the protection of nationals abroad constituted an ‘old pretext’ (ibid. 470<sup>th</sup> plen. meeting, at §84)” (CASSESE, Antonio, *International Law*, 2<sup>nd</sup> edition, Oxford University Press, Oxford, 2005, p. 368).

81 ICISS, 2001b, 68.

82 MURPHY, 1996, 84.

83 Article 10 establishes that “the General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”

84 ICISS, 2001b, pp. 54-55.

85 ICISS, 2001b, pp. 54-55.

86 WHEELER, 2000, pp. 65-6.

87 WHEELER, 2000, p. 68.

88 ICISS, 2001b, pp. 55-6.

89 WHEELER, 2000, p. 70.

through the use of the veto right. From March 1978 to March 1979, human rights abuses in Cambodia were recorded in the resolutions of the UN Commission on Human Rights.<sup>90</sup> In the ongoing war between Cambodia and Vietnam on the border, “humanitarian” reasons were available for Vietnam to claim as a justification of its acts. However, as in the example of India, the primary reasoning for intervention was presented as the right of “self-defence” against the aggression by the Khmer Rouge regime.<sup>91</sup>

The opposition to the Vietnamese intervention came from three different groups. The first was “the USA and its allies, who interpreted Vietnam’s action as a move in the game of cold-war power politics.”<sup>92</sup> The second was the Association of Southeast Asian Nations (ASEAN), which interpreted the intervention in Cambodia as a sign of the Vietnamese ambition to become a regional hegemon, and the last group was of the neutrals and non-aligneds which considered the Vietnamese intervention as an erosion of “the rule of law in international relations.”<sup>93</sup> On the other hand, the Soviets and the eastern block countries sided with Vietnam, and the Soviet Union vetoed the draft resolution asking “for the withdrawal of all foreign (that is, Vietnamese) forces from Cambodia.”<sup>94</sup>

The debate in the General Assembly was crucial in the sense that the question “whether substantial human rights violations could provide a justification for intervention” was raised.<sup>95</sup>

The USA recognized that Vietnam had legitimate security anxieties relating to Cambodian attacks against its citizens in the border areas, but Young argued that ‘border disputes do not grant one nation the right to impose a government on another by military force’. [...] The Carter administration had sought to elevate human rights in the hierarchy of foreign-policy

principles, but, when it came to a choice between upholding the rule of law or permitting an exception in the name of rescuing the Cambodian people, an absolutist interpretation of the rules won out.”<sup>96</sup>

The end result was the same as in the case of India since an immediate withdrawal of Vietnamese forces was called for. Moreover, the new Cambodian government was not recognized and the ousted government remained as the official government by a decision of the General Assembly.<sup>97</sup>

Although the incidents were similar to the ones in the Vietnamese case, in the 1979 Tanzanian intervention in Uganda, the end result was different. In April 1979, President Idi Amin’s government of Uganda was overthrown, and Idi Amin was considered responsible for mass murder of Ugandan people. The course of events reached its peak when the atrocities were made public by the British press, and Britain asked the UN Commission on Human Rights for an international investigation in Uganda concerning human rights violations. There was international condemnation by the heads of governments.<sup>98</sup> Later on, following Idi Amin’s declaration that he annexed Kagera region Tanzania attacked Uganda.<sup>99</sup>

Like India and Vietnam, Tanzania also claimed the right of “self-defence” for its actions, and stated that “there were two wars being fought: ‘First there are Ugandans fighting to remove the Fascist dictator. Then there are Tanzanians fighting to maintain national security.’”<sup>100</sup> The main difference of the Tanzanian intervention from Indian and Vietnamese interventions was that, there was almost no international reaction to the Tanzanian intervention. Despite the fact that the Soviet Union was a supplier of advisers and arms to Uganda throughout the 1970s up until Amin’s invasion of Kagera region, the Soviets did not intend to support Idi Amin against Tanzania.<sup>101</sup> The superpower competition for spreading influence did not stretch to Tanzania as there was another

90 RAMSBOTHAM, Oliver / WOODHOUSE, Tom, “Forcible Self-Help,” **Humanitarian Intervention in Contemporary Conflict: A Reconceptualization**, Polity Press, Cambridge, 1996, p. 55.

91 ICISS, **2001**, p. 58.

92 WHEELER, **2000**, p. 89.

93 WHEELER, **2000**, pp. 89-90.

94 ICISS, **2001b**, 59.

95 ICISS, **2001b**, p. 60.

96 WHEELER, **2000**, p. 91.

97 RAMSBOTHAM / WOODHOUSE, **1996**, p. 55.

98 ICISS, **2001b**, p. 61.

99 ICISS, **2001b**, p. 60.

100 ICISS, **2001b**, p. 60.

101 WHEELER, **2000**, p. 123.



issue at stake between the United States and the Soviet Union: the conflict between Somalia and Ethiopia. Moreover, the Sino-Soviet competition, where “China [was] acting as a patron for Tanzania while the Soviet Union backed Amin,” was not aggravated, first due to non-involvement by the US, second because of “the Soviet Union’s growing embarrassment at Amin’s actions.”<sup>102</sup> Contrary to the outcome of the Vietnamese intervention, the new government in Kampala was recognized by most countries in a short period of time, and there were no condemnations regarding the actions of Tanzania.<sup>103</sup> Nonetheless, as in the other two cases, the Tanzanian intervention was never authorised by the Security Council.

As Corten observes:

A review of precedents characteristic of the Cold War clearly show that States remain attached to a classical conception by which violations of human rights cannot justify military actions from outside. [...] it was only in the 1990s that States as a whole admitted an extended competence of the Security Council to deal with situations that had formerly been considered as purely internal, including by authorising an outside military intervention.<sup>104</sup>

In this context, in the aftermath of the Cold War two fundamental changes of understanding has taken place on the part of the international community: (1) the description of “civil war and internal strife [...] as threats to international peace and security” and the acceptance that these may constitute “the basis for Chapter VII enforcement action”;<sup>105</sup> and (2) the possibility of considering refugee influxes as a threat to international peace and security.<sup>106</sup>

In the 1990s, nine cases -namely Liberia,

Northern Iraq, Bosnia-Herzegovina, Rwanda, Haiti, Sierra Leone, Kosovo and East Timor- came to the fore as the main examples of invocation of humanitarian reasons to take action in the period prior to the announcement of RtoP by the International Commission on Intervention and State Sovereignty (ICISS). The cases of Bosnia-Herzegovina, Somalia and Rwanda were among the precedents of use of force justified on humanitarian grounds, and undertaken with Security Council authorisation based on Chapter VII.

Concerning the case of Somalia, Security Council Resolution 794 dated 3 December 1992 found that “the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.” Likewise in the case of Liberia the Security Council with Resolution 788 (1992) determined that “deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole.” Resolution 929 (1994) of 22 June 1994 on Rwanda determined “that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region,” and “[a]cting under Chapter VII of the Charter of the United Nations, authorizes the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in subparagraphs 4 (a) and (b) of resolution 925 (1994). Resolution 940 (1994) of 31 July 1994 on Haiti adopted a similar language and considered the situation “a threat to peace and security in the region.” On the basis of Chapter VII, it authorized

Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish

102 WHEELER, 2000, p. 123.

103 WHEELER, 2000, p. 125.

104 CORTEN, 2010, p. 534.

105 “[B]y 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia summarized that it is the ‘settled practice of the Security Council and the common understanding of the United Nations membership in general’ that a purely internal armed conflict may constitute a ‘threat to the peace’ (ICISS, 2001b, p. 119).

106 Such interpretation has made possible the legitimisation of the safe havens created in the Balkans and Rwanda through Chapter VII (ICISS, 2001b, p. 119).

and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States.

Similarly, Security Council Resolution 1264 (1999) established “that the present situation in East Timor constitutes a threat to peace and security”, and acted under the mandate of Chapter VII. With this Resolution, the Security Council also authorised “the establishment of a multinational force under a unified command structure, [and authorised] the States participating in the multinational force to take all necessary measures to fulfil this mandate.” In another instance, concerning the case of Bosnia and Herzegovina, in Resolution 1305 (2000), the Council determined “that the situation in the region continues<sup>107</sup> to constitute a threat to international peace and security.”

In the light of these examples it can be argued that in contrast to the Cold War-era, the Security Council assumed a more active role in addressing cases of mass atrocities and did not necessarily refrain from adopting coercive measures. Nevertheless, the international community prioritised the employment of sanctions and international prosecution before resorting to the controversial measure of military intervention.<sup>108</sup>

The ICISS notes:

Unlike the earlier cases, in which the rescue of nationals and self-defence were the prominent justifications, the conscience-shocking and truly ‘humanitarian’ elements of the post-1990 cases were explicitly recognized as important justifications for

international action. Instead of single-state military operations, the interventions of the 1990s were also genuinely multilateral.<sup>109</sup>

Furthermore, in cases where the interventions were carried out by forces other than that of the UN, it can be observed that certain operations were authorised by the Security Council. For instance, the bombings of the Serbian forces (from 1994 to 1995) by the NATO directed to stop the atrocities in Bosnia-Herzegovina had Security Council authorisation through resolutions such as 770, 776 and 836.<sup>110</sup>

One major exception to this prevalent trend was the case of Kosovo. Occurring in the aftermath of the international community’s failure<sup>111</sup> to take effective action in Rwanda where the death toll was around 800,000 due to the “systematic slaughter of men, women and children which took place over the course of about 100 days between April and July of 1994”<sup>112</sup>, the Kosovo case constituted a fundamental test of morality. Despite the fact that the Security Council in its Resolutions 1199 (23 September 1998) and 1203 (24 October 1998) described the situation in Kosovo as a “threat to peace and security in the region,” and indicated that it is acting under Chapter VII, the NATO action was never authorized by the Council. Thus, in the absence of a Security Council authorisation and/or state consent, NATO’s coercive action against the Federal Republic of Yugoslavia (specifically Serbia and Montenegro) undertaken collectively upon the decision of 19 states, became an example of an illegal intervention.<sup>113</sup>

109 ICISS, **2001b**, p. 117.

110 CORTEN, **2010**, p. 539.

111 “The failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there” (UN Document S/1999/1257 (December 15, 1999), 3).

112 Carnegie Commission on Preventing Deadly Conflict. *Preventing Deadly Conflict-Final Report; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Document S/1999/1257 (December 15, 1999), p. 3.

113 “Legal authorities, ranging from Professor Brownlie, the sternest critic of the legality of NATO action, to Professor Greenwood, the firmest supporter of legality, agree that the provisions of the UN Charter were thus not complied with” (House of Commons, Foreign Affairs Committee, *Fourth Report*, Session 1999-2000, <http://www.publications.parliament.uk/pa/cm199900/cm->

107 Similar statements are present in Security Council resolutions adopted after the embracement of RtoP through paragraphs 138 and 139 of the Outcome Document, some of which are the following: Resolution 1865 (2009) concerning Côte d’Ivoire, adopted by the Security Council at its 6076<sup>th</sup> meeting, on 27 January 2009; Resolution 1854 (2008) concerning the case of Liberia, adopted by the Security Council at its 6051<sup>st</sup> meeting, on 19 December 2008; Resolution 1771 (2007) concerning the situation in the Democratic Republic of Congo, adopted by the Security Council at its 5730<sup>th</sup> meeting, on 10 August 2007.

108 “The 1990s have been labelled the “sanctions decade” because the Security Council imposed 12 sanctions regimes, several times more than in the previous 40 years combined. As well as being used more frequently, sanctions were also applied more widely, including against nonstate actors in Angola and Cambodia” (ICISS, **2001b**, p. 118).

The ICISS notes:

NATO's intervention in Kosovo in 1999 brought the controversy to its most intense head. Security Council members were divided; the legal justification for military action without new Security Council authority was asserted but largely unargued; the moral or humanitarian justification for the action, which on the face of it was much stronger, was clouded by allegations that the intervention generated more carnage than it averted; and there were many criticisms of the way in which the NATO allies conducted the operation.<sup>114</sup>

This brought into question also the legitimacy of the intervention, which could be argued on the basis of the humanitarian objective of the intervening states, nevertheless was put to risk due to the way of conduct. Although the intervening states argued for the legality<sup>115</sup> of their action, not all the members of the international community were of the same opinion. By mid-1998 China and Russia had already signalled that they would veto any Security Council authorisation under Chapter VII. In the aftermath

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select/cmffaff/28/2802.htm, accessed August 20, 2012). Likewise, Bruno Simma (1999) and Antonio Cassese (1999) are among the scholars who argue that "NATO's action falls outside the scope of the United Nations Charter and, by that token, is illegal under international law" (CASSESE, Antonio, "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" **European Journal of International Law**, Year: 1999, Volume: 10, (p. 23).

114 ICISS, **2001a**, p. vii.

115 Regarding UK's response, "the Government's position on the legality of *Operation Allied Force* was ... clearly set out by the then Defence Secretary on 25 March 1999. He told the House that the Government was 'in no doubt that NATO is acting within international law' and that 'the use of force...can be justified as an exceptional measure in support of purposes laid down by the UN Secretary, but without the Council's express authorisation, where that is the only means to avert an immediate and overwhelming humanitarian catastrophe.'" (HOUSE OF COMMONS, **Fourth Report**, 1999-2000). "The Netherlands evoked a right of intervention to prevent 'genocide' or 'to avert large-scale and massive violation of basic human rights in the framework of a humanitarian emergency situation.' Germany declared over the need to secure authorization that 'derogation from this principle could only be exceptional: to prevent humanitarian catastrophes and grave violations of human rights, when an immediate intervention is absolutely necessary for humanitarian reasons.' Belgium argued in the International Court of Justice for a 'right of humanitarian interference'." (CORTEN, **2010**, p. 542).

of the operation, Russia proposed a draft resolution for the condemnation of NATO's forceful action, but this was turned down by twelve votes to three.<sup>116</sup>

Taking into consideration the veto issue, and the fact that the intervention was carried out without Security Council authorisation, it is possible to trace certain similarities between the Kosovo case and those of the Cold War period. Nevertheless, the claimed humanitarian justifications for undertaking action instead of invocation of self-defence (as it was the case in the Cold War) and the conduct of the intervention in a consistent manner with the claimed reasons constitute a genuine case for the assumption of a moral responsibility as well as the prioritisation of human rights matters over legality and legitimacy concerns. At the heat of political rivalries, throughout the Cold War, the Security Council was neither able to authorise nor to condemn the use of force by States. This, from a political point of view, reveals the politicised nature of the relationship and is classically interpreted as prevalence of interests over moral concerns. Thus, it is not possible to claim that importance was genuinely placed on humanitarian norms.

Unlike the previous decades, the 1990s were characterised in general by collective humanitarian interventions based on Security Council resolutions that invoked action under Chapter VII. This was an era where inaction (as in the case of Rwanda) was criticised severely. The controversial case of Kosovo while reignited the debates on the lawfulness of forceful action without Security Council authorisation UN, once again led practitioners and researchers to question the legitimate bases for action in the name of halting mass atrocities. In the meanwhile, the humanitarian situations that arose in the 1990s reaffirmed a sense of moral duty, which later on was translated into language of RtoP. In this vein, the ICISS suggested the political understanding that states need to protect their populations, and that when they are unable or unwilling to do so, the international community has a responsibility to take up such duty.<sup>117</sup>

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116 HOUSE OF COMMONS, **1999-2000**.

117 ICISS, **2001a**, p. xi.

#### 4. Conclusion

From a legal point of view, in the light of the cases mentioned, it can be argued that there is no solid proof to support the arguments in favour of the existence of a (unilateral) right to intervene. In the Cold War-era there is no assertive evidence of states undertaking action based on motivations of humanitarian concerns. Yet, one can talk about an increasing importance of human rights within the international community as through the conventions, resolutions and declarations it adopted the UN has assumed the mission of law-making for the purpose of protecting human rights while trying to avoid interference in states' domestic affairs. That is to say, there was an increasing consciousness regarding human rights alongside adherence to fundamental principles of international law in the international conduct.

Nicholas J. Wheeler asserts that norms have clearly changed since the debates in the UN over India's, Vietnam's and Tanzania's use of force in the 1970s, and Kofi Annan is right to believe that there is a "developing international norm" in support of intervention. However, this normative change is subject to the very important caveat that the society of states shows little or no enthusiasm for legitimating acts of humanitarian intervention not authorized by the Security Council.<sup>118</sup>

In this vein, the lack of a specific legal norm outlawing or enabling humanitarian intervention in clear terms brings to the fore the legitimacy and lawfulness issues while leaving scholars with several unanswered questions such as: what should legally be done when humanitarian atrocities occur and when peoples are being deprived of their fundamental human rights on a massive scale; should any state or regional/international actor be permitted to undertake an intervention for humanitarian reasons, (i.e. for the purpose of stopping mass atrocities); and, standing on the thin line between lawfulness and legitimacy, who is to authorise such use of force and on which grounds?

By the 2000s, under the changing political circumstances (but continuing scepticism), it no longer was possible to address these questions

through the traditional arguments in favour of humanitarian intervention. Thus, based on the lessons drawn from the cases of 1990s, and the recognition of the need to take action (through non-coercive and if necessary coercive measures) against grave violations of human rights, by the end of 2001 the ICISS introduced an alternative approach, aiming to shift the focus from a right to intervene to a responsibility to protect. Twelve years after its introduction, it yet remains a question whether the international community will transform RtoP into a legal norm and legalise the use of force on humanitarian grounds. Nevertheless, as also established within the RtoP framework, at the current state of affairs the only unchallenged authority for deciding on a lawful humanitarian military intervention remains to be the UN Security Council, and the international community seems determined to keep it as such.

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<sup>118</sup> Wheeler, 2000, p. 286.

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