CHAPTER SIX
HUMANITARIAN INTERVENTION IN INTERNAL CONFLICTS
6.1. Introduction

The notion that a state may have the right to use force to alleviate a humanitarian catastrophe, without authorization from the Security Council, has been the subject of vast debate within international legal scholarship.

For many years, international lawyers and scholars have debated the lawfulness of humanitarian intervention. Humanitarian intervention permits a state or a group of states to intervene in a country to protect not only its own nationals, but also to protect nationals of either third states or nationals of the country in which the intervention is made.\(^1\) The legality of humanitarian intervention has recently become an important issue, as nations throughout the world have increasingly used force to stop acts of genocide and other atrocities committed by governments against their own populations.\(^2\)

Military intervention for stated humanitarian purpose has been undertaken on several occasions since the end of the Cold-War. It is bound to be attempted again, yet academics and policy makers have left fundamental questions unanswered. Have past humanitarian military intervention saved lives? Under what conditions is humanitarian intervention likely to save lives in the future?

Case studies of humanitarian interventions in northern Iraq from 1991 through 1996, Somalia from 1992 to 1995, Rwanda in 1994, Haiti in 1995, and East Timor in 1999, reveal that seven out of ten military operations saved more lives then would have been saved in the absence of intervention. However, the number of lives saved was lower then is commonly believed, ranging from thousands in Iraq to ten thousands in Rwanda, not the hundreds of thousands governments claim.\(^3\)

Whenever one power intervenes in the name of humanity in the domain of another power, it cannot but impose its concept of justice and public policy on the other state, by force if necessary. Its intervention tends definitely to draw the other state into its moral and social sphere of influence, and ultimately into its political sphere of influence.

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2. Ibid. at 148.
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It will control the other state while preparing to dominate it. Humanitarian intervention consequently looks like an ingenious juridical technique to encroach little by little upon the independence of a state in order to reduce it progressively to the status of semi-sovereignty.\(^4\) The world has changed in many respects since the end of the Cold-War. In some ways these changes have been for the better. For example, mutual interests have paved the way for increased cooperation between the U.S. and Russia on matters ranging from arms control to space exploration. In other respects, however, post Cold-War changes have been very detrimental to international stability. The presence of bi-polar superpower tension was a stabilizing force in many regions of the world.\(^5\)

As the U.S. and Soviet Union struggled to enlarge their respective spheres of influence, they suppressed some regional ethnic, tribal, and clan (interest group) tension through the influx of international aid (both economic and military) and the threat of unilateral intervention.\(^6\) The end of the Cold-War has resulted in a reduction of these interest group controls, and consequently an increase in internal conflicts and humanitarian crises.

Within the U.N. system, the Security Council is empowered with the primary responsibility for the maintenance of international stability.\(^7\) Under the terms of Chapter VII of the U.N. Charter, the Security Council has the authority to determine the existence of threats to peace and to enact enforcement measures aimed at the maintenance or restoration of international peace and security.\(^8\) The Council's capacity to prevent and stop internal conflicts and humanitarian crises is also a byproduct of the end of the Cold-War. As a result of coalescing interests and decreased tension among its permanent Members (the U.S., Russia, the U.K., France, and the People's Republic of China), the Security Council has become more effective in dealing with these conflicts and crises.\(^9\)

\(^7\) U.N. Charter, Article. 24(1).
\(^8\) Chapter VII is titled “Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. U.N Charter, Articles. 39-51. As the title would suggest, Chapter VII is concerned with the Council's authority to determine, prevent, and remove threats to peace, breaches of peace, and acts of aggression.
6.2. What is Humanitarian Intervention?

Historically, humanitarian intervention has been associated with the use of force by a state or group of states against a target state in order to protect the citizens of the target state from inhumane or cruel treatment at the hands of the sovereign.\(^\text{10}\)

In the 19\(^\text{th}\) century, many writers referred to humanitarian intervention as ‘intervention undertaken in the cause of humanity’, thus placing the emphasis on protecting human rights. The French legal philosopher Rougier, for example, stated that “the theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity”.\(^\text{11}\)

Similarly, Ellery Stowell defined humanitarian intervention as “reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrarily and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice”.\(^\text{12}\)

However, some have questioned the legal merit of humanitarian intervention, and proponents have limited its scope to mitigate potential deleterious effects on the right of sovereignty.\(^\text{13}\) One view stated that humanitarian intervention could be legitimate only where it could achieve a positive good; otherwise, the intrusion into sovereignty was not acceptable. Moreover, Oppenheim and Hershey argued that humanitarian intervention did exist as an international right, but that it was only justified where great evils existed, where great crimes were being perpetrated, where there was a danger of race extermination, or where there were several participants involved.\(^\text{14}\)

In the 20\(^\text{th}\) century, the concept of humanitarian intervention was expanded to include non-military means such as moral suasion, economic sanctions, and diplomatic isolation. In the Cold-War and post Cold-War era, utilization of non-military means to address human rights issues has grown tremendously under the

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\(^{10}\) See Ellery Stowell, *Intervention in International Law*, (J. Bryne, 1921), p.51-149.

\(^{11}\) Rougier, supra note 22, at 472.

\(^{12}\) Stowell, supra note 6, at 53.

\(^{13}\) T. J. Lawrence, *Principles of International Law*, (D.C. Heath & Co., 1910), p. 132-33. (arguing that although the French intervention to protect the Maronite Christians in Lebanon was deserving of moral approval, it was not strictly within the bounds of international law).

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aegis of the U.N.O. In many ways, these non-military forms of humanitarian intervention have attained full legitimacy in international law.\(^\text{15}\)

The scope of legitimate humanitarian intervention, nevertheless, remains at issue. Modern concerns include whether rescue should be the sole motive, whether the duration should be limited, and whether interventions which change the authority structure in a state should properly qualify as humanitarian intervention.\(^\text{16}\) In short, humanitarian intervention is generally understood to involve action by a state or group of states to protect the human rights of citizens of a different state; where the intervening parties determine that a sovereign has exceeded or violated its sovereign authority; involving a transgression into the sovereignty in respect of its internal affairs; and may involve military or non-military means.

The concept of humanitarian intervention also includes the assistance provided by (International NGOs to local NGOs). This entails the provision of aid by foreign donors, especially from the North to the South, in cases of both man-made and natural disasters. However, this humanitarian assistance has also been “expanded to include categories of victims produced by political crisis”.\(^\text{17}\)

These crises include intrastate conflicts with gross human rights violations resulting in huge numbers of refugees and the displacement of people within the state.

Since the concept has universal application, it is influenced by several factors such as culture, religion, ethics and law.\(^\text{18}\) In fact, “in 1998 the U.N. General Assembly adopted Resolution 43/131 which acknowledged the rights of citizens to international humanitarian assistance and the role of NGOs in humanitarian crisis”. Several other U.N. Resolutions were adopted, including Resolution 45/100 in 1990, which obliges states to establish corridors of peace to allow humanitarian assistance, and Resolution 46/182 in 1991, which obliges governments to accept humanitarian assistance relating to humanitarian actions. Nevertheless, this moral imperative without the U.N. mandate is often abused by intervening states. This gave rise to the

\(^{15}\) N. Cutler, supra note 44, at 578-79.


selective application of humanitarian intervention by states in cases that they perceive
deserve this principle.

The major limitation of this selective application without the U.N. mandate
has been inconsistency of policy and abuse of the principle. This stems from the fact
that, “because states will be governed by what they judge to be their national interest,
they intervene only when they deem this to be at stake”. 19 Since selective application
of humanitarian intervention is susceptible to abuse, it is important to seek the U.N.
mandate before intervention is conducted. Besides that, the major limitation of
selective application of humanitarian intervention has been its lack of uniformity in a
plethora of cases demanding different responses. From this perspective, humanitarian
intervention is an extraordinary exercise by external forces (another state, group of
states, international organization, or a combination thereof) in the internal affairs of a
target state in order to impose certain humanitarian values and practices on the latter.

6.3. The Relationship Between Non-Interference and Human Rights:
The Changing Face of Sovereignty

Since the latter half of the 20th century, both the reality and legal conception of
sovereignty have been profoundly affected by the emergence of the customary and
conventional human rights scheme. The concept of sovereignty requires a more
balanced and complex interpretation as growth of the international human rights
regime supports the view that the state itself is the subject of obligations in addition to
having an entitlement to rights. 20 As a concept, sovereignty has been continuously
redefined and modified, emerging presently as more of a ‘ticket for admission’ to
international fora rather than as a formula for shielding exclusive areas of national
concern. In fact, the tendency of all international activities in recent times has been
towards the promotion of the common welfare of the international community with a
corresponding restriction of the sovereign power of individual states. 21 Justices of the
ICJ have expressed similar sentiments regarding the erosion of the concept of absolute
sovereignty, finding that new international law must “limit absolute international
sovereignty of states according to the new requirements of life of peoples and must
yield to the changing necessities of that life”. 22 Former U.N. Secretary-General Perez

19 Ibid. at 108.
21 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951]
de Cuellar echoed a similar view in his 1991 Annual Report, stating that “the principle of non-interference within the essential domestic jurisdiction cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity”. In the aftermath of NATO’s intervention in Kosovo, the Netherlands’s delegate also stated in the Security Council that respect for human rights in contemporary international law may be greater and respect for sovereignty less absolute, as it is generally accepted in international law that “no sovereign state has the right to terrorize its citizens”.

Therefore, while the Charter does guarantee the sovereign equality of states, it has not operated as an interference or impediment to the growth of the international human rights regime: a state’s treatment of its own citizens is neither insulated nor protected from international scrutiny. This is consistent with the notion that domestic jurisdiction is ‘essentially relative’ and depends on the development of international relations. areas governed by international conventions to which a state is a party do not fall within the exclusive jurisdiction of that state. What non-interference obligations prohibit is ‘dictatorial interference’ in matters in which “each state is permitted, by the principle of state sovereignty, to decide freely”.

Matters upon which states are permitted to decide freely by virtue of sovereign equality would include the choice of a political, economic, social, or cultural system in addition to foreign policy formulations.

However, there is no doubt that contemporary international law has established that severe violations of human rights are matters of international concern. As such, reconciling human rights protection with the primacy of sovereignty need not be conclusively resolved because the two do not stand in direct contrast: sovereignty remains unrestricted only in regard to matters within the essential jurisdiction of the state.

As the ICJ has articulated, prohibited interventions are those which have “bearing on matters in which each state is permitted, by the principle of state

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26 The court there was considering domestic jurisdiction as articulated in Article 15(8) of the Covenant of the League of Nations
28 UN SCOR, 54th Year, 3988th Mtg., UN Doc. S/PV.3988 (1999). Not even the Russian Federation argued that the situation in Kosovo was an internal matter, the dominant view being that the FRY had violated its international legal commitments which “cannot be dismissed as an internal matter”.
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sovereignty, to decide freely”.²⁹ As systematic violations of basic human rights do not fall within the ambit of essential domestic jurisdiction, nor are they matters upon which states are permitted to decide freely, their mode of remedy or protection from outside sources will not, in all cases, necessarily offend the principle of non-interference: it is a principle which operates only in terms of purely domestic matters.³⁰

While the Charter did accord priority to state sovereignty and equality, those provisions interpreted within the framework of contemporary international law are not necessarily inconsistent with an intervention to protect the right to life. If Article 2(4) is in principle capable of exception, and humanitarian concerns in cases of massive human rights violations and if crimes against humanity do not belong to the sole province of state sovereignty,³¹ then carving out a limited exception to Article 2(4) which permits the employment of limited force for humanitarian purposes is not necessarily inconsistent with contemporary international law. The argument that sovereignty occupies a primordial place in international law, so much so that it operates as a bar to interference in cases of extreme humanitarian need, ignores the well-settled principle that sovereignty shields only matters of exclusive domestic jurisdiction, matters which do not include grave human rights violations.

6.4. The Internationalization of Human Rights

One of the goals of the allied powers during World War II was the realization that, only international protection and promotion of human rights can achieve international peace and progress.³² The Charter thus provided initial principles for the protection of human rights. One of its basic purposes, as stated in Article 1(3), is “promoting and encouraging respect for human rights”. Similarly, by Article 55,³³ the

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²⁹ Nicaragua, supra note 56 at para. 205.
³⁰ See North Atlantic Assembly, Resolution 283, Recasting Euro-Atlantic Security: Towards the Washington Summit (November 1998) at para. 15(e). Proposals within the NATO Parliamentary Assembly to extend the right of self-defence to embrace the “defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes”.
³¹ See Secretary-General Annan’s statements in U.N. Press Release, supra note 4.
³² Hersch Lauterpacht, *International Law and Human Rights*, (Archon Books, 1968), p.186. The preamble of the Charter declares the determination of the peoples of the world “...reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women ...” and a commitment “to ensure, by the acceptance of principles and methods, that armed force shall not be used, Save in the common interest”.
³³ Article 55 provides: “with a view to the creation of conditions of stability and wellbeing which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote... among
members of the U.N. reaffirm a commitment to promoting universal respect for and observance of human rights and fundamental freedoms for all. Under Article 56, all members of the U.N. “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55”.

In spite of differing opinions on their legal effect, the actual practice of the U.N. has been that it has not been prevented from investigating, discussing and evaluating human rights abuses and today even taking action despite the numerous constraints which the Organization faces. It would seem that the Charter provisions regarding human rights represent binding legal obligations for all states. The cumulative effect of these provisions is that intervention to prevent human rights abuses is still valid. While it may be doubtful whether states can be called to account for every alleged violation of the general Charter provisions, there is little doubt that “responsibility exists under the Charter for any substantial infringement of the provisions, especially when a class of persons or a pattern of activity are involved”.

Elaborating and supplementing the Charter provisions on human rights is the Universal Declaration of Human Rights (UDHR), which was adopted by the General Assembly on 10th December 1948. It proclaims a whole gamut of civil and political rights and economic, social and cultural rights pertinent to human existence. The Declaration at the very least serves as a yardstick in measuring the degree of respect for, and compliance with international standards of human rights.

The ICCPR, and the Optional Protocol on communication (petitions), was adopted by the General Assembly, and entered into force on March 23, 1976. The Covenant defines and sets out in much greater detail than the UDHR a variety of rights and freedoms. In addition it contains a number of rights that are not listed under the Declaration. It imposes an absolute and immediate obligation on each of the states parties in Article 2(1) to (respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind ...). Under Article 2(2) each Party (undertakes to take the

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necessary steps ... to give effect to the rights recognized in the present Covenant) where a right is not already protected by existing legislation.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966 entered into force in 1976. It contains 31 Articles and is divided into five parts. It elaborates upon most of the economic, social and cultural rights provided for under the UDHR, and frequently sets out measures that should be undertaken to achieve their realization. Under the Covenant, the duty of states parties is merely to take steps “to the maximum of its available resources” aimed at achieving “progressively the full realization” of these rights.

This provision seems realistic given the fact that economic constraints on states, (especially third world countries) may prevent the immediate enjoyment of those rights. However, the question is whether it is within the discretion of states parties to determine when available resources permit their realization.

It has been suggested that (the principle of progressive realization ... really means that a state is obligated to undertake a program of activities - including but not limited to specific measures listed in the Covenant - to realize those rights. While this obligation is limited by resource constraints, the Covenant indicates that priority should be given to this area and that the level of effort should increase over time).  

On the issue of standards to be applied under the Covenant, it is maintained that different measures would have to be adopted as a matter of practical reality, since no two states are likely to have the same available resources.

Apart from these instruments, there are also a host of declarations, conventions and instruments adopted by the General Assembly elucidating specific obligations pertaining to particular human rights. The U.N. by and large plays only a supervisory role in implementation and enforcement action. One writer suggests it may be classified as weak to strong depending upon how directly and quickly it acts in response to complaints. A number of institutional arrangements have been

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37 Brownlie, supra note 51, at 573.
38 These instruments address a broad range of concerns that include: the prevention and punishment of the crime of genocide; the humane treatment of military and civilian personnel in time of war; the status of refugees; the protection and reduction of statelessness; prevention of discrimination and the protection of minorities; the promotion of the political rights of women; the elimination of all forms of discrimination against women; the rights of children; rights of indigenous peoples; and, the promotion of equality of opportunity and treatment of migrant workers, among others.
established designed to deal with the promotion and protection of human rights. These arrangements constitute the international human rights regime. The U.N.’s efforts in this regard have been through the use of committees, commissions, sub-commissions, specialized agencies, and working groups. The main techniques employed in their enforcement measures have been communications, inquiries, investigations, periodic reports, advisory services, global studies of specific rights or groups of rights and recommendations. It uses global and regional conferences and seminars on various specialized topics, open to individuals and organizations, to make them aware of human rights values enshrined in international instrument.\(^{40}\)

The Human Rights Committee is the principal organ responsible for implementing the ICCPR.\(^{41}\) It has adopted a dynamic approach to protection by reminding states parties that the obligation under the Covenant is not only limited to respect for human rights, but also to ensure the enjoyment of those rights.

The Commission on Human Rights under Article 68 of the Charter is mandated to establish “commissions in economic and social fields and for the promotion of human rights”. The commission is instructed to report its recommendations on violations to the Economic and Social Council. The commission has created various programs for the promotion of human rights, as well as developing international machinery to deal with violations, such as the special rapporteurs and working groups.\(^{42}\)

Despite efforts of the U.N. aimed at promotion and protection there are still widespread human rights violation. Apart from weaknesses in the implementation procedures, the main problems encountered relate to: governmental commitment; problems of perspectives and priorities; problems in the field of fact-finding; problems stemming from institutional structure; the primitiveness of remedial responses, methods and procedures; responsibilities in the information process and problems of resources. As presently constituted, these mechanisms fail to deal with situations involving massive human rights violations, as past practice has shown.

\(^{40}\) Topics covered in such conferences have included: human rights in developing countries; the participation of women in the economic life of their states; human rights and scientific and technological development; women, equality, development and peace; and human rights teaching. The significance of these topics help to promote penetrating discussions of deeper issues of injustice underlying human rights violations.

\(^{41}\) See part IV of the Civil and Political Covenant.

\(^{42}\) See Report of the Commission on Human Rights (Annual).
In their survey of the U.N. Human Rights machinery, Pease and Forsythe indicate most states not only allowed these treaties to originate from U.N. bodies, but also that more than half of the international community became legal parties to them.

About a quarter of the international community has accepted monitoring systems of differing strength for the supervision of the implementation of these internationally recognized norms. Although few states objected to the overall process, “there is an overwhelming official consensus that at least the discussion of human rights is a proper international subject matter, even if many disagreements remain over definition and implementation”.

Apart from the U.N. Human Rights machinery, it is also worthwhile noting that most of the world’s regional organizations have enacted treaties bolstering the protection of human rights. Examples of these treaties are the European Convention for the Protection of Human Rights, the American Convention of Human Rights (ACHR) and the African Charter on Human and Peoples Rights. The accumulation of these instruments has helped in crystallizing legal norms in favour of human rights so that (. . .everyone is now entitled to certain basic human rights under U.N. Conventions, regional treaties, and bilateral agreements).

The various developments on human rights outlined above have had a significant effect on the status of individuals in international law. Each progress made in terms of concepts, standard setting, procedures and mechanisms leads to a realignment of the position of individuals in relation to states. If the above examination, broadly speaking, is correct, then it portends or indicates a gradual shift in thinking about absolute notions of state sovereignty and its corollary principle of non-intervention. It is increasingly becoming accepted that human rights violations within states will not preclude the taking of international action to redress those situations of abuse. Gross systematic violations of human rights have become a concern of the whole international community and not just a matter exclusively within the domestic purview of states, constituting infringement on their sovereign rights.

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These human rights treaties not only create binding legal obligations among states parties, but they also provide evidence of state practice and new attitudes regarding human rights. Particularly significant is the trend reflected in the Preamble to the Additional Protocol to the ACHR, which suggests that human rights treaties merely codify what is intrinsic in the human condition. It “recognizes that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”.47

The extension of this principle into the international arena suggests a theoretical shift in the conception of human rights. Although there were significant developments regarding human rights prior to the Charter, the human rights provisions of the Charter and the international human rights instruments discussed above were watersheds. Since the inception of the U.N. human rights regime, human rights issues have become important, and their internationalization has been increasingly recognized. Even though this is the case, and one finds an ethos of moral universalism underlying the international human rights instruments, one does not find any explanation why the human rights provided for are in fact human rights and why they should be accepted as universal. Taking action in support of human rights necessarily confronts objections of cultural relativism. Supporters of cultural relativism point out that it is impossible in a culturally diverse world to have universal notions of human rights. While the objective here is not to resolve the debate one way or the other, although a universal conceptualization of human rights is preferred; it tends to elucidate the issues at stake in the international human rights discourse. The significance of arguments about moral universalism should therefore serve to support the examination of the universality of the U.N. human rights instruments. Thus, some remarks about the concept of human rights and the debate it engenders will be appropriate. The concept of human rights does not lend itself easily to any precise definition.48

Although the concept eludes any precise definition, it can be argued that human rights are our entitlements as human beings, which we may demand from one another and from our societies. The idea of human rights is tied to the idea of human

dignity: are essential for the maintenance of human dignity. They are based on elementary human needs as imperatives. Human rights are universal and inalienable.

They exist by virtue of the right holder’s existence. They are not created or granted by the state or some agent and therefore cannot be taken away. The practical effect of this would be that rights are not creations of society, state, or any political authority, legitimate or not, and thus cannot be limited or taken away by them. If this were the case, then, it would follow that all human beings have rights in the same way and to the same extent regardless of race, culture, political system or any other distinction.

The conviction that human beings have certain rights, which governments have a duty to respect, essentially, is a reaction or response to a feeling of revulsion occasioned by acts of political, religious or economic repression. The universality of human rights is a feeling of moral outrage. This consciousness draws on the moral resources of humankind's belief that there is an underlying universal humanity, and that it is possible to achieve or strive to achieve a type of society that ensures that fundamental human needs and reasonable aspirations of human beings all over the world are effectively realized.  

The renaissance of natural rights and its consequent influence upon international human rights is regarded as a product of Western liberal thought and its justifications for claims about the truth, immutability, and universality of rationally accessed moral dictums. This conceptual approach, however, does not necessarily have universal acceptance throughout the world. The concept of human rights can assume different meanings to different societies, and is influenced depending on a particular society's perception by culture, economics, politics and religion, among other factors.

Polis and Schwab, for example, criticized the established human rights norms by expressing an objection to ethnocentrism thus: “Unfortunately not only do human rights set forth in the Universal Declaration reveal a strong western bias, but there has been a tendency to view human rights a historically and in isolation from their social, political, and economic milieu”.

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This particular moral/cultural relativist position which presents theoretical obstacles to human rights activism essentially asserts, firstly, that rules about morality vary from one place to another. Secondly, the way to understand this heterogeneity is to place it in its cultural context. Thirdly, it asserts that moral claims derive from, and are enmeshed in, a cultural context which is itself the source of their validity. There is no universal morality because the history of the world is the history of the plurality of cultures. The attempt to assert universality is a more or less well-disguised account of the imperial practice of making the values of a particular culture general.\(^{51}\)

In this respect, the U.N. human rights regime as enshrined in such documents as the UDHR, are futile proclamations derived from the moral principles valid in one cultural and thrown out into the moral void between cultures. In effect the particular is presented as the universal.

In practice, most governments accused of human rights violations often resort to the doctrine of state sovereignty to deny the legitimacy of external criticism. This defence, however, is commonly strengthened by some form of cultural relativism.

This relativism underlies the assertion of noninterference in the internal affairs of states. The argument usually goes that outsiders are not competent in matters relating to solving problems internal to another culture. Thus, a particular interpretation or even the basic idea of human rights may be alien to a particular culture, so that such a culture should not be judged by standards emanating from external sources.\(^{52}\)

There are few relativists, however, who advocate the extreme position that whatever is, is right, reducing relativism to subjectivism where, in the absence of grounded criteria every individual may determine what is right or wrong, good or bad, for him or herself. According to Puchala, the most readily defendable moral relativist position is the one provided for in the (Bangkok Declaration), adopted at the (World Conference Regional Preparatory Meeting) in April 1993. In that ‘Declaration’, the Asian states agreed that human rights need to be considered in a context that takes into consideration “the significance of national and regional particularities and various historical, cultural and religious backgrounds”. He succinctly argues that the moral relativist position turns out to be unsustainable for the following reasons:

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First, relativism tends to confuse empirical facts of differences in moral codes with philosophical justification for differences. Simply because there are differences does not mean that all the alternatives are right or acceptable. Second, the justification for relativism itself has to be philosophically located beyond relativism. That is, moral relativism can only be right if we did accept the universality of dictums such as mutual tolerance and noninterference in one another’s affairs. Third and at a more practical level, even the relativists balk in the face of the morally atrocious - human sacrifice, ritualistic mutilation, slavery, genocide, apartheid, concentration camps, gulags, and gas chambers.

To explain why such atrocious behavior is immoral invariably requires reaching for universals, and when presented with such behavior most relativists accordingly reach out. Finally, there also exists the damning assertion that relativism is itself immoral because, in the name of community standards, noninterference, political correctness, or the like, it leads to the condoning of principles and practices that are widely distasteful.\(^{53}\)

He argues for the reassertion of moral universalism by pointing out that if it is unjustifiable and moral relativism is unsustainable, then it would seem that the contemporary debate about the universality of human rights, if engaged philosophically, would result in an impasse. And if this were the case, the question of whether the U.N. human rights regime is to remain intact or be done away with would become an issue of politics, power, and money only, which could well be for the benefit of Western countries.

A strong case for moral universalism, according to Puchala, can be made which does not depend for its justification upon either the will of God or the immutability of natural law. He employs the aid of anthropologists who argue that scholars usually find what they seek. Those who have sought differences among cultures have found them.

By the same token, those who have sought similarities among cultures in recent works have also found many, especially in realms of morality. Furthermore, studies in contemporary psychology have reinforced the proposition that “human beings are genetically wired and cognitively equipped to behave morally”.\(^{54}\)

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These studies conclude that all human beings are similarly constituted regarding their moral capacities. The differences among them have only to do with different attainments of moral maturity. Accordingly, human beings achieving similar levels of moral maturity, irrespective of culture, have similar conceptions about the bases of right and wrong. Also, sociologists of religion have found out that the ethical contents of the major religions of the world are similar in their emphases upon such ideals as charity, civility, humility, piety, and nonviolence. Perhaps the international community's inability to agree on a universal conceptualization of human rights stems from the failure of perceiving what the most basic human needs are according to just priorities of each society. Individual and societal needs may vary from one environment to another at any given period of time. It is probably best that the international community perceives and recognizes this. However, concerns of humanity as a whole should outweigh any cultural preferences of different societies.

As Puchala poignantly points out, (our entitlement is not a claim on God or nature, but a claim on one another. The basis of our morality is in our obligation as human beings - individuals and in our societies - to allow and help one another to flourish as human beings. And since the human essence is universal, requirements for human flourishing are universal, obligations to promote such flourishing are universal, and therefore, so is human morality).

In sum, the status of humanitarian intervention is inextricably linked to the status of human rights. Greater respect for human rights will make the international community more likely to engage in actions to protect those rights when violated.

6.5. The U.N. Charter's Effect on Humanitarian Intervention

A consideration of the relevant principles of the Charter will now be undertaken to determine the justification for humanitarian intervention. In arguing the survival of the right of humanitarian intervention, the domestic jurisdiction norm becomes pertinent.

The starting point is the interpretation of Article 2(4). According to some scholars, emphasis must be placed on the need to interpret that provision broadly and consistently with its plain language. It is the fundamental provision of an organization established ‘to save succeeding generations from the scourge of war’. It cannot therefore be subject to an interpretation that would negate its true meaning and

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55 Ibid. at 12-13.
56 Ibid. at 14.
content. The conclusion reached for an absolute prohibition of use of force in any manner, it is argued, is further reinforced by an examination of the travaux preparatoires that led to drafting of Article 2(4).58

Support has also been found by commentators in international case law such as in the Corfu Channel Case.59 While this case can be distinguished on the ground that it did not touch directly on the principle of humanitarian intervention, arguments have been made to the effect that, the Court's (judgment should be interpreted as condemning all intervention, self-protection, or self-help involving the use of force - including... humanitarian intervention).60 Therefore, according to this interpretation of the Charter, the ban on the use of force was provided to preserve territorial integrity and political independence of states, its collective security measures were to ensure peace, and therefore unilateral humanitarian intervention is rendered illegal. However, a qualification must be placed on the prohibition of use of force under Article 2(4).

Intervention for human rights purposes would not contravene that provision if it is confined within the conditions for its exercise. It is argued that Article 2(4) is not an absolute proscription of use of force; for, if force is used in a manner which does not threaten the “territorial integrity or political independence of a state, it escapes the restriction of the first clause”.61

Thus, Schachter observes that “if these words are not redundant, they must qualify the all-inclusive prohibition against force”.62 In essence, Article 2(4) does not cover territorial inviolability so that a state's territorial integrity may be preserved even though there is a limited armed foray into that state's territory. On the contrary, views have been expressed to the effect that even in situations where a rapid withdrawal by the intervenor takes place when its mission is accomplished without

59 19491 I.C.J. Report 4. in that case, the United Kingdom government argued that its use of force in Albanian territorial waters was consistent with its Charter obligations because it “threatened neither the territorial integrity nor the political independence of Albania”. The court in rejecting this argument, stated: “To ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty”. It went on further to state “the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law”.
dissolution of the existing authoritative structure, that intervention will still temporarily violate the target state's territorial integrity and political independence.

Akehurst argues: (any humanitarian intervention, however, limited, constitutes a temporary violation of the target State's political independence and territorial integrity if it is carried out against that State's wishes). On the same subject-matter, Higgins notes: (even temporary incursions without permission into another state's air space constitute a violation of its territorial integrity).63

Levitin opines that a more sensible reading of Article 2(4) is that (a state's political independence is compromised whenever another state attempts through armed force to coerce it, to limit its choices on the international plane, or to interfere with its domestic political regime). Nanda, however, advocates a cautious approach by arguing for a limited use of force for humanitarian purposes which he suggests is permissible in international law, even though a temporary breach of a state's territorial integrity is occasioned.64

In any case, it is argued that provided conditions and limits set out under international law are met, there would be no violation of the territorial integrity or political independence of the target state.65 Since humanitarian intervention does not seek to challenge attributes of sovereignty, territorial integrity or political independence of a state, it will not fall within the scope of the Article 2(4) prohibition of force norm.

The other Charter provision meriting consideration in dealing with the right of humanitarian intervention is Article 2(7) which, as noted earlier, establishes the principle of non-intervention in the internal affairs of states. This Article, it seems, protects states against international action and activities occurring strictly within their territorial boundaries.

Thus, it becomes significant to determine whether human rights issues and their protection are matters lying essentially within the domestic jurisdiction of states.

For, if they are, then any right of intervention for whatever purpose would appear to be precluded. The interpretation of this clause has been qualified despite its

assertive nature. In the past, the U.N. has found that matters lying within a state's domestic jurisdiction provided no impediment to de-colonization or anti-apartheid actions.

In the same vein, some state treaty obligations affecting sovereignty and territorial boundaries cannot be regarded as matters “within domestic jurisdiction”. As states make commitments to a larger and more intrusive regime of international treaties and conventions and as customary international law expands its reach, the concept of ‘domestic jurisdiction’ shrink. If the further condition of essentiality mentioned in Article 2(7) is taken into account, issues subject to international inquiry become considerable, and call for reorientation of priorities.

Fundamental human rights must take precedence over any norms of non-intervention in the internal affairs of states. In stressing the need for balancing the rights of states (as mentioned in the Charter) against individual rights affirmed by the UDHR and other human rights Conventions, Javier Perez de Cuellar, as Secretary-General of the U.N, challenged the traditional construction placed on Article 2(7). He maintained that a “new balance must be struck between sovereignty and the protection of human rights”.

As already noted, it is now increasingly accepted that human rights issues are no longer strictly within the domestic purview of states. It is a matter of concern for the whole world community. Consequently, human rights abuses prompting humanitarian action are no longer “matters essentially within the domestic jurisdiction of a state”, and so will not amount to a violation of the non-intervention principle.

It should also be noted that Article 2(7) ends with a critical proviso: “this principle shall not prejudice the application of enforcement measures under Chapter VII” which deals with enforcement actions to maintain international peace and security. The Security Council is now engaging in more Chapter VII enforcement

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66 See for example, Declaration on the Granting of Independence to Colonial Countries, G.A. Res. 15 14,(1960); G.A. Res. 1805,(1962). There are in addition other Declarations on the subject- matter, culminating in General Assembly Resolution 2288 (1967), which called for global decolonization.


68 Article 27 of the Vienna Convention on the Law of Treaties of 1969 affirms the principle recognized by several international tribunals that a “party may not invoke the provisions of internal law as justification for its failure to perform a treaty”.

actions in matters that were previously considered within the domestic jurisdiction of states. Article 2(7) does not affect the right of humanitarian intervention.\textsuperscript{70}

For, if the most basic rights are not protected, governments will engage in gross violations of human rights without fear of punishment. Attempts by other states aimed at protesting the occurrence of human rights violations will only meet with rebuff under the cloak of non-intervention in domestic matters. In addition to the above considerations, some proponents express their concern over the preservation of humanity, arguing that the value of human life takes precedence over legal principles.

Thus, basic humanitarian feelings lend credence to the view that states cannot remain indifferent whilst massive human rights violations take place. Another reason for continued justification of the right of humanitarian intervention lies in the failure of the U.N. realizing its original aims. The founding fathers of the Organization expected states would take collective action under the aegis of the U.N. in situations of (threats to the peace), (breaches of the peace), or (acts of aggression), rather than rely on unilateral state action. The Security Council under Chapter VII of the Charter is seized with mandatory jurisdiction to take action in those situations.\textsuperscript{71}

This machinery for collective security and enforcement has, however, proved to be largely ineffective. Thus, if the Security Council failed to act under such circumstances, the cumulative effect of Articles 1, 55 and 56, would be to establish the legality of unilateral self-help. In effect, the deterioration of the Charter security regime has stimulated a partial revival of a type of unilateral \textit{jus ad bellum}. This contemporary doctrine relates only to the vindication of rights which the international community recognizes but has, in general or in a particular case, demonstrated an inability to secure or guarantee. Included in this category of rights is humanitarian intervention.\textsuperscript{72}

Thus, individual states may undertake humanitarian interventions, for there exists “a coordinate responsibility for the active protection of human rights: members may act jointly with the Organization ... or singly or collectively”.\textsuperscript{73} Were this not the

\textsuperscript{71} U.N. Charter, Articles. 39-44. Also, by the “Uniting for Peace” Resolution, where the Council is unable to function, the secondary authority of the General Assembly becomes operative. The Assembly may thus perform duties and powers of the Council. See, Uniting for Peace, G.A Res. 377(v), U.N. G.AO.R Supp. No. 20 (A/ 1775), p. 10.
case, as McDougal and Reisman contend, it “would be suicidally destructive of the explicit purposes for which the U.N. was established”.

In sum, it could be argued that the provisions of the U.N. Charter, declarations and covenants constitute an elaborate international human rights regime that could justify intervention in protection of those rights.

6.6. Human Rights and World Order

The question of whether humanitarian concerns can serve as the primary basis of a threat to peace determination is essentially a question of how the protection of human rights should be emphasized in relation to the protection of state sovereignty (particularly domestic jurisdiction). State sovereignty is one of the foundational principles of the present world order. Therefore, many commentators and states are reluctant to rely on humanitarian concerns as the primary basis of a threat to peace determination.

They realize that because the protection of state sovereignty and international protection of human rights are mutually exclusive, state sovereignty is diminished to the extent that human rights receive international protection. However, because of the accumulated weight of international human rights law, the importance of protecting human rights is now considered by many to be as important as the protection of state sovereignty. This realization gives credibility to the argument for basing Chapter VII determinations and actions on human rights concerns. The argument asserts that when the Council determines a threat to peace and enacts enforcement measures based on humanitarian concerns, it acts responsibly to ensure the maintenance international peace and security.

74 Ibid. at 440.
This argument recognizes the clear link that exists between the violation of human rights and the maintenance of international peace and security. Article 55 of the U.N. Charter states that the promotion of (universal respect for and observance of, human rights and fundamental freedoms ... is necessary for peaceful and friendly relations among nations...). According to the argument, allowing massive human rights abuses to go unremedied leads to further violations, and serves to undermine the stability of the world order. Therefore, although the Charter does not go so far as to oblige the U.N. to protect human rights and fundamental freedoms, it clearly vests it with the competence to protect such rights and freedoms because of the detrimental effect their violation has on international stability. This competence vests most fully in the Security Council because it has the primary responsibility for the maintenance of international peace and security.

6.6.1. Peace as a Controlling Norm of the Charter

6.6.1.1. The Meaning of Peace

Following World War II, peace became the supreme goal of the world community, with Article 2(4) formally renouncing the use of force as an instrument of national policy to resolve international disputes. The term ‘peace’ is usually understood to mean the absence of inter-state military conflict or forceful intervention.

This has been asserted as another impediment to the emergence of any right to humanitarian intervention: that the supremacy of refraining from armed conflict, in order to “save succeeding generations from the scourge of war” supersedes all other goals.

While this assertion is not without its merits, both the Preamble and Article 1 of the Charter indicate that peace is more than the absence of war. The Dumbarton Oaks Proposals addressed the importance of international co-operation in social spheres, these provisions based on the belief that, “apart from the abolition of war, the maintenance of peace and security required economic and social stability among and within states”.

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78 U.N. Charter, Article 55.
79 U.N. Charter, Article 24(1).
Some would likely take issue with this proposition and argue that peace, as understood in the Charter, must strictly mean the absence of military conflict or use of force because it was conceived in the aftermath of World War II’s devastation, the goal of the instrument being to “save succeeding generations from the scourge of war”. 83

Even if that is how the drafters conceived the meaning of peace, since 1945 peace has been reconceived by the international community. The absence of military intervention by itself may be too simplistic a manner in which to identify or secure peace: if there is to be perpetual peace in a world of nation states, the individuals who live in them must be free; their human rights must be respected. As stated by former Secretary-General Perez de Cuellar, it is possible for (violations of human rights to imperil peace); 84 a fortiori where the right to life is at stake.

6.6.1.2. The Relationship Between Peace and the Protection of Human Rights

Some scholars have asserted that the protection of human rights within the Charter regime is “subsidiary to the objective of limiting war and the use of force in international relations”. 85 In holding peace as the ultimate goal of the international community, it has been argued that it is “protected primarily through respect for the equality of states and the renunciation of war as an instrument of national policy”.

While the renunciation of war or inter-state armed conflict may be one necessary component of securing a peaceful co-existence of states, it cannot by itself constitute a sufficient condition. The logical conclusion of such a proposition would mean that Rwanda categorically enjoyed peace in 1994 merely because it was not involved in inter-state armed conflict.

The suppression of widespread human rights violations may be intimately tied to the maintenance of international peace as the protection of individual rights is not only a valuable goal in itself but also a precondition for long-term domestic and international order. The argument that peace, interpreted as the absence of force, should reign at all costs ignores the reality that peace cannot exist where the fundamental observance of human rights is lacking: “the right to life as a human right may not be subordinated to the right to peace as a right. The relationship is one of interdependence”. 86

83 U.N. Charter Preamble.
84 Report of the U.N. Secretary-General Perez de Cuellar, supra note 10.
6.6.1.3. Human Rights Violations: Threats to the Peace?

Admittedly, cases where human rights violations, in and of themselves, threaten international peace will be rare. Humanitarian catastrophes or widespread human rights violations “may entail a threat to international peace and security, but they do not necessarily do so”. At the same time, while such cases may not be common, it cannot be ignored that the potential for various situations to threaten peace, beyond those of merely employing military force, remains. As such, human rights and international peace cannot always be neatly divorced. This notion has been recognized at various points in history: (i) the Peace Conference following World War I, (ii) Franklin Roosevelt's Four Freedoms Address, and (iii) the Atlantic Charter.

In 1954, Former U.N. Secretary-General Lie also identified economically underdeveloped areas and the struggle of subjugated peoples for fuller freedoms and national independence as potential threats to international peace.

The Security Council is an appropriate organ to look to for indications of international legal developments. Council Resolutions demonstrate that a wide variety of situations which do not involve the use of force between states can constitute threats to peace, including the following instances:

- The unilateral declaration of independence by Southern Rhodesia;
- Domestic racial policies in South Africa;
- The repression of the civilian population, particularly the Kurdish peoples, in Iraq;
- The alleged support for state sponsored terrorism by Libya and its refusal to extradite individuals suspected of participation in the bombing over Lockerbie, Scotland;

89 President Roosevelt, ‘Wartime Aid to Democracies’, The Public Papers and Addresses of Franklin D. Roosevelt, (Washington, 1938-50) vol. 9, p. 672, stating that human rights are “the necessary conditions of peace and no distant millennium”.
90 Whereby Churchill and Roosevelt agreed that “complete victory over their enemies was essential to defend life, liberty, independence and religious freedom and to preserve human rights and justice in their own lands as well as in other lands”, (14 August 1941).
Chapter – 6: Humanitarian Intervention in Internal Conflicts

- The breakdown of the state and human suffering in Somalia;\(^\text{96}\)
- The refusal to accept election results in Haiti;\(^\text{97}\)
- The presence of civil conflicts in Liberia\(^\text{98}\) and Angola;\(^\text{99}\) and
- The grave humanitarian situation and impending humanitarian catastrophe in Kosovo, FRY.\(^\text{100}\)

As a necessary corollary, if these situations can threaten peace, the absence of inter-state military force alone is clearly not a sufficient condition for the existence of peace. The Security Council has expressly articulated that (the absence of war and military conflicts ... does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security).\(^\text{101}\) The threat of massive human rights deprivations would therefore constitute a threat to peace as the term has come to be defined through U.N. practice. A literal interpretation of Article 2(4) cannot always sufficiently reflect this principle because it fails to account for the capacity of gross human rights violations to imperil peace: a strict reading of the rule presupposes that the only threat to the right of political independence of a people is that of external and overt invasion.\(^\text{102}\)

Through such instruments as the UDHR, Article 56 of the U.N. Charter, the ICCPR\(^\text{103}\) and the ICESCR,\(^\text{104}\) the international community has further demonstrated an overriding commitment to human rights, a goal that is intimately interdependent and connected to that of maintaining peace and security.\(^\text{105}\) In fact, some scholars have submitted that the right to peace should take its cue from the “imperative norm” of the right to life.\(^\text{106}\) This is not to suggest that human rights somehow occupy greater

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\(^\text{105}\) McDougal, Lasswell, & Chen, supra note 88, at 241.

\(^\text{106}\) Ramcharan, supra note 164 at 6.
hierarchical status in the Charter but merely that their promotion and respect is, in some cases, a necessary component for the existence of peace.

6.6.1.4. Peace: The Absence of Force?

Equating peace with the mere absence of force, in every situation, posits the argument as if there were always a stark choice between maintaining peace and protecting human rights, but the concepts are not always capable of separation. There will be times where the preservation of peace is closely tied to the protection of human rights. The argument that the Charter clearly privileges peace over dignity ignores the reality that the two concepts may be intimately interconnected as the securing of peace, broadly understood, will at times potentially rest on the assurance of human dignity.

The realization that dignity can be a precondition for peace is necessary in placing this analysis within the reality of international relations. The apparent tension between the relevant Charter provisions can therefore be reconciled, since the legal obligation to maintain peace may, paradoxically, be accomplished through the use of force. As former U.N. Secretary-General Annan stated following the crisis in Kosovo, the parties who drafted the Charter were experienced in war but were nevertheless aware “that there are times when the use of force may be legitimate in the pursuit of peace”. 107

The critical question in a decentralized security system is not whether force was employed “but whether it has been applied in support of or against community order and basic policies”. 108 The Preamble of the Charter recognizes a similar possibility by stating that “armed force shall not be used, save in the common interest”. 109

The proper question, in terms of assessing the emerging legality of humanitarian intervention, may therefore be whether the use of force is justified as a method to restore peace because once there is large scale loss of life through systematic human rights abuses, peace has already been relinquished. Thus, the inquiry into whether the maintenance of peace need trump the protection of human rights is not proper inquiry as the mere absence of military conflict between states is not sufficient in and of itself for the creation or maintenance of peace. 110

108 Reisman, supra note 183 at 284.
110 Charney, supra note 152, at 834-835.
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As such, the argument that a right to humanitarian intervention is necessarily precluded by the hierarchical position that human rights occupy in the Charter in relation to the provisions regarding peace, does not itself offer a satisfactory justification to prohibit the emergence of such an exception in international law.

6.7. Defining Humanitarian Intervention

The next inquiry is to determine which factors or circumstances must be present if a right to humanitarian intervention can be exercised. The components discussed below are necessary but not sufficient preconditions for the exercise of any right to humanitarian intervention. If such a right were to emerge and crystallize, it would only be capable of being exercised within the following restricted parameters.

6.7.1. Nature of the Right Involved: The Right to Life

Humanitarian intervention would be restricted to cases where the right to life is at stake. A doctrine of humanitarian intervention is inapplicable to human rights abuses in general. Since human rights violations are a common occurrence in the international community, if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other.

Furthermore, a doctrine of humanitarian intervention which recognized the equal validity of civil and political rights and economic, social and cultural rights would be unable to distinguish between the NATO intervention in Kosovo and the intervention by the Soviet force, in 1968, to end the ‘Prague spring’ in Czechoslovakia.

The practice of states further reflects that loss of life is the appropriate initial threshold for any humanitarian intervention. This practice is also consistent with the principle that the right the intervening states seek to protect must be one that is both fundamental and universal in nature. The right to life has attained the status of jus cogens, recognized as a (primordial human right) by the international community.

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113 Legality of the Use of Force (Provisional Measures), “Oral Pleadings of Italy” (11 May 1999), I.C.J. Doc. CR 99/19 at 6: Italy argued that the aim of NATO's operation in Kosovo was “the protection of the right to life”. Bosnia and Herzegovina stated in Security Council debates at the time of the NATO intervention in Kosovo that military action may be “the only option available to save innocent lives”, U.N. SCOR, 54th Year, 3988th Mtg., UN Doc. S/PV.3988 (1999) at 12.
As such, the right to life has been considered as “the most prominent and undisputed human right protectable by humanitarian intervention”.  

6.7.2. Scale of Deprivation or Violations: Humanitarian Catastrophe

As military intervention for humanitarian purposes is an ‘exceptional measure’, large scale loss of life must be evident. Only severe threats to life, on a widespread scale, will warrant consideration of a military response. The international community has generally required evidence demonstrating overwhelming humanitarian distress in that the right to life was about to be violated on a massive scale or that there was an ‘overwhelming necessity to act’ to avoid additional loss of life. It has been and should continue to be incumbent on the intervenors “to make the case to other governments and domestic and international public opinion that the violations of human rights within the target state had reached such a magnitude that ... they shock the conscience of humanity”.  

The practice of states demonstrates that large scale loss of life is a threshold requirement when considering intervention for humanitarian purposes. In a statement to the House of Commons the Secretary of State for Defence for the U.K. described this as the presence of an “immediate and overwhelming humanitarian catastrophe” which could only be averted by the use of force. Other NATO member states couched their justifications for intervention in Kosovo in similar terms: (i) the U.S., Germany, and the Netherlands referred to the “humanitarian catastrophe that engulfed the people of Kosovo”; (ii) Canada stated that its participation was prompted by events that “shocked the conscience of the world”; and (iii) Italy argued NATO was compelled to intervene to halt “ongoing genocide”.  

While humanitarian intervention should undoubtedly be reserved for cases which involve large scale loss of life, in certain cases such loss of life may be prospective or threatened. Given that the very basis of humanitarian intervention is

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the protection of humanity, there cannot be a principle forcing the intervening party to wait until the destructive act has been committed. Such intervention being preventative rather than punitive, the existence of the imminent danger is sufficient.

Humanitarian intervention may therefore encompass preventative action.\textsuperscript{119} As stated by the U.K’s Permanent Representative to the U.N., NATO’s action in Kosovo was justified to prevent a humanitarian catastrophe, and evidence demonstrated that such a catastrophe was imminent.\textsuperscript{120} State practice seems to suggest that the decision to intervene may therefore be subject to a test of reasonableness or a “good faith determination by the prospective intervenor that human rights violations are in fact imminently threatening, on the brink of evolving into actual mass deprivation”. It would create an anomaly in international law to require that an intervening party wait for actual violations to occur prior to taking any preventative action.

There is, of course, the fear that intervening states will be the sole arbitrers of the necessity to intervene: that allowing a state or coalition to make its own ‘good faith’ determination of the circumstances which might permit intervention would necessarily open the door to abusive claims. This is somewhat untenable because states are consistently subject, in their dealings, to some form of sanction for illegal behaviour in addition to an overriding duty to conduct their dealings in good faith.

Furthermore, the idea that international law has no bearing on state’s protection of their interests is not reflected in practice. As Christopher Greenwood has suggested, “if governments believe that they are free to do as they please, without regard to international law, when faced with threats to their fundamental interests, they do not explain their actions in those terms”.\textsuperscript{121} States have consistently demonstrated that they require a basis of legitimacy in which to ground their actions, both to their own citizens and to other states.\textsuperscript{122}

6.7.3. Purpose of Military Involvement: Relief of Humanitarian Need and Protection of Persons

States have rejected a doctrine of humanitarian intervention that would include the overthrow of a government “even if that government had been responsible for

\textsuperscript{120} UN SCOR, 54thYear, 3988th Mtg., UN Doc. S/PV.3988 (1999) at 12.
massive human rights violations”. The purpose of every phase of a humanitarian intervention must be the relief of humanitarian need and the protection of the victimized population: neither territorial or economic goals nor any objectives designed to effect a change of government in the target state may form part of a humanitarian intervention.

The overthrow of the target state government clearly goes beyond the parameters of a humanitarian intervention since, unlike massive violations of human rights involving large scale loss of life, the 'choice' of government is wholly an internal matter.124

It has been suggested that one method of ensuring the intervening state's 'purity' of humanitarian motive may be to require relative disinterestedness of the parties. However, this component is fraught with difficulty as it is highly subjective and the exercise of imputing motives to states is beset with ambiguity. As Dino Kritsiotis has argued, objective, de minimis legal criteria ought to be preferred over attempts to evaluate subjective intentions as “even where the true motives behind an international action are discernible, using these motives to trump the lawfulness of an operation is unreasonable where the sole consequence of a given operation is the actual protection of human life”. The fact that a state or coalition has some interest in an intervention should not, in and of itself, preclude the intervention from falling within this definitional framework: if the overriding motive is the protection of humanity, some considerations of national interest should not be taken to necessarily invalidate the resort to force.125

At first blush, the presence of a ‘national interest’ seems to fly in the face of an operation supposedly driven by purely humanitarian motives. However, while ‘national interest’ does carry a connotation that states historically resort to war to protect their national interests rather than to defend humanitarian principles, “in an increasingly small and interdependent world this is too narrow a definition of national interest”. In a similar vein, the ICJ has recognized that “all states can be held to have a legal interest in their [human rights] protection; they are obligations erga omnes”.126

125 Lillich, supra note 133, at 325 at 326.
6.7.4. Nature of Military Involvement: Necessary and Proportionate to Achieving Only Humanitarian Goals

Each component of the intervention must be directed exclusively towards ensuring the success of its humanitarian objectives.\textsuperscript{127} Specifically, the method of intervention must be reasonably calculated to end the humanitarian catastrophe as quickly as is possible and involve measures to protect civilians, avoid collateral damage to civilian society, and preclude any punitive or retaliatory action against the target government.\textsuperscript{128} Any use of force must be necessary and proportionate to the humanitarian aim of the operation, strictly limited in both time and scope: as described by the U.K., it is the employment of the minimum force necessary to achieve humanitarian ends and a withdrawal of forces at the earliest point in time that is consistent with the humanitarian objectives. Once the humanitarian goal has been achieved, “the legal mandate for the use of force (or the presence of foreign forces) expires and any continued force or presence will solicit international public censure and become vulnerable to charges of unlawful action”.\textsuperscript{129}

6.8. Humanitarian Intervention in the Post Cold-War Era

Although some governments openly referred to humanitarian goals to justify intervention in the 19\textsuperscript{th} century, during the Cold-War states were reluctant to follow this path for fear of establishing a legal precedent in favor of a right of humanitarian intervention. This apparent change in behavior reflected substantial changes in international society. During the Cold-War era, decolonization accelerated, increasing the number of states; but the legitimacy of these states was an ongoing struggle given the pressures for economic development coupled with the competing forces of ethnic nationalism. Furthermore, the ideological conflict between the superpowers often played itself out in the newer states, and ostensibly involved their internal makeup, allegiance, and ultimately their legitimacy.

With these pressures on states, a formal right of humanitarian intervention appeared to threaten the stability of the nation-states system. States feared that humanitarian intervention would be manipulated by the superpowers or ideological regimes to intervene at will and threaten the independence of many states.


\textsuperscript{128} Kosovo Report, supra note 122 at 194.

\textsuperscript{129} Schacter, supra note 61, at 113.
Therefore, while the major powers of the 19th century who undertook the interventions were fairly secure in their own legitimacy and in the inter-national norms of sovereignty, the twentieth century reflected insecurity and uncertainty about the survival of the states system itself.

Yet, despite the apprehension regarding the impact of a formal right of humanitarian intervention, the human rights issue appeared and reappeared during the Cold-War. The era introduced many important precedents regarding the scope of the nonintervention principle and the extent to which a state or the U.N. as a collective body could intervene where human rights issues were involved.\textsuperscript{130}

The collapse of the Soviet Union and the victory of the capitalist model of development have had two impacts on the U.N. First, the absence of a major superpower conflict has left the U.N. with a greater voice than in previous years.

During the Cold-War, the superpower conflict restrained the U.N. from taking meaningful action on the side of non-intervention or human rights in many cases. The U.N's political paralysis has since ended. However, in the aftermath of the superpower conflict, the post Cold-War era has witnessed tremendous turmoil internal to states caused by movements for ethnic self-determination that have resulted in tragic humanitarian consequences.

During the Cold-War, hostility between the Soviet Union and the U.S. and the ideological struggle between capitalism and communism dominated international relations. The cessation of this hostility means that decisions concerning the use of force can now be made on factors other than containment and spheres of influence. As the only remaining superpower, the U.S. faces few overwhelming strategic threats from abroad and if it chooses, can increasingly allow its ideals to govern its foreign policy.

U.S. intervention in Somalia, undertaken for humanitarian reasons with few military, economic or political interests at stake, represented a bold and definitive assertion of the humanitarian intervention principle.\textsuperscript{131}

Even before the disintegration of the Soviet Union, the world community began to cooperate in the promotion of human rights. The responses to the Rumanian internal conflict highlighted this increased cooperation. During the last days of its

\textsuperscript{130} Ibid. at 114
power, the Ceausescu regime’s atrocities against the Rumanian people were uniformly condemned by the international community. Even though no forcible intervention occurred, the prospect was seriously considered by a number of governments. France offered troops to the rebel contingent. In a historically unprecedented invitation, U.S. Secretary of State James Baker, said that “the U.S. would support Soviet military intervention”.

Baker’s green light to the Soviet Union demonstrated a new international cooperation and a greater willingness on the part of powerful international actors to examine and influence a state’s treatment of its own nationals.

Besides overshadowing the importance of humanitarian issues in foreign policy, the Cold-War effectively prevented the Security Council from playing an active role in world affairs. The voting mechanism for the Security Council, which grants the five permanent members the power to veto any Council action, all but guaranteed that the Council could not engage in enforcement measures during the Cold-War. Enmity and mistrust between the U.S. and the Soviet Union assured that almost any proposed action would be vetoed.

As a result, the U.N. has been called upon to monitor, moderate, and directly intervene in every major conflict since the end of the Cold-War. These changing circumstances have led to an important shift in U.N. thinking. Whereas the Charter expressed a strong distinction between international conflict and matters of an essentially domestic nature, the U.N. of the 1990’s has internationalized many internal conflicts on the rationale that they create potential international threats to peace and security. Internal conflict, in the eyes of many political observers, is currently the most significant threat to the society of states.

Hence, the U.N. now recognizes that economic development and ethnic self-determination are among the major challenges confronting the modern state, and has turned its sights on the prevention of conflict within states. For example, in An Agenda for Peace, the U.N. Secretary General offers many suggestions for adapting the U.N. to internal conflict prevention. It identifies the dangers of ethnic nationalism for multi-ethnic states and emphasizes the importance of developing civic

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nationalism, with respect for democracy and human rights as essential to the survival of modern multi-ethnic states.\footnote{134}{N. Cutler, supra note 18, at 578.}

In addition, the U.N. now openly acknowledges that sovereignty is not absolute and that there must be some accommodation between states to address transnational problems.\footnote{135}{Ibid. at 577-79.} In one sense, this is the natural consequence of the shift from the traditional interstate focus of international law to internal conflicts. The U.N. now recognizes that contrary to a traditional positivist view, protecting human rights may not only be consistent with sovereignty, but also may be necessary for the survival of many multi-ethnic states. The human rights consequences of internal conflict threaten to undermine the very foundation of the international society of nation-states should both the causes and consequences of internal conflict be left unaddressed. The U.N. authorized actions in Northern Iraq, Somalia, Rwanda, Haiti, and East Timor reflect the new approach to human rights and internal conflict; in each case the humanitarian cost of internal conflict was held to constitute a threat to peace and security, and, hence the U.N. arrived at a justification for intervention.

The end of the Cold-War and the dramatic collapse of the Soviet Union mean that at least for now, an automatic veto will not hamper Security Council action.

Security Council actions against Iraq, Somalia, Rwanda, Haiti, and East Timor as shown in the subsequent part below demonstrate that the new potential for enforcement measures. This in turn has created high hopes in the international community that the Council will be more likely to undertake collective action and to take a more active role in world affairs.\footnote{136}{W. Micheal Reisman, ‘Some Lessons from Iraq’, 16 Yale J. Int’l L, (1991), pp. 203-204.}

Collective intervention provides safeguards to prevent the invocation of humanitarian concerns merely as a pretext for an otherwise illegal invasion. Since the adoption of the U.N. Charter, the doctrine has, in fact, been invoked to justify unlawful invasions.\footnote{137}{Michael J. Bazyler, ‘Re-examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia’, 23 Stan.J.Int’l’l,(1987), pp.547-548. The Soviet Union justified its unlawful invasions of Hungary (1956), Czechoslovakia (1968) and Afghanistan with (quasi-humanitarian) excuses.} This potential abuse of humanitarian intervention made many international diplomats and scholars wary of recognizing the doctrine. The end of the Cold-War has made these types of collective actions to protect human rights possible.
6.9. Responsibility to Protect: State Sovereignty and Human Rights

The uncertainty that followed the humanitarian interventions of the 1990s, particularly Kosovo, led to efforts at consensus-building to reach common ground on the conditions under which humanitarian intervention should be considered permissible. The most important of these efforts was the creation of the International Commission on Intervention and State Sovereignty (ICISS), an international commission of experts sponsored by the Canadian government under U.N. auspices that issued a report to the Secretary-General in 2001.138

The Responsibility to Protect, addresses the contentious issue of balancing the rights and responsibilities inherent to a state with those of a state's citizens.139 The Commission asserts that one of the most important steps towards resolving the apparently incompatible notions of traditional state sovereignty provisions and humanitarian intervention would be a clarified redefinition of state sovereignty. The current, prevailing definition stems from the seventeenth-century (Treaty of Westphalia) and the Charter of the U.N., and assures certain rights and protections based on the concept of state equality.140 In their evaluation of state sovereignty, the ICISS helps create a working definition for the term: ‘State sovereignty denotes the competence, independence’, and legal equality of states.

The concept is normally used to encompass all matters in which each state is permitted by international law to decide and act without intrusions from other sovereign states. These matters include the choice of political, economic, social, and cultural systems and the formulation of foreign policy. The scope of the freedom of choice of states in these matters is not unlimited; it depends on developments in international law (including agreements made voluntarily), and international relations.

The ICISS provides a basis for the prevailing ideas of state sovereignty. After starting with this general definition, the ICISS goes on to delineate a number of limits

139 ICISS, Report, supra note 15.
140 Ibid. at 12.
on and challenges to sovereignty.\textsuperscript{141} The Commission contends that these limitations have yielded a new definition of sovereignty - one that is more consistent with the preservation of human rights than the potential for sovereign authority to mask humanitarian emergencies and human rights violations.

The ICISS-proposed definition would alter the conception of sovereignty from an idea based on the privileges bestowed upon the state to one predicated upon the responsibilities that states must assume for their citizens. The contention put forth stresses that states are under a responsibility to protect their citizens, and if a state fails to protect its citizens, then the international community can and must take the responsibility for human security. This conception elevates “the people's sovereignty, rather than the sovereign's sovereignty”.\textsuperscript{142} Sovereignty, in this case, should be viewed as a bottom-up practice insofar as it represents a power that ascends from the level of the citizens upwards to their governments. This is in contrast to traditional conceptions of sovereignty as a top-down process in which the greater international society, often through organizations such as the U.N.O, extends the rights, privileges, and responsibilities of sovereignty down to a state.

A redefined concept of sovereignty remains a necessary precondition for increased legalization and legitimization of humanitarian interventions. For if a notion of sovereignty consistent with the ICISS findings gains widespread acceptance among the society of states, the principle of non-intervention will be weakened. The current statist-based definitions of sovereignty may skew the balance between human rights considerations and state sovereignty in international law: “By prohibiting even the most well-intentioned interventions, the current per se illegality of unilateral humanitarian intervention perpetuates this imbalance and calls into question the desirability of a body of law that protects human rights abusers more than the abused”.\textsuperscript{143} According to this view, the need to rebalance the provisions of human rights and state sovereignty warrants a redefinition of sovereignty even if the principle of non-intervention gets impaired in the process.

Proponents of humanitarian intervention accurately identify redefining the traditional Westphalian - based concept of state sovereignty as a potential pathway to

\textsuperscript{141} Ibid. at 13.
\textsuperscript{143} Ibid. at 875.
wider acceptance of unilateral humanitarian intervention. However, identifying a problem and proposing a feasible solution are two drastically different steps.

Implementing such a redefinition of state sovereignty, as proposed by the ICISS, would require both broad and specific state support. Approval for this redefinition would erode the protections of non-intervention. It would also amount to the vast majority of U.N. members repudiating what Algerian President Abdelaziz Bouteflika, addressing the U.N. General Assembly in 1999 in his capacity as head of the OAU, called: “our final defence against the rules of an unjust world.”

There would seem to be very little practicality in suggesting that such a measure could garner significant world-wide support—member-states who are potential sites of intervention far outnumber those who have the power to intervene. Nor would there be any significant checks on a right to unilateral humanitarian intervention beyond the loose requirement that a mission have a stated humanitarian goal. Many states, especially those in the developing world, tend to view a right to unilateral humanitarian intervention “as the thin end of a neo-imperialist wedge.”

A right that is inherent to an ICISS-type redefinition of state sovereignty. This is not to suggest that human rights concerns are not shared by nearly all U.N. members, but rather that a redefinition of state sovereignty that focuses on the rights of individuals and supports unilateral humanitarian intervention, while potentially weakening the protections of territorial integrity or political independence, provided by traditional conceptions of state sovereignty, may never be acceptable, legitimate, or incorporated into state practice by most U.N. members.

In addition to the legitimacy problems presented in the ICISS report's recommendations, pro-intervention works such as (The Responsibility to Protect and Wheeler's Saving Strangers) take a selective view of humanitarian intervention under international law. Though conceding that no customary international law legalizes unilateral humanitarian intervention, their pro-intervention analysis is based on the presumption that such a law does exist. In fact, in the paragraph immediately following the non-existence of customary international law admission, the report continues: “That intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is

145 Ibid. at 24.
occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator”. 147

Setting aside that this is but another example of analysis that lumps states that are unable to prevent humanitarian disasters with those that are unwilling to do so, references to any role for the U.N. Security Council are conspicuous only by their absence. Previous Security Council actions and resolutions serve only to as a legitimating factor for future interventions, regardless of whether they occur unilaterally or through the U.N.O., as long as they have humanitarian objectives.

Allowing international policy to acknowledge and commend knowingly illegal behavior, such as unauthorized humanitarian interventions, threatens to destabilize international security through an erosion of law at an international level. This threat exists regardless of the moral and humanitarian underpinning of any specific international law violations. While international concern for human rights swells, and the body of human rights law grows, proposed policy changes must still be mindful of at least two pitfalls: outpacing the international political will for change and establishing rights easily susceptible to abuse.

6.9.1. The Six Principal Criteria for Humanitarian Intervention Under the Responsibility to Protect

The report among other issues argues that, the so-called “right of humanitarian intervention” has been one of the most controversial foreign policy issues of the last decade-both when intervention has happened, as in Kosovo, and when it has failed to happen, as in Rwanda. The report central theme is the idea of “the Responsibility to Protect”. Sovereign states have a responsibility to protect their own citizens from avoidable catastrophe - from mass murder and rape, from starvation - but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. The supplementary volume of the Commission’s report is itself an important contribution to the ongoing debate on how the international community should respond to massive.

The U.N. Charter argues that, all states are equal before international law irrespective of comparable size and wealth. This principle of the sovereign equality of states has been enshrined in Article 2(1) of the U.N. Charter. 148 It entails the country’s sole right to make laws within its territory. States are prevented from intervening “in

147 Ibid. at 16.
148 U.N. Charter, Article 2(1).
the internal affairs of a sovereign state. If that duty is violated, the victim state has the further right to defend its territorial integrity and political independence”\textsuperscript{149}

This does not preclude legitimate humanitarian intervention when is morally required, where the use of force is intended to stop the slaughter of human beings by states, which hide behind sovereignty and the concept of the norm of non-intervention in carrying out such actions. ICISS argues that humanitarian intervention is associated with justifiable means of using force for the purpose of protecting the people within another state, “from the treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereignty is presumed to act with reason”.\textsuperscript{150}

The ICISS concludes that the most appropriate body to authorize such intervention is the U.N. Security Council, and that the task is to make the Security Council work better than it has in the past. It recommends that the General Assembly adopts a draft declaratory resolution embodying the basic principles of the responsibility to protect, and that the Security Council should seek to reach an agreement on a set of guidelines embracing the principles laid out in the report.

Finally, the influential and widely cited ICISS report suggests six principal criteria for what is to be considered a legitimate humanitarian intervention. In no particular order, these are: right motives (primacy of humanitarian purpose); just cause (the level of violence must be large-scale); force must be a last resort; reasonable prospects for success; proportionality (force must not do more harm than good and must comply with humanitarian law); and right authority (force must be legitimated by some multilateral framework).\textsuperscript{151}

6.10. Humanitarian Intervention in Practice

Over the past twenty years, a number of interventions under humanitarian auspices have occurred. In analyzing interventions in northern Iraq, Somalia, Rwanda, Haiti, and East Timor, I will highlight the role of the Security Council and Security Council resolutions in the development and debate of a doctrine of humanitarian intervention. The purpose of a more in-depth treatment of these specific cases of intervention is threefold. First: to identify when the international community has been

\textsuperscript{149} ICIS, p.12.
\textsuperscript{150} Ibid. at 17.
\textsuperscript{151} Ibid. at 32. These criteria are partially derived from the Just War tradition, as documented by Mona Fixdal & Dan Smith, ‘Humanitarian Intervention and Just War’, MISR, 42 (November 1998), pp.283-312.
willing to take up arms for humanitarian considerations. Such an identification is necessary, because no steadfast and objectively measurable threshold requirement has been agreed upon to dictate either when, where or under what circumstances to intervene.

Second: to isolate the particular legal issues surrounding each intervention and to explore how the subsequent legal questions were or were not addressed in each case.

Third: to heighten understanding of previous interventions and to clarify the applicability of past lessons learned for present and future actions. These interventions will be viewed through the lenses of current international political and security concerns.

The focus here will be on what practical lessons for the doctrine of humanitarian intervention can be seen from today that may have been obscured in the immediate aftermath of interventions ten, five, or even three years ago.

Each case will begin by briefly addressing the political circumstances and humanitarian crisis at issue. Then the attention will shift to examining how the U.N. responded to each situation, and each case will finish with a look at the actual intervention, its forces, and its outcomes. The most important factor in each case will be the way each contributes to the debate over the legality and legitimacy of humanitarian intervention.

6.10.1. Northern Iraq

Saddam Hussein's Iraq repeatedly violated international humanitarian and human rights law with respect to the Kurdish population in northern Iraq.\textsuperscript{152} Kurdish uprisings against Iraqi rule followed the military successes of the U.S.-led coalition forces in the 1991 Gulf War. The rebellions, while briefly successful, were brutally put down by Hussein's Iraq and followed by a “campaign of repression against the Kurds”.

In March 1991, fearing the worst, hundreds of thousands of Kurds sought refuge in the mountainous Iraqi border regions with Turkey and Iran. Though up to a thousand refugees were dying daily from terrible health conditions and lack of food, the refugees still preferred these conditions to facing the distraught and vengeful Iraqi forces - Iraqi forces that had already unleashed chemical weapons against the Kurds

in 1988.\textsuperscript{153} The intense human suffering looked to become even worse as the refugee Kurds were cut-off from access to basic survival necessities.

6.10.1.1. United Nations

The question for the U.N.O. and the coalition forces still in the region was whether and in what way they would respond to the Kurds plight. The U.N. responded with the Security Council's Resolution 688 on April 5, 1991.\textsuperscript{154} In Resolution 688, the Security Council condemned “the repression of Iraqi civilian population . . . including, most recently in Kurdish-populated areas” and demanded “that Iraq . . . immediately end this repression, and . . . expressed the hope that an open dialogue will take place to ensure the human and political rights” of all Iraqis.

Outside of the appeals for Iraq to take measures on its own, the Security Council insisted that “Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq” as well as appealing to “all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts”.\textsuperscript{155}

This resolution was the least supported of all Security Council resolutions passed in the wake of the Iraqi invasion of Kuwait with three votes against (Cuba, Yemen, and Zimbabwe) and two abstentions (China and India). In the divided Security Council, France was the most outspoken member in favor of a robust resolution embracing the Council's (duty of intervention).\textsuperscript{156} Sir David Hannay, then the British Permanent Representative on the Security Council, noted in a recent interview:

“We were all worried by that, the French proposal for a (duty of intervention) because that elevated the whole thing to an issue of principle . . . . If you asked about one hundred and eighty-five members of the U.N.O. whether they agreed that there was a duty to intervene, one hundred and eighty-four would have said no”.\textsuperscript{157}

Hannay's comment reveals the extent to which U.N.O. members did not want any action taken under humanitarian justifications in Iraq to be used as a precedent for future actions. Recalling the first requirement of a customary international law, broad acceptance in state practice, the uniqueness of the French position shows that a right or duty of humanitarian intervention was no where near meeting those criteria. Thus,

\textsuperscript{153} Ibid. at 78.
\textsuperscript{155} Ibid. at 13.
\textsuperscript{157} Jane Stromseth, supra note 14, at 79.
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Resolution 688 reflects that the solidarist French position was overshadowed by pluralist support for principles of state sovereignty and non-intervention and realist fears of becoming the next site of intervention. Contrary to some scholars who assert that Resolution 688 invoked Chapter VII, the resolution never specifically took the step of declaring the situation in northern Iraq to be a threat to international peace and security. The resolution stated that only the (consequences of the repression threaten international peace and security), not the repression itself.\(^\text{158}\)

6.10.1.2. Intervention

Assurances from U.S. President George Bush that “we’re not going to get sucked into this Kurdish situation by sending precious American lives into battle”, and British foreign secretary Douglas Hurd that there was no legal justification for intervention inside Iraqi borders,\(^\text{159}\) were apparently whisked away by Resolution 688, which made no reference to the use or authorization of military force in Iraq. Within two weeks of Resolution 688, a coalition of military forces, largely consisting of American, British, and French troops, began to establish so-called safe havens in northern Iraq for Kurdish refugees without Iraqi consent. Though the coalition claimed that such measures were legitimate and legal under paragraph six of Resolution 688 that appealed for member states to contribute to the humanitarian effort, the most common explanation for this policy shift towards solidarism was that it reflected an increase in media exposure of the Kurdish plight in the West.\(^\text{160}\)

The initial result of the safe havens mission was success in getting needed humanitarian relief supplies to the refugees, but creating a secure environment for Kurdish refugees to return home proved to be a more difficult and longer-term operation. In addition to sending ground troops, the coalition brought significant air support force and established a no-fly zone for Iraqi aircraft north of the 36\(^{\text{th}}\) parallel on April 11, 1991. The U.S. was anxious to pull back its ground troop commitment to the Kurds and the temporary benefit of establishing safe havens was tempered by the resultant creation of conditions that led to further interventions. One example of this was a series of aggressive Turkish interventions throughout the rest of the 1990s against the Kurdish Workers Party (PKK) in northern Iraq.\(^\text{161}\)

\(^{158}\) S.C. Res. 688, supra note 156.
\(^{160}\) Ibid. at 7.
6.10.1.3. Legal Analysis

How is the coalition intervention in northern Iraq to be regarded in the context of the development of a legal and legitimate right to humanitarian intervention? For the Kurdish intervention to be either considered legal or as contributing to the development of customary international law, the decision to intervene should be widely accepted, clearly legitimized, legally sound, and broadly applicable. The Kurdish case is weak in all four areas. The issues of acceptance and legitimacy are related and can be viewed in the context of Security Council negotiations regarding the situation in northern Iraq. During the debates over Resolution 688, there was specifically no mention of the use or threat of force against Iraq for humanitarian defence because “it would have been killed by a Soviet veto”. The imminent threat of losing a vote or getting a veto means that the coalition would have been unable to get Security Council authorization for their intervention. India and China refrained from voting against 688, because it stopped short of labeling the situation a direct threat to international peace and security and thus did not violate Iraq's domestic jurisdiction protections of U.N. Charter Article 2(7).\(^\text{162}\)

A stronger Security Council resolution, one that would have explicitly authorized coalition efforts, was out of the question thereby damaging the legitimacy of the intervention. Proponents of the intervention claim that because neither the U.N.O. nor the broader international community officially condemned the U.S., U.K., or France for the intervention, the intervention was legitimate and even legal. However, the lack of condemnation seems to have come as much from the belief that the intervention would be short-term and therefore not as grave a violation of Iraqi sovereignty and the principle of non-intervention.

As to the legal basis for intervention, “even the most cursory glance at Resolution 688 reveals that intervention by the U.S. and allied forces was not endorsed by the U.N.”. Furthermore, customary international law does not definitively support unilateral humanitarian intervention. Without recourse to U.N. resolutions or customary international law supporting humanitarian intervention, Oxford international law professor Adam Roberts, put forth a different explanation, that “the military operation within northern Iraq . . . must be seen partly in the special context of post-war actions by victors in the territory of defeated adversaries”. This justification, though never proffered by the coalition, maintains that Iraqi sovereignty

was temporarily punctured by virtue of the invasion of Kuwait. As such, traditional Iraqi sovereignty provisions were violable, not because Iraq was a failing state or because its government had engaged in human rights violations, but because of the customary international law that permits war victors to bear some responsibility for the defeated territory and its inhabitants.  

This argument further limits the applicability of this case to an evolving customary international law in favor of humanitarian intervention.

Finally, as far as the Kurdish case providing for or contributing to the development of the doctrine of humanitarian intervention and a more solidarist international society, there are at least two problems. First, Roberts's argument cross-applies here to show that a unique case from which general precedents should not be drawn. Second, the international community, the coalition members in particular, did not follow the model created in response to the Kurds. A comparison of the plight of the Kurds in northern Iraq and the Shiites in the south shows that like cases were not treated alike. The humanitarian justifications for intervention in southern Iraq paralleled those for northern intervention.

All the same arguments put forth by the coalition to justify armed intervention for the Kurds applied to the situation for the Shiites, yet no ground forces were sent to defend the Shiites. Only a no-fly zone was established, which did little to stop the Iraqi artillery that was shelling Shiites. While the coalition forces did intervene for predominantly humanitarian reasons in northern Iraq and saved at least some lives in the process, the suspect legal justifications and legitimacy claims make this intervention a poor case to be used as a precedent for an expanding and accepted legal right to humanitarian intervention.

6.10.2. Somalia

Somalia gained its independence in 1960 from colonial powers Britain and Italy. For nine years immediately following independence, Somalia enjoyed a stable democratic government. However, in 1969, allegations of fraud by the elected government prompted Major General Mohamed Siad Barre to seize power through a

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military coup. By manipulating Somalis’ clan loyalties, repressing opposition groups, and corruption, Barre maintained his grip on Somalia for over two decades.\footnote{Samuel M. Makinda, \textit{Seeking Peace From Chaos: Humanitarian Intervention in Somalia}, (Lynne Rienner, 1993), p. 17.}

Because of Somalia's strategic location near the Gulf of Aden, both superpowers sought Somalia's allegiance during the Cold-War by providing Barre with foreign aid. Playing Somalia's strategic geographical position to his advantage, Barre courted the U.S. and the Soviet Union alternately. After coming to power in 1969, Barre declared his government to be Marxist in order to receive foreign aid from the Soviet Union. In 1977, the Soviet Union signed a treaty with Ethiopia, Somalia's historical rival. Consequently, Barre sought and received foreign aid from the U.S. By the mid-1980s, the U.S. started decreasing its aid to Somalia, which fell from $34 million in 1984 to $8.7 million by 1987, a 75 percent decline in just three years. By 1988, the U.S. and the European Community, except for Italy, had virtually abandoned Somalia. After the end of the Cold-War, Somalia's strategic position ceased to have value, and the international community's interest in the country diminished still further.\footnote{Makinda, supra note 23, at 56.}


The USC draws its support from Somalia's largest clan, the Hawiye. However, Mohamed Ali Mahdi faced opposition from General Mohamed Farah Aideed, a member of a different Hawiye sub-clan. During the course of their struggle for control, the factions supporting Ali Mahdi and Aideed destroyed most of Mogadishu.\footnote{Keith B. Richburg, ‘Aideed: Warlord in a Famished Land’, \textit{WASH. POST}, Sept, 8, 1992, p. A1.} The ongoing internal conflict between the USC factions, along with the presence of violent armed gangs in the country, resulted in the collapse of an effective government in Somalia. The situation was further exacerbated by a severe drought, which exacted a terrible toll on Somalia- approximately 300,000 persons perished.\footnote{Patman, supra note 32, at 85.}
These conditions captured the world’s attention and prompted a response from the international community.

6.10.2.1. The Intervention

The U.N.O. first addressed the situation in Somalia in January, 1992. Recognizing the gravity of conditions within Somalia and terming them a threat to international peace and security, the Security Council imposed a complete arms embargo on Somalia and called for increased humanitarian aid. Beyond this marginal commitment to ending the military strife and resulting widespread famine, this Resolution did little more than espouse commonplace rhetoric with no clear hopes of bringing about an end to the crisis.

Three months later, after a cease-fire agreement was signed by the warring parties in early March 1992, the Security Council acted again by adopting Resolution 746. In addition to calling on the combatants within Somalia to cease their activities, Resolution 746 accepted the U.N. Secretary-General’s recommendation that a technical team be sent to Somalia with the goal of observing the administration of humanitarian aid and brokering a peace agreement between the parties.

The team was to report back to the Security Council. However, the inadequacy of these measures soon became apparent, the situation continued to deteriorate, and the Security Council was forced to take additional measures. Thus it adopted Resolution 751, which foreshadowed the formation of the UNOSOM.

The Resolution authorized the Secretary-General to appoint a special representative for Somalia, deployed fifty troops to monitor the cease-fire, and in principle established a security force (to be deployed as soon as possible).

In August 1992, the Security Council acted again in light of further deteriorating conditions in Somalia, authorizing an airlift of humanitarian aid through

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Resolution 775. This resolution seemed to reflect the Security Council's view that UNOSOM had enjoyed some success and that the deployment of additional U.N. forces would perhaps suffice to bring peace to the region.

Months later, nearly one year after its original recognition of the human rights abuses in Somalia, the Security Council acknowledged the ineffectiveness of the embargo and the previous deployment of forces. In Resolution 794, the Security Council determined that the conflict in Somalia constituted a threat to international peace and security, and endorsed the recommendation of the Secretary-General that action under Chapter VII of the Charter of the U.N. should be taken in order to establish a more secure environment for humanitarian relief operations in Somalia. This Resolution could be considered a watershed because it marked the first time that the Security Council invoked its Chapter VII powers and acted under Article 42 on humanitarian grounds.

To illustrate, Resolution 794 broke new ground in two significant ways. First, in light of the internal turmoil and the lack of a functioning government, the Council was forced to intervene without the consent of the government. Second, Resolution 794 seemed to extend the scope of Chapter VII to include human rights abuses, for in invoking its Chapter VII powers, the Security Council stated that “the magnitude of human tragedy caused by the conflict in Somalia ... constitutes a threat to international peace and security”. This aggregation of gross violations of human rights within the borders of a country with a threat to international peace and security expanded the scope of Chapter VII action considerably.

Just as the decision to use force in Somalia broke new legal ground, the implementation also featured a new model of collective humanitarian intervention which could become possible only after the end of the Cold-War. While the early

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178 Letter Dated 29 Nov. 1992 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992). The Security Council adopted Resolution 794 as it was concerned with the starvation of civilians in Somalia, finding that a threat to international peace and security existed because of 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”.

stages of U.N.-led intervention were successful in providing food and medical care to those in need, the U.N. lacked the necessary resources and political will to create another U.N. force. Thus, Resolution 794 empowered a U.S.-led coalition, the UNITAF, to use “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia”.\textsuperscript{180}

Before opting for the U.S.-led coalition, the Council, however, considered five options to address the Somali crisis, as outlined by Boutros Boutros-Ghali in his letter to the Council. Two of these options envisioned direct U.N. intervention. But, as noted earlier, the U.N. lacked the necessary resources, the logistical and contingency planning infrastructure, and the organizational capability to undertake an operation of this magnitude by itself. Moreover, the U.S. had offered to lead a military force for delivery of humanitarian aid in Somalia.\textsuperscript{181}

UNITAF, established to end the humanitarian suffering in Somalia, consisted of 37,000 military personnel, 28,000 of whom came from the U.S.\textsuperscript{182} This new operation enjoyed more success than its predecessor, and the parties agreed to a cease-fire on January 8, 1993, which permitted the full implementation of the U.N.’s 100-Day Action Program.\textsuperscript{183} There was an increased U.N. and NGO presence in Somalia.

The Addis-Ababa agreements of January 8-15 that year committed Somali clan leaders to cooperate in the creation of a cease-fire monitoring group and the collection and destruction of weapons.

With its limited resources and personnel, the U.N. would not have achieved these results without the help of the U.S. However, the U.N's decision to defer control of UNITAF to the U.S. also entailed some costs. The U.S., having achieved the immediate goal of restoring some peace and stability, was unwilling to remain in an

\textsuperscript{180} Michael Wines, ‘U.S. Launches Somalia Aid Mission’, \textit{Plain Dealer}, Dec. 5, 1992, p. A1. It seems likely that without the U.S.’s offer, the U.N. may never have committed to a full peace force in the region.


\textsuperscript{182} By comparison, UNOSOM consisted of only 500 personnel. In his December 8, 1992 address, the Secretary-General stated that Operation Restore Hope's goals were “to feed the starving, protect the defenseless, and prepare the way for political, economic, and social reconstruction”. Statement of the Secretary-general to the People of Somalia on United Nations Action on Security, Humanitarian Relief, and Political Reconciliation in Somalia, U.N. Press Release SG/SM/4874, December 8, 1992.

\textsuperscript{183} See 100-Day Action Programme for Accelerated Humanitarian Assistance for Somalia, October 6, 1992, which called for, among other things, massive infusion of food aid, provision of basic health services, urgent provision of clean water, delivery of shelter materials, and prevention of future refugee outflows.
increasingly hostile environment longer than necessary.\footnote{Keith Richburg, ‘Top U.N. Officer in Somalia Says Tactics were Apt’, \textit{Wash. Post}, Jan, 23, 1993, p. A12. In areas controlled by UNITAF, food and medical supplies resumed movement and agricultural workers once again began production.} By contrast, the Secretary-General clearly wished for the U.S-led UNITAF to remain in place longer, stating that “it would be a tragedy if the premature departure ... of the Unified Task Force were to plunge Somalia back into anarchy and starvation”.\footnote{Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Security Council Resolution 794 (1992), U.N. SCOR, 48th Sess., U.N. Doc. S/25354 and add. 1 & 2 (1993), (proposing that UNITAF extend its operations to the whole of Somalia and disarm the factions before handing over operational responsibility to a new U.N. peacekeeping operation.). See also U.N. Doc. S/24992, Dec. 19, 1992.}

On March 26, 1993, the U.N. Security Council adopted Resolution 814, which established the (UNOSOM II) in hopes of promoting a prompt, smooth, and phased transition from the UNITAF to a U.N. led intervention. Taking into consideration UNITAF's limited success in creating a stable peace in Somalia, the Security Council again acted under Chapter VII and expanded UNOSOM II's size and mission.

The Security Council gave UNOSOM II responsibility for consolidating, expanding, and maintaining a secure environment throughout all of Somalia, with a special eye to disarmament and demanding that the Somali parties abide by the Addis Ababa agreements of January 1993.\footnote{S.C. Res. 814, U.N. Doc. SCOR, 48th Sess., 3188th mtg., at 1, U.N. Doc. S/Res/814 (1993).} This included such nation-building efforts by the U.N. as the establishment of regional councils and a police force. Given UNOSOM II's mandate, it is appropriate to conclude that, while it typified a traditional peacekeeping mission, UNOSOM II was conceived as a peace enforcement mission.\footnote{See Kenneth Freed, ‘Somali Civil War is Over, Rivals Vow Peace’, \textit{L.A. TIMES}, Dec, 29, 1992, p. A1.}

In response to an attack on Pakistani troops serving as part of UNOSOM II, in which over 20 soldiers were killed and over 50 wounded, the Security Council passed Resolution 837.\footnote{S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 1-3, U.N. Doc. S/Res./837 (1993).}

The Resolution reiterated the Secretary-General's prior authorization under Resolution 814 to take all necessary measures including investigation, arrest, detention, and prosecution of all those responsible. The U.N. action entailed, \textit{inter alia}, attacks upon Aideed's headquarters. Several civilian casualties occurred and efforts were taken to find and prosecute Aideed. These actions, however, alienated segments of the local population. Subsequently, the U.S. withdrew its forces, several
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European countries followed suit, and eventually in January 1995, UNOSOM II troops, conceding the failure of the mission, began withdrawing. By early March, all UNOSOM II forces had departed from Somalia.189

6.10.2.2. Legal Analysis

Though the Security Council took steps to ensure that the Somali case be seen as an exception to accepted state and international practice, Security Council decisions regarding Somalia are rightly regarded as a watershed for the doctrine of humanitarian intervention. Even if Resolution 794 did not legalize or address the issue of unilateral humanitarian intervention, the Security Council expanded the scope of Articles 39 and 42 of the U.N. Charter with its course of action in Somalia. The threat of widespread human suffering, within the borders of one state and of exceptional proportions, could legally be considered a threat to international peace and security.

It remains extremely difficult to divorce the disintegration of state capacity in Somalia from the ensuing famine and humanitarian emergency. The existence of such a collapsed or failed state in Somalia allowed the Security Council to agree on stronger intervention measures than would otherwise have been acceptable to the Council. The ability to broker consensus among the international community, particularly the permanent members of the Security Council, to support U.N sponsored missions in Somalia shows a convergence in world opinion. Humanitarian concerns could warrant international intervention, but a humanitarian intervention that was not deemed to threaten the rights of privileges of traditionally associated with state sovereignty.

Other factors in the intervention in Somalia that have contributed to the humanitarian intervention debate include the Somali people’s will, the interveners fatigue, and the mission’s humanitarian character. The will of the Somali people was difficult to judge; Gallup had no polling office in Mogadishu. According to the U.N., the Somali people were desperate for international intervention.190

The actual intervening forces encountered a different situation, as they were often jeered and attacked when in public. If many of the very people for whom they were supposed to be fighting were fighting against them, the U.N. and U.N. member forces had to question whether their mission was warranted and justified. Disputes

190 Ibid. at 4.
between U.N. forces and locals, such as the bloody events of October 3, 1993, also undermined the humanitarian nature of the mission. The lack of clarity regarding the expressed will of the Somali people created problems. Intervening states tired of sending unwanted forces, soldiers questioned why they were sent to Somalia, and the mission compromised its humanitarian character. The first rule of humanitarian intervention, as for doctors, should be ‘do no harm’. Yet, for the intervening forces in Somalia, this rule proved exceedingly difficult to follow.

The Humanitarian intervention mission in Somalia was landmark because it was the first time that the U.N. authorized a Chapter VII intervention prompted by pure humanitarian concerns although the conflict appeared to be completely internal.

However, the slow response, the lack of clear direction and command structure, the lack of U.N. resources and the heavy dependence on the U.S. all led to the failure of the mission. Regrettably, the chief failure of the Somalia mission was that the death of U.S. forces gave birth to the “Somalia Syndrome” which would prove to be a major roadblock for all future Humanitarian Intervention missions.

As evidenced by its actions in Iraq and Somalia, the Security Council has justified its use of force by determining that threats to international peace can exist when there is regional instability as well as purely internal instability, when both “produce severe and widespread human rights deprivations”. The latter being a landmark in the “legality and legitimacy of humanitarian intervention”.  

6.10.3. Rwanda

In a little over three months in the summer of 1994, between 500,000 and 800,000 Rwandans, mostly Tutsis, died tragically in a genocidal campaign. While this slaughter took most of the world by surprise, there was sufficient early warning that such a massacre might occur. However, the U.N. and member states took no effective action to prevent the disaster. Nor did they intervene to stop the killings. Rwanda had in fact suffered several massacres since the 1950s - in 1959, 1963, 1966, 1973, 1990, 1991, 1992, and 1993. Despite this, the 1994 genocide was unprecedented.

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191 Ruth E. Gordon, ‘Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti’, 31 Tex. Int’l. L. J. (1996), p.51. A war in the region immediately prior to the situation in Iraq was also a catalyst in the Security Council’s actions as the tensions in the area “increased the potential for regional instability”.


To provide an appropriate context for understanding the failure of the international community to prevent the 1994 massacre, I will briefly review Rwanda's post-colonial history, early U.N. and regional efforts aimed at halting violence in the region, and the events immediately preceding the summer of 1994.

6.10.3.1. The Conflict

Prior to the 1994 massacre, Rwanda was one of the most densely populated countries in the world. Within its population two major ethnic groups existed. The Hutus accounted for eighty-five percent of the total population, while the Tutsis comprised roughly fourteen percent of the population. In spite of the fact that the Hutus formed the majority group, the Tutsis had ruled over the Hutus since the 16th century.

Prior to colonization, the Tutsis had maintained “reciprocal obligations and allowed for a degree of social mobility”, thereby quelling ethnic violence. After World War I, German and Belgian colonizers exploited ethnic differences between the Hutus and Tutsis, creating a system of ethnic stratification between two culturally and linguistically homogenous groups.

By 1959, Belgium, under pressure from the U.N. General Assembly, instituted democratic reforms in Rwanda, which had become a trust territory of Belgium under U.N. auspices. Democratization, as could be expected, met with strong support among the Hutu population, and fierce opposition among the Tutsi minority. Despite constitutional changes that gave the Hutus greater representation, the Tutsi minority retained control over Rwanda. During this period of post-colonial democratization, the first Hutu uprising claimed the lives of hundreds of Tutsis and drove thousands more from the country. Through this uprising, Hutus gained control of Rwanda upon its independence in 1961. Fear of this Hutu-led government caused over 200,000 Tutsis to flee to neighboring Uganda and other countries.

In 1973, General Habyarimana seized power in a military coup. Habyarimana, a Hutu, governed Rwanda for the next twenty years through the National Republican Movement for Democracy and Development (MRND), Rwanda's sole political party.

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In part, he maintained control by refusing to repatriate Tutsi refugees living in other countries, invoking Rwanda's poor economic conditions. In 1990, however, efforts by the OAU and the Office of the UNHCR compelled Habyarimana to enter into talks regarding political reform. But the process proved fruitless when the Rwandese Patriotic Front (RPF), comprising Tutsis who had earlier fled from Rwanda, invaded from Uganda, killing hundreds of Rwandans and displacing thousands more. In spite of the MRND's numerous human rights violations against Tutsis and moderate Hutus, the peace process resumed on October 17, 1990, and continued through the rest of the year.  

Evidence suggests that Habyarimana, through a campaign of hate propaganda, promoted hatred and fear of Tutsis. The U.N Special Rapporteur on the Question of Extrajudicial, Summary, or Arbitrary Executions stated that since the RPF attacks in 1993, all Tutsis within Rwanda had been labeled accomplices of the RPF and Hutu members of the opposition party were considered traitors. Between 1990 and the massacre in 1994, the Habyarimana government feigned cooperation with those interested in reform, while actually promoting ethnic hatred within Rwanda.

The floodgate of ethnic hatred opened on April 6, 1994, when Habyarimana's airplane was shot down as he was returning from a regional peace summit in Dar es Salaam. His death set off a chain reaction of indiscriminate killing of Tutsis and Hutu opposition members, led by the Presidential Guard. This massacre sparked renewed fighting between the RPF and the Rwandan Government Army which lasted until July 18, when the RPF took control of the country.  

This armed conflict, coupled with the MNDR's inflammatory broadcasts, created widespread fear and displaced 1.5 million people. After gaining control, the RPF established a government with a broad representative base.

6.10.3.2. The Intervention

Early U.N. efforts were focused primarily on promoting cease-fire agreements between the Rwandan government and Tutsi guerrillas. These efforts, while not addressing human rights violations in Rwanda, played a decisive role in promoting the Arusha Peace Agreement. The Arusha Peace Agreement sought the U.N.'s

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oversight of the installation of a broad-based transitional government terminating upon national elections. The Agreement was designed to help unify the armed forces of the government and the RPF and to oversee the cease-fire as established by the Agreement. Both parties, under direction from Tanzanian President Mwinyi, requested U.N. assistance in implementing the Arusha Peace Agreement after it’s signing. The U.N. had been previously involved in the region through the United Nations Observer Mission Uganda-Rwanda (UNOMUR), deployed in June 1993.  

UNOMUR's primary purpose was to ensure that no military assistance from surrounding countries flowed into Rwanda. The Arusha Agreement served as an invitation for a U.N. peacekeeping operation and led to the establishment of the United Nations Assistance Mission for Rwanda (UNAMIR). UNAMIR's mission was to provide short-term peacekeeping operations involving monitoring of the Arusha cease-fire provisions, erecting safe zones, overseeing the transitional government, and providing a security presence in Kigali. The UNAMIR plan consisted of four phases.

First, the U.N. would establish a broad-based transitional government in Kigali. Second, the armed forces would be demobilized and integrated. Third, the U.N. would expand and monitor the Demilitarized Zones (DMZs) throughout Rwanda and along the Rwanda-Uganda border. Fourth, the mission would terminate with nationwide elections in Rwanda.

UNAMIR succeeded in meeting its early goals, but failed to bring lasting peace to the region. In the first ninety day phase, the Secretary-General reported to the Security Council that the political aspects were stabilizing under the leadership of the U.N. Special Representative that steps toward demilitarizing Rwanda were underway, and that humanitarian relief efforts had commenced. However, the Secretary-General also pointed out that during November 1993 two mass slayings in and around the DMZs occurred, humanitarian relief efforts had been interrupted by violence in Burundi, and a serious drought had occurred. The Secretary-General also stressed the importance of continued cooperation and support from Member States. However, as time passed and the crisis deepened, the support of U.N. Member States would falter, hindering U.N. efforts in Rwanda.

Security Council Resolution 893, passed on January 6, 1994, called for the deployment of a second battalion of U.N. troops ahead of schedule. Despite this

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increased U.N. presence, the creation of the transitional government was delayed, creating further tension within the country. By March 1994, a deadlock in the creation of the transitional government created tremendous impediments for the U.N.

One day before the fateful April 6 plane crash, the Security Council passed Resolution 909, extending UNAMIR's mandate and calling for the parties to resolve their differences.\footnote{S.C. Res. 909, U.N. SCOR, 49th Sess., 3358th mtg., U.N. Doc. S/RES/909 (1994).} The death of President Habyarimana and the ensuing genocide in its aftermath soon overwhelmed this call. Rather than taking immediate action, the U.N. reduced UNAMIR forces from 2165 to 1515.

In a memorandum Boutros Boutros-Ghali sent to the Security Council, he presented three options to the Council. The first was to massively expand the number of troops in Rwanda and enlarge its mandate under Chapter VII to authorize UNAMIR to (coerce) a cease-fire. This option would have required Security Council action and the provision of equipment and troops from member states. Conversely, the U.N. could withdraw its forces completely. The third option, the intermediate alternative, was the one accepted by the Security Council in Resolution 912.\footnote{S.C. Res. 912, U.N. SCOR, 49th Sess., 3368th mtg., U.N. Doc. S/RES/912 (1994).}

Resolution 912 provided authorization to continue with the existing mission with reduced U.N. personnel of only 270, authorizing them to act as an intermediary between the Rwandan government and the RPF.\footnote{Peter Rosenbloom, 'The United Nations and Rwanda', 1997-1999', 10 HARV. HUM. RTS.J, (1997), p.313.}

Continued massacres, however, compelled the U.N. to re-evaluate this decision, since Resolution 912 did not empower UNAMIR to bring an end to the grisly massacres taking place in Rwanda. Furthermore, this resolution seemed to convey the international community's lack of concern about the situation in Rwanda.

Finally, on May 17, 1994, over a month after the commencement of the genocide in Rwanda, the Security Council adopted Resolution 918, under which it expanded UNAMIR personnel to 5,500. Acting under Chapter VII, the Security Council imposed an arms embargo on Rwanda. However, the unwillingness of member states to contribute troops and equipment drastically delayed the deployment of this mission. After the Somali experience, the U.S. was reluctant to address U.N. intervention in Rwanda, and refused even to acknowledge the genocide, using instead the language that (acts of genocide may have occurred).\footnote{See Douglas Jehl, ‘Officials Told to Avoid Calling Rwanda Killing Genocide’, N.Y. TIMES, June 10, 1994, p.A8.}
With efforts to revive UNAMIR stalled, the French government stepped forward with an offer to lead a multilateral force in Rwanda similar to the American-led UNITAF mission in Somalia. Part of this proposal required the Security Council to grant the Rwanda mission the right to use force under Chapter VII of the U.N. Charter. Two days later, Security Council Resolution 929 authorized France to use (all necessary means) to achieve humanitarian objectives in Rwanda. This operation, known as “Operation Turquoise”, represented only the second time that a non-U.N. force received authorization to use force for humanitarian reasons.

The French-led force was dispatched immediately. Operation Turquoise’s first task was the establishment of safe zones for the fleeing Hutus. Despite the widespread skepticism that the French were not impartial and were in fact supporting the Hutus, this effort, in conjunction with the RPF’s military victory, brought an end to the largest population movement in modern times.207 Once security had been established, UNAMIR and UNAMIR II troops took over from “Operation Turquoise” on August 21, 1994.

6.10.3.3. Legal Analysis

Rwanda exemplifies quite a different situation than Iraq, and Somalia, in the evaluation of U.N. intervention. In Rwanda, even though internal conflict abounded and genocide was widespread, making it a (classic case for . . . intervention), the U.N. did not take forcible action to prevent further atrocities.

The Rwandan genocide was one of the worst humanitarian tragedies in history. One-seventh of the Tutsi population was slaughtered while the international community stood by and observed. The magnitude of the violence and the speed in which it was carried out was unprecedented, thus making it more difficult for the international community to react in time to protect civilians. The failure of the U.N. to respond in time to prevent the genocide was a low point for international law.

A coalition of states had been prepared to act in defence of the Tutsi population, but they did not receive prompt Security Council authorization. According to the former Secretary-General Kofi Annan, “the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder”.208 Ashamed

207 Ibid. at 9.
of such inaction, Annan resolved to “never again” fail to protect (a civilian population from genocide or mass slaughter).\footnote{Press Release, Kofi Annan Emphasizes Commitment to Enabling U.N. Never Again to Fail in Protecting Civilian Population from Genocide or Mass Slaughter, U.N. Doc. SG/SM/7263, AFR/196 (Dec. 16, 1999).}

The reason for the lack of support is unknown; however, speculation centers on the intervention possibly resulting in great loss for the U.N. members committing troops - a risk they were not willing to take for reasons thought to be outside of the interests of those U.N. members.

### 6.10.4. Haiti

Although the Haitian crisis did not receive the same media attention as Iraq, Rwanda, and Somalia, it represents another instance in which massive violations of human rights compelled the U.N. to authorize forcible intervention.\footnote{By the time the Security Council adopted a Resolution to intervene on July 31, 1994, there were independent reports of widespread massacres of those allegedly supportive of the ousted Haitian President Aristide. Amnesty Reports, Haiti-Human Rights: Increase in Violations, Global Information Network, Aug. 24, 1994, at 1 (Lexis/Nexis News File).}


Aristide had been elected by an overwhelming majority of Haitian voters in the first free election in Haiti’s history.\footnote{Michael P. Scharf, ‘Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?’, 31 TEX. INT’L L.J., (1996), p.1, at 2.} After Aristide’s overthrow by a military junta, widespread human rights abuses ensued. Over 3,000 Haitians were murdered, and others were raped, arbitrarily arrested, and tortured. These violations spurred a massive flight of Haitian citizens who took to makeshift vessels in hopes of reaching the U.S.

The OAS, with its long history of intervention in Haiti, was the first to impose sanctions against the military regime. In an emergency meeting held on September 30, 1991, the OAS “recommended action to bring about the diplomatic isolation of those who hold power illegally in Haiti”.\footnote{Support to the Democratic Government of Haiti, OAS Doc. MRE/RES 1/91 (October 3, 1991).}

The Permanent Council of the OAS went further and called for an economic embargo to isolate Haiti from the rest of the Western Hemisphere.\footnote{In May, 1992, the OAS passed a second Resolution after failed attempts at negotiations asking member states to renew their commitment to the embargo by denying port access to ships violating the embargo, denying visa privileges to coup members, and freezing coup leaders’ assets. O.A.S. Doc. OEA/Ser. G/CP/SA 896/92(8) (Apr. 1, 1992).} Meanwhile, the
U.N. General Assembly passed a resolution supporting these sanctions and condemning the coup and the ensuing human rights abuses.\textsuperscript{215}

The U.N. was also instrumental in universalizing the sanctions originally imposed by the OAS. At the urging of Western governments, the U.N. Security Council expanded the OAS embargo of Haiti to include all U.N. member states.\textsuperscript{216} However, the U.N. did little else to oust Haiti’s military regime.

Diplomatic attempts to find a negotiated settlement to the Haitian crisis began early the following year. In February 1992, representatives of Aristide and the military leaders met in Washington, D.C., and signed the Washington Accord, which called for the selection of a new Prime Minister as well as amnesty for the military leaders and others who were involved in the coup.

Although the Washington Accord also acknowledged Aristide as the president, it did not make provisions for his return to Haiti. Soon after the signing of this agreement, both Aristide and the military regime denounced the Washington Accord, marking the failure of the first round of negotiations.

The collapse of the Washington Accord demonstrated that during the year following the coup little progress had been made toward a resolution of the crisis. The U.S. found itself addressing the issue of refugees fleeing the repressive Cédras regime and seeking asylum in the U.S. In May, President George Bush began the controversial policy of using the U.S. Coast Guard to turn back Haitian refugees intercepted on the high seas. In September, the OAS sponsored further negotiations between representatives of the military regime and Aristide. Although no resolution was reached on the point of Aristide's return, the \textit{de facto} military government did agree to allow human rights observers into the country.

Although another new year began with the military government still firmly in power, the newly-elected President Clinton made some attempts to resolve the crisis the following year. In March 1993, Clinton named Lawrence Pezzullo as a special advisor on Haiti to the Secretary of State. The following month the U.S. imposed new economic sanctions on Haiti, an oil embargo and a freezing of Haitian assets abroad.

In this context of increased pressure on the military leadership, Cédras and Aristide signed the Governors Island Agreement (GIA). The GIA called for a new government and prime minister, the resignation of the military leaders, a general

amnesty for those involved in the coup and U.N. mandated training of Haiti’s police and military. Most significantly, and unlike previous agreements, the Governors Island Agreement provided for Aristide's return to Haiti by October 30, 1993.

The signing of the GIA raised hopes for a peaceful solution to the crisis. In August, the international embargo against Haiti was lifted and apparent progress toward Aristide's return to Haiti was made. These hopes, however, were doomed to disappointment. In spite of the fact that both Aristide and the military leaders signed the GIA, they were not really in agreement, because the differences between the two sides had merely been “papered over”.217

This lack of real consensus made itself clear shortly before the date set for Aristide to return. The prospects for Aristide’s return to Haiti dimmed on October 11 when the American naval ship U.S.S. Harlan County was turned back from landing in Port-au-Prince.218 Two days after this setback, the U.N. re-imposed economic sanctions and an oil embargo, and the U.S. Navy sailed into Haitian waters to enforce the embargo.

The date set in the GIA for Aristide’s return passed without a resolution to the crisis. After the failure of the GIA, the U.S. had no immediate alternative policy, but the Clinton Administration still hoped for a negotiated resolution.

Negotiations began again in December when Haitian Prime Minister Robert Malval traveled to Washington to meet with Aristide. Malval, who had come into office in August as part of the GIA, faced intimidation by the Haitian military, and despite the fact that he and Aristide needed each other's support against the military government, a rift grew between the two of them.219 Despite this tension, Malval decided to seek an agreement with Aristide to resolve the crisis. He traveled to Washington, D.C., where he proposed a plan which the Clinton Administration endorsed enthusiastically. Under the Malval Plan, a national conference would choose a new, more broadly-based government which could negotiate a resolution with the military leaders in order for them to comply with the GIA. The U.N., the OAS, the Four Friends of Haiti (Venezuela, France, the U.S., Canada), and Haiti's political and business leaders all supported the Malval Plan. Aristide, however, rejected it on the ground that the military would still retain substantial power under this plan.220

218 Ibid. at 104.
220 Scharf, supra note 8, at 4.
Despite Aristide's rejection of the Malval Plan, diplomatic efforts to resolve the crisis were not at an end. The Four Friends of Haiti sent a delegation to Haiti and issued a warning to Cédras that unless Haiti's military leaders stepped down by January 15, 1994, Haiti would face even tougher sanctions. In spite of this warning, the January 15 deadline passed without compliance by the Cédras regime. Attempts at a diplomatic resolution to the crisis continued in February 1994, when a Haitian parliamentary delegation traveled to Washington, D.C., to meet with Aristide.

This delegation proposed another solution to the crisis, calling for a new Prime Minister and government, and the implementation of the remaining provisions of the GIA. Aristide also rejected this plan, and demanded tougher sanctions against the military leaders instead of further efforts at a diplomatic resolution. Although the Clinton Administration still favored a diplomatic solution to the crisis, Aristide and his demands for tougher sanctions enjoyed support in the U.S. Senate.

Under pressure from Aristide's American supporters the Clinton Administration subsequently announced its intention to seek tougher sanctions against Haiti, unless the Cédras regime gave up power and allowed Aristide to return. These new sanctions included a complete economic embargo and the closure of Haiti's border with the Dominican Republic. After the military leaders once more refused to step down, the U.N. imposed these new sanctions on May 21, 1995. Over the next month, the Clinton Administration took additional unilateral steps by cutting off all American flights to Haiti, restricting financial transfers to Haiti from the U.S., revoking all non-immigrant visas, and preventing Haitians from entering the country.\footnote{Faiola, supra note 121, at 104.}

### 6.10.4.1. The Intervention

Unfortunately for the Clinton Administration, even these stricter sanctions failed to resolve the crisis and force the military leaders out of power. Hoping that a show of force would compel the military leaders to step down, the U.S stationed 2,000 Marines off the Haitian coast, along with several assault ships and attack helicopters. This step may have had the unintended consequence of making a military intervention inevitable.\footnote{Ibid. at 112.} Doubts still remained, however, about taking the final step, an invasion of Haiti. Weighing against military intervention were concerns about the risks and commitment involved, as well as the precedent that such a measure could
potentially set.\textsuperscript{223} However, notwithstanding these concerns, the U.N. Security Council adopted Resolution 940, authorizing the use of “all necessary means” by a multinational coalition to restore the Aristide government in Haiti.\textsuperscript{224}

The following month President Clinton officially authorized plans for invasion, and a (State Department) representative met with the leaders of four Caribbean nations to form the multinational coalition which was to carry out the invasion. On September 15, over substantial domestic opposition from Congress, President Clinton delivered a televised address to the nation and discussed the plans to invade Haiti. Just when an invasion seemed inevitable and all hope for a peaceful resolution appeared lost, an eleventh hour attempt to find a diplomatic resolution succeeded.

Two days after President Clinton's televised address, an American delegation including former President Jimmy Carter, Senator Sam Nunn and General Colin Powell arrived in Haiti as a last-minute attempt to find a peaceful resolution to the crisis. The following day, the two sides reached a compromise. Cédras agreed that he and the other military leaders would step down by October 15, and that American troops could enter Haiti unopposed. On September 19, U.S. troops landed peacefully in Port-au-Prince. On October 12, Cédras officially resigned, and Aristide finally returned to Haiti on October 15, 1995. Although the consolidation of democracy in Haiti was far from complete, the crisis that the military coup had touched off was finally over.

\textbf{6.10.4.2. Legal Analysis}

An analysis of Resolution 940 and subsequent events confirms the conclusions reached in the cases of Iraq, Somalia, and Rwanda. The Resolution determined that “the illegal de facto regime” in Haiti had failed to comply with the GIA and with previous resolutions of the Security Council. The Security Council expressed its concern with the (significant further deterioration of the humanitarian situation), and particularly the regime's (systematic violation of civil liberties). Thus the Security Council invoked human rights abuses as well as the illegitimacy of the regime as the operative reasons for authorizing military action. Unlike the Somalia case, the Security Council did not determine that the situation in Haiti constituted a threat to international peace and security while asserting that it was acting under Chapter VII.

\textsuperscript{223} Ibid. at 112-13

Thus, this case-study strengthens the interpretation of the Charter, that states have accepted serious violations of human rights as grounds for action by the Security Council under Chapter VII. Resolution 940, like Resolution 794, refers to the “unique character of the present situation in Haiti and its deteriorating, complex, and extraordinary nature, requiring an exceptional response”.

What are the possible arguments against treating the Haitian case as a genuine precedent for collective humanitarian intervention? Anti-interventionists may argue, again, that in fact the Security Council found a threat to the peace and thus authorized the military action under the classic terms of Article 39. To the argument that Resolution 940 does not even try to characterize the situation in Haiti as a threat to the peace, they may reply that Resolution 940 refers to previous Security Council resolutions on Haiti and that in those resolutions the Council did determine that there was a threat to international peace and security in the region.

This is stubborn adherence to the anti-interventionist thesis even when it flies squarely in the face of the facts. No one can seriously argue that the Haitian situation posed a threat to international peace and security in the region. A more accurate reading of Resolution 940 is that the reference to threat to the peace in the region in Resolution 841 was unpersuasive because it reflected neither the facts nor the normative context of the Haitian situation. For that reason, the Security Council, in Resolution 940, sensibly abandoned the reference to the language of Article 39.

Another strategy could be to maintain that the U.S. acted out of purely selfish motives, not humanitarian ones, either to stop the flux of refugees or to get rid of a problem in the U.S. “backyard”. First, this view confuses psychological motivation with legal justification. Second, this view is inconsistent with the wording of Resolution 940 - the legal grounds for the U.S.-led intervention.

Anti-interventionists would have to say that the Security Council simply lied when it mentioned human rights abuses and the restoration of democracy in the resolution. More importantly, President Clinton gave the humanitarian justification of the intervention in his address of September 15, 1994.

President Clinton referred repeatedly to the atrocities committed by the Haitian dictators, and not just to the interruption of the democratic process in Haiti.

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225 Doyle, supra note 14, at 52.
The President did stress that such atrocities affected U.S. interests, but that begs the question of what is the legitimate U.S. national interest. If one asks why the atrocities affected U.S. interests, a plausible answer is that the national interest as defined in a broader sense, and not just in terms of pure national egoism, was affected precisely because the atrocities were morally intolerable. One could reply that the U.S. national interest was affected by the flow of Haitian refugees into U.S. territory. This is certainly true but only means that the U.S. had a self-regarding motive in addition to its humanitarian motives. The U.S. receives a huge flux of illegal immigrants from Mexico every year, and no one would suggest that such a “refugee problem” justifies armed action or even non-forcible action against Mexico. The Haitian “refugee problem” is best defined as (the refugee exodus caused by oppression) and not as (the refugee exodus) tout court.

Finally, there is no reason why the existence of mixed motives should blight an otherwise justified intervention, especially since the Haitian case is one where the humanitarian motive is overwhelmingly predominant.

6.10.5. East Timor

The humanitarian and political crisis in East Timor, like those in Somalia and Haiti, did not become a trouble spot overnight. Most of the problems that culminated in an Australian-led, U.N.- supported intervention force in East Timor began when Indonesia invaded the island in 1975. There was no clear or widely accepted justification for Indonesia’s actions; instead, they relied on appeals to a shared cultural heritage and fears of the potential for unchecked East Timorese radicals to disrupt Indonesian domestic affairs as grounds for their bloody pre-emptive action.

Around a quarter of the East Timorese population died as a result of violence following the invasion. Yet, Indonesia’s size and relative stability along with the precarious Cold-War security balance resulted in most individual states in the international community - including Australia though notably not the U.N. Security Council - tacitly accepting Indonesian rule in East Timor.

By the late 1990s the international political situation had changed markedly from 1975. The Asian financial crisis and the fall of Suharto’s regime contributed to

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228 Text of President Clinton’s Address on Haiti, supra, note 142.
230 Ibid. at 82.
political instability in Indonesia. B.J. Habibie, the Indonesian president, held at best a tenuous control of the world’s fourth most populous country.

Control of East Timor remained a hot-button issue in multi-ethnic Indonesia, as numerous other secessionist groups (including those in Ambon, Irian Jaya, and Aceh) looked to see how Indonesia and the international community would settle the most visible conflict. Changes in Indonesia’s internal economic and political situation helped enable the international community to make greater efforts to protect against human rights abuses and to promote self-determination of peoples. 231 Particularly in Australia, policy on East Timor was shifting. This shift was due in no small part to increased public support for East Timor’s bid for self-determination from post-Suharto Indonesia. Thus, there were increasing internal and external pressures for a resolution of East Timor’s status.

6.10.5.1. United Nations

Under international pressure to allow more autonomy for East Timor, President Habibie agreed to allow a referendum for East Timor to determine its future status. The election was to be administered in August 1999 by the United Nations Mission in East Timor (UNAMET). UNAMET entered a hostile environment where pro-integration militias aggressively sought to disrupt the voting process and intimidate the voting public. 232

In a stance that would prove costly in human terms, Habibie insisted that no outside election monitors were needed to accompany UNAMET. The Indonesian president asserted that his own army and local police would keep the peace.

After the militants succeeded in delaying the vote twice, the East Timorese voted resoundingly in favor of independence on August 30, 1999. Chaos followed the announcement of the election results. According to Jarat Chopra, former head of the United Nations Transitional Authority in East Timor (UNTAET), local militias supported by Indonesian armed forces undertook “Operation Clean Sweep”, a campaign to eliminate any and all supporters of an independent East Timor. Over three-quarters of the population were displaced in response to militia action following

231 U.N. Charter, Article 42 states: “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 actions 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”.

orders to kill “those 15 years and older, including both males and females, without exception”.

In East Timor, “the military and the militias were clearly determined to destroy the territory that had had the temerity to vote for independence”. The Security Council responded quickly to the crisis and passed Resolution 1264 on September 15, 1999. The Security Council was “appalled by the worsening humanitarian situation in East Timor, particularly as it affects women, children and other vulnerable groups” and noted that (widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor . . . .).

The Security Council also invoked its Chapter VII right in declaring the situation a threat to international peace and security. The Security Council further noted the creation of refugees and protection of UNAMET workers as reasons for designating the situation to be an international threat. The resolution then agreed to the establishment of a coalition force, to be led by Australia, with a mandate “to restore peace and security in East Timor . . . and authorized the states participating in the multinational force to take all necessary measures to fulfill this mandate”.234

6.10.5.2. Intervention

The Australians played an instrumental role in resolving of the East Timor crisis. Not only did the Australians apply political pressure to convince Habibie to agree to the ballot initiative, they also led the International Force for East Timor (INTERFET) envisioned in Resolution 1264.235 Neither Australia nor the U.N. were willing to send an intervention force without at least a nominal invitation from the Indonesian government.236 However, an invitation for outside intervention from Habibie would be an admission that either the Indonesian military was incapable of controlling the militia activity in East Timor or that Habibie was incapable of controlling the military. Neither one was an attractive option for Habibie, who did not want to allow foreign troops on what was still Indonesian soil. A Security Council mission brought the head of the Indonesian army, General Wiranto, to witness the mayhem that East Timor had become and the role of local military forces in

233 Ibid. at 135.
235 Ibid. at 357.
supporting the violence.\textsuperscript{237} His shock over the severity of the situation and embarrassment at the demonstrable lack of control Jakarta had over Indonesian military in East Timor helped influence Habibie to accept an intervention force.\textsuperscript{238}

INTERFET entered Dili, East Timor on September 21, 1999.\textsuperscript{239} The 8,000-member force entered the situation unsure if the Indonesian military forces in East Timor would cooperate. Jakarta’s assurances held little weight, as many of the same forces the Indonesian government sent to ensure both the safety of the election and the island actively contributed to the pro-integrationist violence. Australian intelligence also demonstrated there was high-level support from the Indonesian military for the militia-led violence. When INTERFET landed on the island, they feared an extremely hostile environment, but they found opposition to be less than expected. The predominantly-Australian force occupied the whole of East Timor in less than two months, reaching the last enclaves of pro-integration forces on November 16. In the course of the intervention, INTERFET sustained no casualties and inflicted only a handful.\textsuperscript{240}

6.10.5.3. Legal Analysis

INTERFET remains the closest instance of a true humanitarian intervention in goal, scope, and results. Like Somalia, the intervening forces had no ulterior realist motives for taking up arms in defense of the East Timorese. In fact, “the case of INTERFET is particularly significant . . . because Australia’s ‘vital interests’ were clearly not being served by its armed rescue of the East Timorese”.\textsuperscript{241} The Jakarta-first policy that Australia had pursued regarding East Timor from 1976-1999 bears witness to the fact that both Australian and regional security were best preserved through a pacific relationship with Indonesia.\textsuperscript{242}

Control of East Timor and the fate of the East Timorese were, even after the outbreak of post-ballot violence in September 1999, not causes worth risking the relative peace and security balance of the region. Hence, the Australians needed an invitation for intervention from the Indonesian government. Besides humanitarian

\textsuperscript{237} Byers, supra note 354, at 81-82.
\textsuperscript{238} Joyner, supra note 112, at 134.
\textsuperscript{239} Byers, Supra note 356, at 86-87.
motivations, the intervention’s low casualty totals underscore a mission that preserved its humanitarian character. That is to say, the means employed by the intervention force were consistent with the intended goals. INTERFET also achieved a humanitarian outcome by stopping the persecution of the East Timorese and allowing refugees to begin returning home.

The East Timor intervention provides another angle for analyzing the relationship between the principles of state sovereignty and a right to humanitarian intervention as well as adding another case to trace possible developments in international law. With respect to Indonesian sovereignty, neither the U.N. nor any individual state was willing to intervene without some show of support from Habibie.

This need to gain permission supports traditional definitions of sovereignty and the principle of non-intervention over the emergence of a customary international law in favor of unilateral humanitarian intervention. Regional views of the intervention also show one should be hesitant before citing East Timor as a case supporting a legalized right of intervention.

One scholar of the region contends that there is almost no chance that Indonesia’s fellow Association of Southeast Asian Nations (ASEAN) members would have supported intervention in any of its member states, regardless of size, without consent of the concerned state. Only the unique history of East Timor and Indonesia’s agreement to invite the intervention allowed for ASEAN members to support INTERFET.\(^{243}\)

The issue of state capacity also warrants consideration here. Indonesia, as a whole, was not a failing state to the extent of either Somalia or Sierra Leone. In Indonesia, (despite dangerous economic and other vicissitudes in the post-Suharto era, the state provides most of the other necessary political goods and remains legitimate. Indonesia need not be classified as anything other than a weak state . . . .\(^{244}\)

While Indonesia cannot be properly identified as a failing state, the situation for East Timor was slightly different. East Timor prior to INTERFET’s landing was “not so much a failed state as a territory from which the attributes of the state had been removed.” In response to East Timor’s desperation, Habibie’s government had been unable to control the situation or provide security for the East Timorese. With

\(^{243}\) Joyner, supra note 137, at 135.

\(^{244}\) Ibid. at 136.
regard to the situation in East Timor, “Habibie seemed to be operating in a universe of his own and was certainly not in charge”. Habibie lost international credibility when he was unable to fulfill Indonesia’s commitment to the U.N. to provide security for UNAMET and the referendum.

Had he been in better control of his military, Habibie would likely have been able to stop the pro-integration violence. Calling for international assistance was an option of last resort that provides further evidence that the government was unable to stop the humanitarian disaster not unwilling.²⁴⁵

6.11. Conclusion

The basic thrust of the concept of humanitarian intervention lies in the responsibility of the international community in maintaining the moral correctness of the nation-state system. In terms of state practice and the practice of international organizations, however, the concept has witnessed many changes over the years.

The degree of those changes is not reflected in the law on the subject. Recent attempts to create ad hoc regimes of humanitarian intervention have increased the confusion. Uncertainties over future humanitarian crises, growing sensitivity of the public at large over humanitarian matters, shrinking willingness of leading states to shoulder the responsibility in risk-prone areas, and normative anarchy have not only questioned the efficacy of the existing law on humanitarian intervention but have also presented a powerful thesis for the evolution of a new law on the subject.

The progressive development and codification of a new law of humanitarian intervention ought to reflect normative transparency, both in terms of substance and procedure. This is possible when not just the U.N. Security Council but also all other relevant organs of the U.N. system are involved in the process. Operational transparency is necessary to ensure the credibility of the intervenor, be that a state or an international organization.

Humanitarian intervention may well never become an international obligation consistently employed by the U.N. to protect human rights. It can, however, become a legal right employed selectively but decisively by the international community to put an end to egregious human rights violations. Indeed, recent events suggest that such a development is in fact occurring, and that it is a development that will ultimately contribute significantly to international stability and the protection of human dignity.

Chapter – 6: Humanitarian Intervention in Internal Conflicts

If military intervention is to be contemplated, the need for a post-intervention strategy is also of paramount importance. Military intervention is one instrument in a broader spectrum of tools designed to prevent conflicts and humanitarian emergencies from arising, intensifying, spreading, persisting or recurring. The objective of such a strategy must be to help ensure that the conditions that prompted the military intervention do not repeat themselves or simply resurface. As former U.N. Secretary General Kofi Annan wrote in the Economist (18 September 1999): “When fighting stops the international commitment to peace must be as strong as was the commitment to war.” Thus reconstruction after military and armed conflict should not be taken for granted by the international community after the humanitarian intervention.

In summary, any intervention ought to be done in a structured manner and within the very essence of the U.N. Charter, whose primary objective is to ensure prevention of conflict and maintenance of international peace and security, in an environment where justice, human rights and dignity of all human beings are respected.