

UNIVERSITY OF KWAZULU-NATAL

The Impact of NATO Intervention in Kosovo and the Changing  
Rules of International Humanitarian Intervention

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# Declaration

I, Sakhile Hadebe, declare that, the work contained in this dissertation except where otherwise indicated is my original work. It has not been submitted for any degree or examination at any other university.

Sakhile Hadebe

Date:

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29 November 2012

## Dedication

I dedicate this work to my daughter Ndalwenhle. This should be a challenge for you my girl.

I dedicate this work, in loving memory, to my parents: my mother Ziphi Eugenia Radebe (the late) and my father Dubula Johannes Ngubane (the late). It is my view that they left me too early; they should have not. My soul mates in everything I do and in every step I take I will be missing you, thou shall rest in peace.

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## **CHAPTER ONE: INTRODUCTION**

### **BACKGROUND AND OUTLINE OF RESEARCH PROBLEM**

The issue of humanitarian intervention has generated a lot of controversies, especially in Somalia, Bosnia, Kosovo and Rwanda. Wheeler (2001) and Mertus (2000) have tried to discuss and debate humanitarian intervention and the Responsibility to Protect Doctrine. Since the North Atlantic Treaty Organization (NATO) intervention in Kosovo, human rights lawyers have tried to get the international community to focus on Kosovo. There were reports of systematic human rights abuses in the region. The perpetrators of the crimes were Serb citizens and Serb police (Mertus, 2000). These violations of human rights were directed to the Albanians. By then, violence was alarming and forced deportations were imminent. There was a need for the international community to take preventative measures as grave human rights violations were imminent, however; leaders did not treat Kosovo with the urgency it deserved. This forced the Albanians to abandon passive resistance and to opt for armed resistance (Mertus, 2000). In 1998 Serb forces killed about fifty four Albanians in response to the Kosovo Liberation Army's (KLA) provocation. All this did not provoke the international leaders to intervene. It was only at the later stage that international community started focusing in Kosovo (Mertus, 2000).

Currently, the international law outlaws the breach of human rights and humanitarian law orchestrated by state against its citizens. Every state has the responsibility to respond to these breaches individually and collectively. Such responses ought to be non-forcible (Dana, 2000). A variety of nongovernmental organizations can be part of fighting such violations. However, the intervention in Kosovo by NATO forces raised controversy with regard to the permissibility of the use of force by foreign states either individually or collectively. The UN Security Council



was part in Kosovo issue for quite some time. Before the air strikes, it had already adopted three resolutions in line with Chapter VII (Dana, 2000). The resolutions laid a foundation for the program of action which authorized the Organization for Security and Co-operation in Europe (OSCE) to put in place an observer force, the Kosovo Verification Mission (KVM) in Kosovo to monitor the situation. The resolutions further called upon the Former Republic of Yugoslavia (FRY), the KLA, and all other states and organizations to stop using force and called for a stop in violations of human rights. By no means have the resolutions authorized the use of force by any external actor. Instead they reaffirmed the importance of sovereignty and territorial integrity of the FRY. At that point no foreign actor had an authority to use force (Dana, 2000).

This research project is aimed at giving an insight on the NATO's intervention in Kosovo in 1999, and will examine how that has impacted on the law of international humanitarian intervention. It will reconcile the legality of intervention in line with both international customary law and the United Nations (UN) Charter which clearly stipulates that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Hatley, 2010:65).

Schabas in Hatley (2010) suggested that the Kosovo intervention was necessary to prevent an impending humanitarian catastrophe while others maintained that it was illegal. The intervention was so controversial because it was the first time since the founding of the UN that a group of states acted without explicit Security Council's authority to defend a breach of the sovereignty rule primarily on humanitarian grounds (Hatley, 2010).

The international reactions to NATO's intervention were mixed: on one hand, it was welcomed by scholars who argued that the threat or use of the veto in the Security Council cannot be allowed to stand in the way of the defense of human rights. Some supported this position on the grounds that morality should supersede legality in exceptional cases where governments commit massive violations of human rights inside their borders (Donnelly, 2003). For this group, the international law should not be changed to accommodate the practice of humanitarian intervention because this would be open for abuse. Others argued that NATO's action was legal because it represented the development of international customary law through state practice. On the other hand, states like Russia, China and India strongly opposed the claim that NATO's action was lawful and argued that humanitarian intervention without Security Council's authority jeopardizes the foundations of international order and that a single event cannot develop the international customary law (Donnelly, 2003).

#### AIMS OF THE STUDY

This research project seeks to explore the changing normative context of humanitarian intervention in the international relations as a result of Kosovo. It will do so by examining the effect of the Kosovo intervention by the NATO forces in 1999. It will assess the claim first made by Jonathan Charney that the Kosovo intervention laid the precedent for changing the international law. The legal and moral justifications of unilateral intervention will be assessed by this research project. The dilemma between violation of human rights and the use of force outside the UN consent will be highlighted. It will also determine whether unilateral intervention can be justified on humanitarian grounds.

The research project will claim that the NATO's intervention in Kosovo revealed the underdevelopment of the international law in relation to morality. It will argue that the

intervention was morally just given the then violation on human rights, but it created a bad precedent and if that precedent is followed, then it likely to leave the room for superpowers to use force in a way which is inconsistent with the law.

The research project will use constructivism approach to enhance the understanding of normative context of humanitarian intervention. These theorists negate the dominant traditional understanding of the international relations theory that states' interest and those of other actors are formed independent of society's interaction (Finnemore, 1996). They suggest that identity formation is relational and prior to interest formation. Interests are understood in two terms, material and non-material. Consequently, they focus on the role that culture, institutions and norms play in shaping identity and behavior. The idea is that there is an absence of a supranational authority; as a result norms dictate the behavior of a state. It is worth noting that according to the constructivists, ideas, norms including rules are not courses but justifications for the behavior (Finnemore, 1996).

## DEFINITION OF HUMANITARIAN INTERVENTION

Defining humanitarian intervention is no easy task as it is highly contested by and among commentators and political scientists in international relations. It is generally accepted that it refers to outside military interference by a state or group of states in the domestic affairs of another state in order to pursue humanitarian principles (Oxford Dictionary of Law, 1997). Verey (1985) notes that, if present there are few concepts which are as complex as humanitarian intervention in the international system. He suggests that this is due to the absence of consensus

on the legal meaning of intervention and of humanitarianism. Despite that, certain standard characteristics seem to be overlapping in many authors' definitions.

Firstly, it is the violation of the sovereignty of the country in which intervention is taking place (Rostow, 1971). Sovereignty implies the legal independence of a state in international relations.

Rostow notes that "The formal structure of the international state system is built on the principle that each state is autonomous and independent, and has the right in its internal affairs to be free from acts of coercion committed or assisted by other states. This rule is basic to the possibility of international law" (1971:15). Internally, it refers to the prerogative of a state to make laws and implement them. Externally, it refers to the idea that all states are equal in the international arena and that no state can compel the other to do anything it would have not preferred (Mastanduno, 1995). The major problem with regard to humanitarian intervention is imbedded in the breach of sovereignty and thus arise the question of supremacy between the two principles. This seeks to suggest that any form of humanitarian intervention by state or group of states on invitation by the host state is excluded here since it not hostile towards sovereignty. Secondly, the utilization of armed personnel in intervention is central. This excludes a variety of interpretations of intervention as a concept, which is inclusive of political and economic interference with a state's domestic policy. Humanitarian intervention is normally not utilized in this general sense.

Thirdly, the concept of humanitarian intervention includes the large scale violation of human rights. Donnelly asserts that "human rights are ordinarily understood as the rights one has simply because one is a human being. Furthermore, a concept of gross human rights violations must embrace notions such as genocide, crimes against humanity and general humanitarian law"

(1995: 24). One scholar Lauterpacht correctly captured that a “state renders itself guilty of cruelties against persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind” (1955:36). Interventions which are not carried out on the basis of humanitarianism must be omitted. However, the prerequisite should be that the intervention is intended to effect humanitarian conduct of the state in question and that the intervener will not be benefiting from the action. Also it must be aimed at preventing grave human rights violations. Lastly, humanitarian intervention is a legal issue; therefore it should be handled as such. This means that relevant sources of law need to be contacted (Lauterpacht, 1955).

## EVOLUTION OF THE DOCTRINE OF HUMANITARIAN INTERVENTION

### THE LAW OF NATURE

With the emergence of western culture (384-322 BC) philosophers in Greece started arguing that there is a universal law of nature which abides all humankind and is supreme to all positive laws (Crisp, 2000). Aristotle in Crisp came up with key proposition that “One part of what is politically just is natural, and the other part legal. What is natural is what has the same validity everywhere alike” (2000: 34). At a later stage Stoicists developed this into a proper theory of the Law of Nature. Natural law was seen as being founded on the structure of the universe. This means that the law of nature is universally applicable to all people. This law serves as the foundation for a number of moral and legal principles (Crisp, 2000). Since it advocated for equality, it was the bases for inherently human rights. During the Enlightenment period law of

nature served as a foundation for social contract and states sovereignty. As a result, it is the earliest and most crucial source of ideas in relation to humanitarian intervention.

## JUST WAR-THEORIES

The humanitarian intervention doctrine is largely grounded in the just war theory. In ancient Greece, war could only be justified if there was a just cause for it (Mushkat, 1986). Christian churches were pacific not allowing any form of justification for war. It was St. Augustine who started to admit that war could be justified on just cause (Mushkat, 1986). In an attempt to bridge the gap between the Christians' position and the real political environment, he came up with some procedures that were aimed at making war to be justified in some cases. Just like Christian moral theory, his theory evolved around just cause and intention. "The justness of an action could not be judged without evaluating the driving intention, so also with the state action of going to war" (Mushkat, 1986: 26). As the Christian church extended its influence just war theory emerged as the basis of rules of war.

Through the amalgamation of ancient Greece, Aristotle and Christian church writings, St. Thomas Aquinas came with his conclusion. He concluded that there is no overall condemnation of war, but it should be a just war. In order for war to be just it has to pass the following requirements: the war should be authorized by proper authorities. There should be valid reasons and need to wage war. That need is usually based on self-defense; attempts to restore peace; defense of the helpless and in helping the neighbor who's under attack. Also it should be waged with good intention (Mushkat, 1986).

Hugo Grotius is said to be the one who separated the law of nature from God. Although he did not exclusively reject the existence of God he did not use him as an explanatory factor. He expanded on Aristotle's rule that people are social beings. He proposed that people strive to live in a peaceful environment and in harmony with other beings. He held that individual beings and their natural rights are the center of law (Freeman, 1994). The central values of good faith apply to every being despite nationality and status. He claimed that in case of violation of individual's fundamental rights the larger community has the right to use force in defense of that individual. He applied natural law to international law; his Law of Nations was developed from his Law on Nature. He argued that the nation-states were constructed in order to improve security. Individual beings had intrinsic rights which state had to protect. This limited states' internal sovereignty (Freeman, 1994).

In the case of the state which violates fundamental human rights of its citizens that state is deemed to have breached its jurisdiction, as a result other states are entitled to intervene to restore the order of the Law of Nature. Grotius held that "Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some special rights over his subjects. [But] .if a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case. It would not follow that others may not take up arms for them" (Freeman, 1994: 54). It was Grotius' position that made Lauterpacht to suggest that he (Grotius) was that first person to come out and claim the existence of the doctrine of humanitarian intervention. Humanitarian intervention meant that domestic jurisdiction ends when atrocity against people begins. Grotius then came with the proportionality principle. It held that the use of excessive force would render the action unjust

(Freeman, 1994). For example the attack on non-combatants and unnecessary destruction of enemy's properties is totally prohibited. The custodians of natural law suggested that humanitarian intervention conforms to the Law of Nature. The wars were not totally banned but they had to meet certain requirements.

## RESEARCH METHODOLOGY

This research project requires a qualitative method. It will be based on secondary sources. In line with Creswell (2003) who acknowledged that qualitative research is used in various academic disciplines but it was traditionally used in social sciences. Qualitative researchers strive to get a thorough understanding of human behavior and the rationale behind it. This approach is more suitable as the study seeks to understand the decision by NATO to invade Kosovo outside the U.N. authority. Mainly it seeks to assess the response by states and individuals in the international arena. It explores every detail of the decision making and usually a smaller sample is required. This research project is aimed at understanding the changing behavior of states in relation to humanitarian intervention. Qualitative research has several meanings, for example, the term can be used interchangeably with the terms such as naturalistic, ethnographic, subjective, and post-positivistic. According to Wolcott (1990), qualitative research is geared towards gaining an understanding of human systems.

For the purpose of data collection, secondary sources will be mostly used to get an insight on the theories which have been used to explain the change of norms and behavior in the international system. As correctly pointed out by Wolcott, qualitative researchers tend to study things in their



natural settings trying to make sense of them (Wolcott, 1990). In this research project the researcher will study secondary resources in order to make sense of the behavior of states.

## **CHAPTER TWO: THEORETICAL FRAMEWORK**

### **OUTLINE**

Due to the fact that humanitarian intervention has been studied comprehensively in international relations, it is necessary to focus on the impact of NATO's intervention in Kosovo. Before executing such a task, this chapter deals with theoretical approaches in the international relations: idealism, neorealism, pluralism and constructivism respectively. Their perceptions are not mutually exclusive in assessing humanitarian intervention but their justifications are different. It is suggested in this chapter that above all, constructivism offers the most convincing account for humanitarian intervention because it allows us to understand different moral and legal discourses with international relations relating to humanitarian intervention over the course of history.

### **IDEALISM**

The Idealist school of thought starts from the premise that the conventional approach is failing to explain the incidences in the international system since it only explains them in military terms. Brand-Jacobsen in Baldwin contends that "unless the international community comes up with new ways of addressing security concerns and to transcend the limitations inherent in traditional conception of security and inter and intra-state relations, the current status of unauthorized use of force will continue (Baldwin, 1993:16). This owes to the fact that scourges are not only present in military but everywhere and they do threaten security.

The point of departure stems from the perception that humans by nature are cooperative. The implication for this is very important in analyzing why wars occur and what the society must do to prevent them. This view holds that natural harmony exists among human beings; as a result wars are a product of evil institutions and their practices as opposed to human wickedness. It is

the evil institutions which upset harmony and order among people (Hanlon, 2008). The central duty is to identify and restructure these evil institutions to avoid war.

According to Woodrow Wilson, international peace can be assured by means of the establishment of an international structure similar to the League of Nations to control anarchy. Such a structure would allow for diplomatic processes to take place and protect states from outside hostility (Hanlon, 2008). Post Second World War, the UN adopted the principle of territorial integrity which has been perpetually breached by states under the guise of humanitarian intervention.

## NEOREALISM

The Neorealist school of thought was first coined by Kenneth Waltz in his book *International Politics* in 1979. It was an attempt to modify and update realism theory. Waltz argued that the international system is an anarchic system which lacks central authority to regulate states' relations (Waltz, 1979). International politics is as a result of systemic nature as opposed to human nature. States are eager to pursue their personal gains and they act according to their interests. Even if states join alliances they do so to further pursue their interests even inside the alliances. He holds that due to security concerns states are always competing with one another. Power is important in understanding interactions among states (Waltz, 1979). In the international system the stronger the state, the less vulnerable it is. Neorealism states that the only way to maintain peace is by maximizing power. He holds that "A state having too much power may scare other states into uniting against it and thus become less secure. A state having too little power may tempt other states to take advantage of it (Waltz, 1979:10).

As said Neorealism was a modification of Realism. Scholars of Realist school of thought hold that national interests, power and state survival are central in analyzing states' relations. They held that when states' interests are troubled, states ought to act under the code of responsibility. This rule is usually used to justify violation of the rules of war. It has the roots on Thucydides' account of the Peloponnesian War and also in Sun Tzu's *Art of War* (Waltz, 2004). Thucydides noted that "In a world where no superordinate or central authority exists to impose order, the strong do what they have the power to do and the weak accept what they have to accept" (Waltz, 2004:2) . A number of realism advocates hold that national security can be better attained through application of realist theory.

Georg Schwarzenberger also shares Thucydides' view on international system "In the absence of genuine international community...groups within the international system can be expected to do what they are physically able to do rather than what they are morally exhorted to do" (Waltz, 2004:4).

Due to the fact that realist school of thought sees the international system an anarchic, it is clear that the intervening states subscribe to this approach. This view is shared by modern neorealist as Kenneth Waltz and John Mearsheimer (Waltz, 2004). They argue that the absence of central government in the international system necessitates that states rely on their own power for safety. Deducting from the importance of power, Morgenthau deducts that "a political policy seeks either to keep power, or to increase power, or to demonstrate power" (Waltz, 2004: 6). Such reflection of power has been demonstrated by intervening states in the international system.

## PLURALISM

Pluralism is used mainly in both fields of international relations and political science. It criticizes the traditional notion of security studies by asserting that, instead of focusing on security and development, it is of importance to realize that there are a variety of securities and developments (Kauppi & Viotti, 1998). What is security to one could be the total opposite of security to the other. Due to that understanding the pluralists hold that “to seek to impose one view or one understanding upon those who do not support or share that view may in itself be conflict provoking and engendering, promoting insecurity and destabilization rather than security”

(Kauppi & Viotti, 1998:24). These scholars believe that cooperation among states is important in assuring the secure environment. As a result, instead of states being skeptical of one another it is important that they work together to find amicable solutions addressing the root causes of conflict that provoke insecurity (Kauppi & Viotti, 1998). For pluralists, cooperation and peaceful means are vital in addressing a number of shortfalls of the traditional notion of security.

Pluralists oppose the belief that the state is the major player in international relations. In doing so, they assert that there is a lot of interaction taking place outside the state (Brown, 2001). They forward a number of reasons to prove that the traditional approach to international relations is flawed. They do recognize the central role of the state; however, they hold that “states are important, for they set rules of the economic, communications, technology, and other games that occur simultaneously. But by themselves, they do not set the international agenda, nor can they make decisions as if removed from the interests, values, and aspirations of millions of business firms, banks, shipping companies, political parties, citizens groups, and the like” (Bull, 1984:18). State is recognized as one among the actors in the pluralist environment. For that reason, they are essentially against the traditional principle of sovereignty as embraced by Thomas Hobbes and others alike (Bull, 1984).

The pluralist scholars reject the idea that state is absolute. They argue that it is inappropriate to disregard the role played by non-state actors like rebel movements (Brown, 2001). These non-state actors have massive influence in determining which issues are of importance and which are of none. They point out that states are entering into treaties with international and regional bodies. Accordingly, such treaties have binding status which cannot be breached. They submit that, for the improvement of international relations it is important to abandon the notion of absolute sovereignty and its effects (Brown, 2001).

Regardless of pluralists' assumption, sovereignty remains at the center of political reality. Due to the fact that state legislates rules it follows that they have the prerogative to unmake or amend them to suit their will regardless of its correctness or lack thereof (Kauppi & Viotti, 1998). State has the ability to breach treaties. It is a common knowledge that intervening states are signatories to various international and regional treaties regarding the peaceful means of conflict resolution.

## CONSTRUCTIVISM

Among key challenges facing the international relations theorists today is to explain the major political changes in the arena. The end of Cold War presented new dynamics and challenges to the existing and dominant analytical frameworks: neo-realism and idealism, respectively (Finnemore, 1996). This situation opened the vacuum which was subsequently occupied by the emergence of the new wave, the constructivists. These theorists negate the dominant traditional understanding of the international relations theory that states' interest and those of other actors are formed independent of society's interaction (Finnemore, 1996). They suggest that identity formation is relational and prior to interest formation. Interests are understood in two terms, material and non-material. Consequently, they focus on the role that culture, institutions and

norms play in shaping identity and behavior. The idea is that there is an absence of a supranational authority; as a result norms dictate the behavior of a state. It is worth noting that according to the constructivists, ideas, norms including rules are not causes but justifications for the behavior (Finnemore, 1996).

The constructivist theorists concentrate on human awareness and its position in international affairs. Most of international relations theories, neorealism in particular is materialistic. It suggests that material power: military capabilities and economic power in the international arena offers the explanation with regard to state' behavior. Scholars of constructivist school reject this claim on bases that it is one sided as it only focuses on material. They claim that the most crucial feature of international relations is not material but social (Wendt, 1999). The social and political world inclusive of international relations is not just physical object exclusive of human awareness. As a result the study of international relations ought to put attention on ideas and beliefs as they dictate state behavior. The international system is not immune from human interaction since it does not exist in isolation. If the ideas and norms that inform the position in international relation changes so the system itself changes. This is the basis for Alexander Wendt's (1992) assertion that anarchy is what states make of it.

Since constructivists discard arguments by neo-realists with regard to the nexus between state of anarchy and states' behavior in international relations including materialism, identities and interests emerge as fundamental aspects in studying international relations. Given that states are not constrained under the self-help arrangement, interests and identities shape their behavior. In line with the international order, constructivism sees identities and interests as the outcome of social construction and not based on materialism. In essence, the ideas, objects and actors are all given by social relations (Katzenstein, 1996).

Wendt (1992) forwarded an argument rejecting neo-realists' position that state of anarchy compels state to play competitive power politics. He argued that power politics if it exists is as a result of process rather than state of anarchy. State identities and interests are established and altered within the framework of international arena and not existing exogenous variables. Identities by nature are relational; as a result states can have various identities e.g. sovereign and imperial power, depending on the type of interaction it enjoys with others (Wendt, 1992). Identities serve as the foundation for interests. States have no single universal identity of being a super power exclusive of social context as neo-realist would suggest. The interaction of international actors determines interests and not the structure of the system. Foreign policy identities and interests are informed by the international system. Constant social interaction of state A with state B creates mutual expectations about future behavior, thereafter, identities and interests emerge (Wendt, 1992).

In comparison to conventional approaches in international relations constructivism gives a compelling analysis of humanitarian intervention. It does so by introducing human consciousness, national identity and interest formation. The change of behavior in relation to humanitarian intervention is congruent to the changes of normative standards. It is these norms which dictate who worth humanitarian intervention and the modus operandi in implementation also changes accordingly. The pattern of intervention cannot be understood apart from the changing normative context in which it occurs. The failure of alternative explanations to account for changing patterns of intervention behavior increases the credibility of the norms approach.



### **CHAPTER THREE: JUSTIFYING HUMANITARIAN INTERVENTION**

The issue of humanitarian intervention relates to two aspects in the international arena, international law and morality respectively. International law embodies non-intervention principle and state sovereignty while morality embodies human right protections (Ayoob, 2001). It is generally argued that morality is excluded in the formation of the international law. And such international law excludes the authorization of intervention based on humanitarianism. With the end of Cold War a new normative dimension has emerged which allows the Security Council to authorise interventions on humanitarian grounds like in Somalia. The intervention on humanitarian grounds either it protect the civilians from persecution or force the government to stop human rights violation (Ayoob, 2001).

There are number of perspectives in engaging on justifications of interventions: legal, moral and political. However, the current debate on intervention is largely based on legal and moral justifications (Jackson, 1990). The legal aspect is important in determining how far the law allows for the violation of both codified and customary rights of sovereign states in defence of humanitarian interventions. Morality relates to the moral principles which can be evoked in order to legitimize the breach of sovereignty on the state (Goldsmith, 2005). With regard to political approach, there are minimal chances for this justification, however; it is central to take into account the fact that motives behind interventions are most likely to be political. In addition to that the decision to intervene or not is influenced by public opinion and domestic policy (Goldsmith, 2005).

## LEGAL JUSTIFICATIONS

The comparison between international law and domestic law usually shows the inadequacy as the two are different. They are different in a sense that: international law lacks single authoritative legislator; it shorts of presiding officer who interprets the law and who is above all states in terms of authority; customs are equally important as treaties and lastly, it is underdeveloped. The international law is derived from two major sources, treaties and customary international law, respectively (Gelb & Rosenthal, 2003).

Treaties and conventions come in the form of quasi documented agreements between and among states. Their interpretations are in accordance with the agreed upon guidelines or general guidelines as set out in the 1969 Vienna Convention on the Law of Treaties. Customary international law comes from states' practice coupled by *opinion juris* (Farer, 2003). This is the states' belief that they are required by law to follow that practice. Usually treaties have a weight compared to customary international law.

Article 2 (4) of the UN Charter stipulates "all members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This prohibition generally applies to all subjects of international law. It is not limited to the UN members; it serves as a peremptory legal norm (Gelb & Rosenthal, 2003).

Article 2 (4) is further strengthen by article 2 (7) which out –laws any intervention by the UN in the domestic affairs of any given state (Lyons, 1995). It reads "Nothing contained in the present

Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” The legitimacy of the Security Council to use or sanction the use of force derived from article 39 “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Adding to these provisions, Chapter VIII Article 51 allows for the application of force in self-defence, individual or collective defence. Article 53 further allows the Security Council to utilize regional organizations accordingly or to give authority to them to apply force (Lyons, 1995).

The general prohibition of intervention with an exception in rare circumstances is backed by the United Nations General Assembly. The 1965 Declaration on the Inadmissibility of Intervention stated that “no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any state” (Chesterman, 2004). In the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the General Assembly again interpreted the Charter as meaning “no state or group of states has the right to intervene in any form or for any reason whatsoever in the internal or external affairs of any state”. The 1981 Declaration on the Inadmissibility of Intervention and

Interference in the Internal Affairs of States and the 1993 review of the implementation of the Declaration on the Inadmissibility of Intervention on the Strengthening of International Security both again called upon states to refrain from the use of force, aggression, intervention and interference and that they take further steps aimed at promoting the ideal of collective security as

envisioned in the Charter (Chesterman, 2004). The Assembly has, according to Michael Glennon, constructed a rule of invalidity with respect to intervention. The rule admits no exception. Thus, there is a line taken by the UN General Assembly that maintains that intervention is always unlawful, regardless of the state undertaking intervention, and regardless of motives or effects.

As much as humanitarian intervention is not explicitly singled out, there is a general consensus that the Security Council is entrusted with the responsibility to intervene on humanitarian grounds or authorizes such an action under Chapter VIII of the Charter (Chesterman, 2004). The base for such authority is Article 39 which entrust the Security Council with the duty to

“determine the existence of any threat to the peace, breach of peace or act of aggression, and shall make recommendations, or decide what measures are to be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security.” In the post-Cold War, the Security Council have begun interpreting the phrase “threat to peace” differently. It has acknowledged that humanitarian catastrophe especially in collapsed states might have splits over effects. The issue is can really humanitarian catastrophe be regarded as threat to peace. The response is simple, Article 39 reads “the Security Council shall determine” the existence of a threat to peace. Then the prerogative to decide what constitutes threat to peace rests on the Security Council (Chesterman, 2004).

“As the international community has not criticised or opposed humanitarian interventions under Chapter VII authorisations, they are arguably lawful modifications of the treaty through practice. The Vienna Convention on the Law of Treaties provides that the interpretation of a treaty may be

influenced by practice” (Jackson, 1990:54). Despite the absence of well documented authority, currently the Security Council is seen as the legitimate body to authorize humanitarian intervention through allied forces or regional organizations. The one part of the Charter which seems to be outlawing humanitarian intervention is Article 2 (7). It prohibits the UN from intervening in domestic affairs of any given state (Jackson, 1990). What is problematic is that the same Article 2 (7) further provide that “This non-interventionist principle shall not prejudice the application of enforcement measures under Chapter VII”. This seeks to suggest that domestic jurisdiction part does not interfere with the authority as articulated in Chapter VII. In addition to Chapter VII the UN since its inception has had substantial human rights structures. These includes but not limited to: UN Declaration of Human Rights (1948); the Convention on the Prevention of the Crime of Genocide (1948); the International Covenant on Civil and Political Rights (1966); and the Covenant on Economic, Social, and Cultural Rights (1966). Flowing from this, it can be argued that humanitarian intervention falls outside the Article 2 (7) prohibition scope (Meggle, 2004). However, in reality when the military action is authorized by the Security Council is justified when it not then its status is uncertain.

Now let turn to Article 2 (4) of the Charter which prohibits the use of force including the threat to use force. It states “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations”. The proponents of humanitarian intervention doctrine suggest that it is legal in the current Charter and that the prohibition only focus on three cases (Ayoob, 2002). To start with, humanitarian intervention doctrine is legal in the current Charter provided it does not institute the application of force against territorial

integrity. Violation of territorial integrity entails the control of another state's territory. The second issue relates to political independence. If the intervention is aimed at restoring or installing democracy it can be said it promotes political independence as oppose to violating it. Lastly, among other key purposes of the UN is to promote human rights, therefore, intervention based on protection of human rights cannot amount to violation of Article 2 (4) if interpreted in this manner (Ayoob, 2002).

Contrary to the above interpretation of Article 2 (4) the detractors holds that the prohibition contained here is complete without any exception. With regard to the wording "...or in any other manner inconsistent..." is not meant to permit exceptions to the rule but to make it undisputable.

In relation to international law as codified in the Article 53 and 54 of the 1969 Vienna Convention on the Law of Treaties the detractors holds that prohibition in Article 2 (4) is part of *jus cogens*. This suggests that it is acknowledged as a norm which ought to be followed without deviation (Meggle, 2004).

As much as the standing of an unauthorized humanitarian intervention is uncertain, its position might also be influenced by worrisome set of laws known as customary international law. The latest states' practice in relation to humanitarian intervention has the potential to lay a foundation for evolution of the new rules of customary law (Finnemore, 2003). The American Law Institute in its Restatement of Foreign Relations Law defines customary international law as the "general and consistent practices of states that they follow from a sense of legal obligation". With this definition come two important components: the presence of common and consistent state practice and states must follow such a pattern believing that they are obliged by the law to do

that. Among states, the development of customary international law remains a contentious issue. There has not been an agreed upon definitions of legal obligation and of state practice. The argument is that any actor who wants to bring about development of customary international law must embark on action as it is one who matters in state practice (Finnemore, 2003).

Contrary to this view, there is a view that the actual act is bound to violate the existing customary international law. There seem to be no consensus as to say with the exclusion of actual act what constitutes state practice. “First, the least controversial source is policy statements, legislation and diplomatic correspondence. Second treaties, particularly multilateral but also bilateral, are often utilised as evidence of international customary law. Third, the writings of jurists are a common source of customary law. Finally, United Nations General Assembly resolutions and other non-binding statements and resolutions by multilateral organisations are often viewed as a source of international customary law” (Jackson, 1990:60). Adding to the problem of determining which acts are relevant is the uncertainty as relate to the degree of widespread of state practice. Theoretically the states practice should be general, meaning the majority if not all states should follow it. In reality this is not possible; as a result customary international law is based on selective cases of superpowers. “The conception that international customary law is being made by a limited group of states is of concern to many, but it is true that powerful states have always had a disproportionate influence on customary law-making, mainly because they have a broader range of interests and consequently engage in more practice than other states” (Meggle, 2004:34).

In light of all these, one holds the view that a new customary norm of humanitarian intervention has been developed as an exception to the rule of the prohibition of the use of force. As noted in the above discussion, customary international law permits for the establishment of such a norm by means of development of consistent and widespread practice coupled by *opinio juris*. Despite this, there are no many unauthorized humanitarian interventions so; the likelihood is that the changes in the international law are likely to be by means of the UN Charter. And in the foreseeable future states are most likely to intervene out-side the UN of humanitarian crisis.

## MORAL JUSTIFICATIONS

During the Cold War it was not likely to find moral and ethical considerations informing state's foreign policy especially when relates to security. However, the end of Cold War brought of about paradigm shift from such behaviour. The post-Cold War period has been characterized by acts of humanitarianism despite that there is no codified law prescribing moral and ethical considerations (Meggle, 2004).

Basically, an ethical decision is one that can reasonable take “a universal point of view and believes that the notion of morals applies some sentiment common to all mankind, which recommends the same object to general approbation. Regardless of the discussions in relation to the merits and demerits of relative thoughts, there is a general agreement relating to the kind of behaviour that might lead to intervention. In the post-Cold War period, humanitarian intervention serves as an example of emerging importance of morality in the international arena. While morality only featured now in the foreign policy of states' morality of war is quite old” (Meggle, 2004:34). The Egyptians of the olden days and Chinese military strategist Sun Tzu laid out the



rules on how and why war should be fought. “Natural Law developed from the common threads that characterises traditional Western Greco-Roman and Christian thought and can be seen as a set of values, based on what are assumed to be the permanent characteristics of human nature that can serve as a standard for evaluating conduct” (Meggle, 2004:38). Stoics came with the most concrete traditional formulation of natural law. They hold that every man have reasoning ability whom which they use to appreciate and obey law.

In addition to that they hold that world is governed by reason. Due to the fact that people have free will they will not follow the reasoning firmed. This principle was promoted within Romans by Cicero “there is in fact a true law - namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect on the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible.....The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest penalties, though he has escaped all the other consequences which men call punishment” (Meggle, 2004:43).

Upon being familiar with natural law principle, Christians realized that it is harmonious with their beliefs. St. Thomas Aquinas (1225-74) teachings on natural law are commonly known. He holds that there is natural law constituting part on eternal law (Bazyler, 1987). He saw such law as giving all people the inclination to behaviours which are appropriate to them. Accordingly, natural law presented a barometer for the measurement of behaviour free, rational individuals

and moral guide. The Stoics, St. Thomas and the Romans shared the view that any positive law which violated natural law was not a legitimate law (Bazylar, 1987).

During the 17<sup>th</sup> century the societies were becoming more secular, hence there was a shift away from the then dominant theocentric view towards anthropocentric. Such shift was also influenced by the enlightenment period (Hensel, 2004). Hugo Grotius (1583-1645) is taken as a founder of the current natural law. He holds that natural law is the body of rules based on reasoning. His position is that even if there was no God but the natural law can still be valid. Natural law is different from positive law but continues to be the underlying base for morality (Hensel, 2004). Morality is derived neither from custom nor positive law but form base for humans. The United Nations Declaration of Human Rights can be seen as the development of natural law in a secular age. It reinforces the key concept of natural law proponents that the global community has a responsibility to protect the right of all peoples to realise their essential being, and therefore, fulfil themselves as much as possible as human beings (Hensel, 2004).

This form of obligation to human rights is entrenched in the Just War theories. The morality which is entrenched in the Just War theories appears in the 5<sup>th</sup> century Augustine, 13<sup>th</sup> Thomas Aquinas and today's teachings. Despite the fact that this principle originated mainly from Christians it lacks religious justifications. Morality of war provides a useful starting point for examining the morality of humanitarian intervention since it also uses force. The doctrine establishes a range of principles that must be satisfied for the war to be ethically justified. These principles falls within two categories: *Jus ad Bellum* and *Jus in Bello*. *Jus ad Bellum* deals with

the legitimacy of decision to go to war while *Jus in Bello* establishes the right conduct during war (Reisman, 1985).

Just War theories establish six criteria under *Jus ad Bellum*. The first one is that there must be a just cause. This means that there must be a good reason for going to war that is to protect the innocent civilians. For example to prevent genocide or to restore rights wrongfully denied or to re-establish order (Simms & Trim, 2011). The second one is that there must be a proportional cause. In addition to being just, the cause must be serious enough to warrant engaging in war. There must be a reasonable expectation that the outcome will bring about enough good to offset the inevitable pain and destruction of war. The third criterion is that the aim must be to create a better, more just, subsequent peace than there would have been if war had not taken place (Simms & Trim, 2011).

The fourth one is that the decision to go to war must be taken by proper authorities (Simms & Trim, 2011). Historically the right authority has usually meant the ruler or the government of a sovereign state. However, in modern times it is usually considered that a higher authority than a single state, such as the United Nations, is required. However, in practice regional bodies or coalitions of hegemonic states often take action without UN approval. The fifth one is that there must be a prospect of success. This means that there must be a reasonable chance that the action will succeed. The last criterion is that the decision to go to war must be taken as a last resort (Simms & Trim, 2011).

There are two criteria under *Jus in Bello*. The first one is discrimination; this specifies the conduct during war. It says that there must be no deliberate attack on the innocent civilians. Deliberate attack means attack in which harm to the innocent civilians is the purposeful, or important to accomplish the mission (Reisman, 1985). “This does not rule out an attack in which harm may befall the innocent as long as all that could have been done to reasonably protect the innocent is done, consistent with the legitimate military purpose of the action” (Reisman, 1985:45). The second one is proportionality; “it says an action must not be taken in which the harm done is an unreasonably heavy price to pay for the likely military victory” (Reisman, 1985:45). The damage or destruction must be compared against lives of both armed combatants in the war as well as the civilians. There is a strong linkage between Just War principles as discussed earlier and the moral guidelines contained in the International Commission on Intervention and State Sovereignty (ICISS) report. Seemingly the ICISS is mainly based in these principles.

The first requirement as conveyed in the *Jus ad Jellum* is the magnitude of the crisis. This is inclusive of the just cause and proportionate cause of the war. Under normal circumstances there are two situations in which humanitarian intervention can be justified (Lowe, 2007). Firstly, it is in the case where government commits mass atrocities. Secondly, in the case where government fail to maintain law and order. The controversial issue is the magnitude of violations of human rights which warrants justifiable humanitarian intervention. “Additionally, there is near universal agreement that the threshold for military intervention must be very high. Generally, it is agreed that genocide and crimes against humanity warrant intervention, but others would argue that

lesser occurrences that entail the actual or imminent large scale loss of life would also justify intervention” (Simms & Trim, 2011:15).

The second requirement as articulated in the ICISS is the aim of the intervention. There must be right intension. This speaks to the key motives for humanitarian intervention (Lowe, 2007). One might argue that the main purpose should be to protect ill-treated people. “The intervention should be apolitical or disinterested which would prevent the seizure of territory or the installation of a puppet regime under the guise of protecting innocent civilians. Others take a less severe view of motivations. ...the true test is whether the intervention has put an end to human rights deprivations” (Simms & Trim, 2011:19). This is enough to meet the requirements of disinterestedness; inclusive of the cases where there are no humanitarian reasons informing the intervention. Wheeler suggests a sliding scale of international legitimacy which approves of interventions carried out on humanitarian grounds and he further show tolerance to those which are not carried out on humanitarian grounds but who yield positive results (Lowe, 2007).

The third requirement is that the intervention should be multilateral. This entails that the decision to intervene must be taken by proper authorities. Interventions should be multilateral and be authorised by the UN Security Council in order to limit abuse. This should exclude the interventions by super powers. On the ethical point of view intervention by single hegemonic state is morally impermissible (Jackson, 1990). “If a multinational intervention is ethically sound it is hard to argue that it would not remain so if conducted by a single state. Similarly, hesitation against interventions by hegemonic states may be understandable but that alone cannot destroy

the confidence in an otherwise justifiable intervention. In fact, hegemonic powers are among the few states with the ability to project military force beyond their borders (Jackson, 1990:54).

The last requirement to be fulfilled is that the intervention ought to be carried out as a last resort. It is only after all other measures have been employed and failed that the application of force should be allowed. Jackson (1990) and Simms & Trim (2011) share a view that force should follow after virtually all possible measures have fallen short. Such measures are inclusive of fact finding missions, mediation in conflict, political, economic and other kinds of sanctions. The latter author notes that these measures are not casting stones with fixed series of events but are important measures which need to be taken into account prior to armed intervention (Simms & Trim, 2011).

Contrary to four requirements of *Jus ad Bellum*, *Jus in Bello* has two requirements to be fulfilled for the intervention to be justified. The first one is proportionality. The degree of force applied must be equivalent to the provocation in question; it must not be an excessive force. It must be not an unnecessary disastrous force but falls within the scope of ethical decision making. The second one which is the last speaks to the impact of the intervention. This includes the discrimination of non-combatants during war and the chances for successful intervention. However, it is not easy to judge whether or not the intervention will produce more good than harm (Reisman, 1985).

An intervening state or group of states ought to act within the parameters of International Human Rights Law. The intervening actor also has the responsibility to minimise harm and destruction

to other parties concerned. These are inclusive of the civilians being protected, the combatants in conflict and the intervening actor itself. “Determining the costs and benefits of interventions are difficult to assess prior to the actual use of coercion. This reality makes proportionality and impact the most subjective of criteria, particularly when the uncertainties of waging war and the subjective judgements of what constitutes acceptable and unacceptable damage are taken into account” (Simms & Trim, 2011:26). Further to that, the principle in question suggests that there must be realistic chances of successful intervention. By implication this suggests that it would not be easy to wage successful humanitarian goals against super powers (Simms & Trim, 2011). Overall, it is one’s contention that Just War practices can serve as a determinant in the dilemma of deciding whether or not humanitarian intervention can be morally justified.

## **CHAPTER FOUR**

### **THE LEGALITY OF HUMANITARIAN INTERVENTION**

The doctrine of unilateral humanitarian intervention has been a subject of discussion in the international arena for quite some time, as it can be traced back to the writings of Augustine, St. Thomas Aquinas and Hugo Grotius. Regardless of its long existence, it remains one of the controversial areas due to its inconsistency with state sovereignty doctrine (Reisman, 1990). Since the formation of the current statehood, state sovereignty doctrine has been central in regulating interactions among states. This doctrine is embedded in the U.N. Charter and customary law as the major sources of international law. As it is among the core principles of the international law it plays an important role in maintaining world order. According to Wright (1989) the non-intervention principle enshrined in state sovereignty doctrine make it to be the supreme principle. The principle of non-intervention rejects the interference of external actors in the domestic affairs of a sovereign state. It assumes that states are at liberty to make their own decisions; basically it means the independence of the state (Wright, 1989).

The term unilateral humanitarian intervention usually is used to characterize an “armed interference by one or several states in the internal affairs of another state, without its prior consent, in order to curtail gross human rights violations in the state” (Burmester, 1994:39). Due to the lack of prior consent then it violates the sovereignty of the state which intervention is taking place. Since it violates the supreme principle of state sovereignty it then needs a strong justification (Burmester, 1994). It is easy to find moral justification but hard to get legal justification for unilateral humanitarian intervention. Currently, the legality of the doctrine of



unilateral humanitarian intervention remains contentious. Scholars of international relations like Schabas maintain that the U.N. Charter outlaws unilateral use of force inclusive of those who are carried out on humanitarian grounds.

## STATE SOVEREIGNTY AND THE PRINCIPLE OF NON-INTERVENTION

The doctrine of state sovereignty is central in regulation of states' interaction and maintaining of peace and order. It plays a huge role in protecting weaker states against possible abuse by superpowers (Geissler, 2000). State sovereignty denotes the independence and legal status of a state. The doctrine of state sovereignty has long been part on the international system, but the current understanding of the concept has roots in the Treaty of Westphalia. "The supremacy of the sovereign authority was established within a system of independent and equal states as a measure to avoid another war after nearly three decades of war, and thus establish peace and order in Europe (Geissler, 2000: 325)". It is important to know the central characteristics of statehood mainly because for a unit to be sovereign it must be a state first. The major characteristics of a state as agreed upon in Montevideo Convention include citizens, defined territory and government (Geissler, 2000).

The U.N. Charter acknowledges the importance of state sovereignty; in line with that it embraces the principle of sovereign equality of all state in the international arena. "Flowing from the importance of the principle of the sovereign equality of all states, the Charter sought to prohibit interference in the domestic affairs of sovereign states by other sovereign states, especially the threat or use of force" (Simma, 1990:48). The U.N. Charter in ensuring the promotion of sovereignty of states it clearly said "nothing contained in the present Charter shall authorize the

United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter” (Simma, 1990:50).

The inviolability of the non-interference doctrine is accepted even by the International Court of Justice (ICJ) which is the primary judicial branch of the U.N. The ICJ stated in 1949 that “between independent states, respect for territorial sovereignty is an essential foundation of international relations” (Harris, 1998:67). And about thirty years down the line it further noted that “the principle of non-intervention was the fundamental principle of state sovereignty on which the whole of international law rests” (Bazyler, 1987:41). Due to this, it can be concluded that neither states nor international organizations holds the right to interfere in the internal affairs of a sovereign state.

#### DEFINITION OF UNILATERAL HUMANITARIAN INTERVENTION

Just like other phenomenon in the international arena, humanitarian intervention has been given many definitions. It has been referred to as the “justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reasons and justice” (Arend, 1993:25). Abiew had defined it as “the theory of intervention on the ground of humanity that recognizes the right of one state to exercise an international control by military force over the acts of another in regard to its internal sovereignty when contrary to the law of humanity” (1999:43). A present day scholar Teson in O’Connell said it “the proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are

being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government” (2000: 34).

All these definitions are different, but they all reflect what the doctrine of humanitarian intervention entails. All these definitions cover common characteristics of the concept of humanitarian intervention as the use of force. Teson correctly captured that the traditional meaning of unlawful interventions means “dictatorial interference in the affairs of another state for purposes of altering or maintaining the actual order of things in a matter which is essentially within the discretion of the target state” (O’Connell, 2000: 36). Deducting from these definitions, in order for intervention to qualify as unlawful the force must have been applied in the domestic affair of another country.

#### PURPOSES OF HUMANITARIAN INTERVENTION

##### CURTAILING MASSIVE HUMAN RIGHTS VIOLATIONS

The most popular justification in support of humanitarian interventions is the stoppage of mass slaughter committed by states on their nationals. Since the end of the Cold War an estimate of 169, 198, 000 people have been murdered by their own governments (Misha, 1999). This number far exceeds the sum of the World Wars killings. These interventions have been carried out in response to grave human rights abuses (Misha, 1999).

##### MAINTAINING REGIONAL AND GLOBAL STABILITY

The second reason used to legitimise humanitarian intervention is maintenance of regional and global security (Misha, 1999). When there is a mass killing regional and global peace are

threatened. This results from the refugees fleeing their land looking for safer places. This was partly the case with India's intervention in East Bengal known today as Bangladesh. The government started killing its citizens and people flooded India. It was reported that more than 10 million people entered India avoiding persecution in East Bengal (Misha, 1999).

## TREATY LAW – UNITED NATIONS CHARTER

The foundation of international law concerning the application of force is found in the U.N. Charter (Mingst, 1995). Every issue pertaining the lawfulness or lack thereof of the application of force in the international law evolved around article 2 (4) of the U.N. Charter. It states that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the objectives of Purposes of the United Nations.” The Charter then allows for two exceptions to the rule: article 51 in cases of self-defence and Chapter VII the exception to non-intervention doctrine. To cement the prohibition of the application of force as stated in article 2(4), article 2(7) further outlaws the intervention by the UN itself on the domestic affairs of any given state (Mingst, 1995).

The fundamental problem is that in the presence of both article 2(4) and 2(7) respectively, there exists the right of humanitarian intervention taking into account the phrasing of the above articles. The intervention in accordance with Chapter VII is legitimate and is excluded here. The dilemma is an unauthorized intervention, collective or individually (Mingst, 1995). Within the Charter there is an emphasis on independence, sovereignty and equality of states. In the same Charter, states collectively are expected to maintain peace and security. Flowing from the

general understanding of the Charter, there is a view that humanitarian intervention is illegal under the Charter although its principal goal is to promote human rights (Mingst, 1995).

## SUGGESTED REVISIONS OF THE UN CHARTER

The problem for the international community surely does not rise from states' willingness to intervene. Rather it rises from states' willingness not to intervene and look for excuses for that (Cronin, 2002). Hopefully, the intervention in Kosovo is likely to make it hard for the international community not to intervene in cases of atrocities. As much as this is imperative, the decision to intervene should be inclusive of the Security Council. This is important to the UN as Human Rights protection is one of the core principles of the Charter. Currently, the Charter does not allow the Security Council to intervene in protection of Human Rights in cases of atrocities (Cronin, 2002).

According to Bellamy "the distribution of powers between the different organs of the UN is part of a complex political and legal construction with the collective security system at its centre. Under the collective security system, the role of the UNSC is, or has been until now, to ensure international peace and international order. The issue of human rights protection has been of only secondary importance to the UNSC within this framework" (Bellamy, 2004:64). The perfect solution to ensure Human Rights protection within the collective security system would be to amend the Charter. The Charter should be organized in such a way that it allows the Security Council to legally invoke Human Rights and International Law as the motivation for intervention. This amendment should not allow international community to standby while Human Rights violations and breach of International Law continues (Bellamy, 2004). An easy

way to amend would be to make reference on the current articles without adding new ones. Article 1 for instance, relates to the purposes of the UN and the Human Rights issue can be added there. It reads “to maintain international peace and security”; it can then read “To maintain international peace and security and respect for human rights” (Bellamy, 2004).

## CUSTOMARY INTERNATIONAL LAW

In the international arena customs are understood to be the rules emerged out of states’ practice and other states abide by them because they think there is a law compelling them to do so (Fonteyne, 1998). Rebecca Wallace in Fontyne notes that it “a practice followed by those concerned because they feel legally obliged to behave in such a way” (1998:28). For an action to qualify as state practice it is required that such an action is generally followed by other states under impression that they are obliged to do so by law. It remains central to divorce custom from other actions followed for different reasons like friendship. What distinguishes custom from other norms is the fact that custom is result from state practice and *opinion juris*. On one hand, state practice originates from states’ behaviour (Fonteyne, 1998). On the other hand, *opinion juris* is an individual belief by states that behaviour is required by law. In order the customary international law to be formed, states’ action or behaviour must constitute both states’ practice and *opinion juris*. Failure to meet the above criteria means the absence of legitimate customary international law (Fonteyne, 1998).

## STATE PRACTICE AFTER 1945

### INTERVENTIONS DURING THE COLD WAR, 1945-1989

The Cold War period was full of antagonism and hostility between the Western and Soviet and their respective allies. There was a minimal cooperation if any; rivalries would support opposing sides of the conflict for the purpose of defying each other (Ghali, 1996). This rivalry between the two powers rendered the Security Council ineffective. In every case there is need for humanitarian assistance the Security Council could not act because one member would veto the decision (Ghali, 1996). Almost all interventions during the Cold War period were driven by ideologies, due to that they will not be discussed here. However; two interventions had neither Western nor Soviet influence as a consequence they were regarded as humanitarian although other motives were suspected for intervening.

#### INDIA IN EAST BENGAL (BANGLADESH), 1971

On independence in 1947 India separated into India and Pakistan. Pakistan was a divided society; it was divided into East and West Pakistan and was further divided on ethnic lines (Henkin, 1995). They were only united by the shared religion and their hostility to India. By 1970 West Pakistan which was the smallest in terms of size had already got political and economic control of East Pakistan. This led to political riots in the East. When the general elections were held in 1990 the Awami League which was the opposition got the majority of seats in the National assembly. They then demanded more autonomy (Henkin, 1995). The central government under the leadership of President Yahya Khan was not happy with the results and delayed the National Assembly indefinitely. This provoked the Awami League and 1971 it declared the emancipation.

In response to the declaration of emancipation, West Pakistan launch strikes destroying property and killing East Pakistan civilians. During that strikes about one million East Pakistan citizens

were murdered the majority being the Hindu minority (Henkin, 1995). About ten million refugees entered India putting serious strain on India. Due to that and border killings the relationship between India and Pakistan became bitter. This led to Indian forces attacking Pakistan and thereafter recognizing Bangladesh as an independent state. After a twelve day war, West Pakistan was defeated. At the beginning India evoked humanitarian reasons to justify its attack. Addressing the UN the Indian representative said “we have ... absolutely nothing but the purest of motives and the purest intentions: to rescue the people of East Bengal from what they are suffering” (Cassese, 1999:61). At the later stage India changed its justification to self-defence. It submitted that during the border battles it was also attacked (Cassese, 1999).

The responses from the international community were not mutual. There was an argument that India’s intervention could not be deemed as a legitimate humanitarian intervention thus does not support the legality of humanitarian intervention (Cassese, 1999). There was a general consensus that India had more selfish reasons for intervening than it had humanitarian. Given that Pakistan was a powerful enemy its split was strategic for India’s security. Nevertheless, the above explanation does not weaken humanitarianism and the existence of such a rule (Henkin, 1995). It is so because for intervention to be a legitimate humanitarian intervention does not require the action to be motivated only by human rights concerns because it hard to figure out all the reasons for state behaviour.

India was heavily criticised by the UN with the majority of its member state openly lambasting the action characterizing it as the unlawful violation of state sovereignty (Henkin, 1995). The switch in justifications also hammered India as it was interpreted as a sign of acknowledging the



absence of the doctrine of humanitarian intervention. According to Bazyler India's intervention was a classical case for humanitarianism and suggested that it supported the doctrine. He noted that the action can be legally impermissible at the time of its execution but lay a foundation for new customary law (Cassese, 1999).

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#### TANZANIA IN UGANDA, 1979

In Uganda under Idi Amin's regime the government slaughtered own citizens and severe human rights abuses took place between 1971 and 1979 (Reisman, 1985). About three hundred thousand people were killed in this campaign. The campaign included rape, torture and public executions. In the course of killings border skirmishes resulted in bitter relations between Uganda and neighbouring Tanzania (Reisman, 1985). In 1978 Uganda attacked and occupied Kagera, a Tanzanian territory. Amin later announced that Uganda has taken over that territory. This action further fuelled the tension between the two countries and President Nyerere saw the seizure of Tanzanian land as declaration of war. Towards the end of 1979, Tanzania entered Ugandan soil and attacked Amin's troops. This action was welcomed by Ugandan citizens. Nyerere's troops overthrew Amin regime (Reisman, 1985).

After the war, it was argued that Tanzania acted out of own interest. It was so because on the first invasion Tanzania had evoked self-defence. Just after the attack Nyerere said "[the] war between Tanzania and Idi Amin's regime in Uganda was caused by the Ugandan army's aggression against Tanzania and Idi Amin's claim to have annexed part of Ugandan territory. There was no other cause for it" (Nanda, 1992:12). However, it was known that humanitarianism informed the intervention and Nyerere's hatreds for Amin regime was an aggravating factor. At

some stage, Nyerere had referred to Amin regime as “thugs” which Ugandan people possess a full right to overthrow (Nanda, 1992). The overthrowing of Amin was described by Tanzanian foreign ministry as “a tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity” (Nanda, 1992: 15).

In examining the legitimacy of the Ugandan invasion by Nyerere’s troops with regards to the legality of unilateral humanitarian intervention, it is worth taking into account that the international community responded positively to it. Tanzania was not really chastised for its action although it was a violation of international law. Johann Mouton suggested that lenience towards Tanzania’s action implied acceptance of the humanitarian doctrine. “This is surely tantamount to saying that the international community as a whole recognized in this case the primacy of a modicum of human dignity over sovereignty” (Nanda, 1992:14). Contrary to this, Tanzania never used humanitarianism as the justification for war. As a consequence, this case can never be used as a precedent in relation to the legality of humanitarian intervention doctrine.

#### INTERVENTIONS AFTER THE COLD WAR, 1990-PRESENT

The beginning of 1990s saw brought about changes in the international arena. The changes were as the result of the end of Cold War and with them, came a new world order. This brought hope that the United Nations in particular the Security Council could function. “The conclusion of the Cold War ... presented a once-in-a-lifetime opportunity for the nations of the world, acting individually, collectively and through the UN ...to help achieve two principal purposes of the UN: the maintenance of international peace and security and the promotion and encouragement of human rights and fundamental freedoms” (Lillich, 1994:56). Due to the restoration of the

Security Council, many post- 1990 interventions were authorized by the Security Council and will not be discussed here. Few unilateral interventions will be discussed.

#### USA, UK AND FRANCE IN IRAQ, 1991

The Kurds people are scattered all over: turkey, Iran, Iraq and Syria. In Iraq they have been claiming sovereignty as back as the late 19<sup>th</sup> century. Iraq under Saddam Hussein's regime systematically murdered over ten thousands Kurds in 1985 (Ghali, 1996). In 1991, just after the Persian Gulf War the Kurds attempted military action against the government. Nevertheless they could not sustain it. Government forces reacted by wiping their villages killing about over one million civilians (Ghali, 1996). An estimated three million Kurds ran escaped to Iran and Turkey. Flowing from that, the Security Council passed Resolution 668 "Condemns the repression of the Iraqi civil population... Demands that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression ... Appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts" (Ghali, 1996:35). The resolution did mention threat to global peace but never authorized any use of force in line with Chapter VII of the UN Charter. It neither makes reference to collective enforcement measures nor explicitly authorizes the use of force. Regardless of the UN resolution the "USA UK and France announced their plans of 'Operation Provide Comfort' to establish 'safe havens' and a 'no-fly-zone' in Northern Iraq" (Ghali, 1996:37). However, Perez de Cuellar the then UN Secretary General conveyed his discomfort as the intervention without Iraq's consent was going to violate its sovereignty.

Despite that, the planned military action proceeded. President Bush cited humanitarian reasons for the action. The UN Secretary General accepted the importance of acting on moral and humanitarian grounds (Stromseth, 1993). The British Foreign Ministry said “we operate under international law. Not every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognizes extreme humanitarian needs” (Stromseth, 1993:42). Just after the military action the alliance attempted to get the UN to take responsibility. For the operation to be legal consent from Iraq was required. They subsequently they got it. This meant that the operation was legal through consent (Stromseth, 1993).

One disagrees with the conclusion that the operation was legal through consent. Events unfolded openly, a substantial number of allied forces invaded Iraq without its consent or UN authority and at a later stage pressured Iraq to agree on the presence of minimal UN forces. This intervention clearly falls under the scope of unilateral humanitarian intervention. In a memorandum to the British Foreign Affairs and Commonwealth Office, the legal counsel said that: “the intervention in northern Iraq ‘Provide Comfort’ was in fact, not specifically mandated by the United Nations, but the states taking action in northern Iraq did so exercise of the customary international law principle of humanitarian intervention” (Lobel & Ratner, 1999:52).

As alluded before these were not official justifications but communiqué among them. This suggests that they were mindful of the illegality of humanitarian intervention doctrine.

## ECOWAS IN LIBERIA, 1990

On the eve of Christmas in 1989, Charles Taylor and his National Patriotic Front of Liberia (NPFL) attacked with the intention to topple Samuel Doe's authoritarian regime in Liberia (Eisner, 1993). Doe's regime was characterized by massive human rights violations. By August 1990, Taylor's army had conquered the whole part of Liberia but Monrovia, the capital. War continued with splinter armies from both sides making the situation to be more complex. Both Doe's and Taylor's forces were engaged in torturing and murdering. The estimated number of refugees and internally displaced people range to 1.3 million combined (Eisner, 1993).

As the civil war drags on the Economic Community of West African States (ECOWAS) resolved to military action against Liberia. Its justification was on the basis that "there is a state of anarchy and total breakdown of Law and order in Liberia. ... These developments have traumatized the Liberian population and greatly shocked the people of the sub-region and the rest of the international community" (Wippman, 1993:23). ECOWAS intervention resulted in establishment of peace treaty which lasted more than previous ones but conflict itself continued.

The Security Council thereafter passed resolution 788 where it said "determining that the deterioration of the situation in Liberia constitutes a threat to international peace and security.... Recalling the provisions of Chapter VII of the Charter of the United Nations.... Recognising the need for increased humanitarian assistance.... Commends ECOWAS for its efforts to restore peace, security and stability in Liberia.... Requests the Secretary General to dispatch urgently a Special Representative to Liberia to evaluate the situation...." (Wippman, 1993:26). Just like the resolution in Iraq, this resolution does not give go ahead for military intervention. Again, similar

to Iraq the resolution is passed when the intervention has already started. This was another sign that the Security Council members were sceptical to approve the military action in the war zone as the result of the Persian Gulf War had led to troubles in Somalia. This action was taken as a multilateral intervention on the grounds of humanitarian reasons (Wippman, 1993). However, the central issue was the existence of *opinion juris* or lack thereof which grants legal status under customary law.

Despite the fact that the Security Council never gave ECOWAS the right to intervene, it commended ECOWAS for its effort (Wippman, 1993). This signals support for the intervention in question. There is an argument that Security Council members accepted the intervention as legitimate but sceptical of making a fragile precedent. This argument does not hold water for simply reasons. ECOWAS should have deployed armed forces from the beginning but decided not to. By commending the action meant that they recognized that military action was needed from the onset (Wippman, 1993). This intervention does not offer much with respect to the legality of unilateral humanitarian intervention under customary law as the UN claim it to be under its authority.

#### NATO IN KOSOVO, 1999

The end of war in Bosnia came with expectations of peace in the region. However, that was just a dream with the ill-treatment of Kosovo-Albanians by President Slobodan Milosevic of the Federal Republic of Yugoslavia (Malanczuk, 2000). He put into place segregation policies similar to that of apartheid South Africa. By 1996 the Kosovo Liberation Army (KLA) had already started to mobilize the international community into their side. FRY forces intensified

their attacks on KLA up to 1998 when the international community finally put its attention to Kosovo (Malanczuk, 2000). On March 31, 1998, the Security Council passed resolution 1160, in which it condemned “the use of excessive force by Serbian police forces against civilians and peaceful demonstrations in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army” (Wheeler, 2001:37). Further to condemnation the resolution also imposed weapons embargo and argued conflicting parties to address through dialogue.

The aggressions did not stop and victims of war started entering Albania and Macedonia to escape aggression. The Security Council passed another resolution that “affirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region.... Demands ...that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe” (Wheeler, 2001:40).

As much as the situation necessitated the application of Chapter VII of the UN Charter, it was however, not applied not even a threat to apply it. It was clear that the military action was not going to be resolved to as Russia and China were going to veto such a decision (Henkin, 1999) . The aggression became more intense forcing the NATO to intervene. In October 1998 NATO threatened to use air strikes should the Serbs continue with killings in Kosovars villages. On the last minute NATO deployed US Special Envoy to talk to President Milosevic which resulted on the cease-fire agreement and the presence of inspector of Organization on Security and Cooperation in Europe (Henkin, 1999).

The delicate agreement was crushed by the KLA as they were not part of the negotiations. In response to that FRY army killed 45 civilians which surprised the world. NATO called both parties into the table in Paris in the attempt to find last minutes solution (Kritsiotis, 2000). They could not agree neither FRY nor KLA accepted the terms of discussions. On the 23<sup>rd</sup> of March 1999 NATO forces started attacking FRY through air strikes. Number of justifications was submitted. The first one was that the preservation of NATO's credibility as a defence organization. This is not a legal justification. The second one was that the military action was in line with Security Council resolutions (Kritsiotis, 2000). The presence of China and Russia in the council weakens this argument because the Security Council would have not supported military action. And this justification does not help in addressing the unilateral humanitarian intervention principle.

The justification relevant here is the one which evoke humanitarian reasons. It was claimed that the aim was to prevent an impending catastrophe. "We were left with no other way of preventing the present humanitarian crisis from becoming a catastrophe than by taking military action to limit the capacity of Milosevic's army to repress the Kosovar Albanians (Kritsiotis, 2000:34)". The significance of this military action is embedded in the international community's response to it. The intervention was supported by the large number of western countries. Britain for example said that the intervention was legally legitimate under the customary international law. China referred to it as 'absolute gunboat diplomacy' while Russian representatives in the UN stated that "what is in the balance now is the question of law and lawlessness. It is a question of either reaffirming the commitment of one's country and people to the basic principles and



values of the United Nations Charter, or tolerating a situation in which gross force dictates realpolitik” (Henkin, 1999:42). Russia mobilized support from India and Belarus, together they proposed a resolution to condemn the intervention but they lost in a voting process. The Security Council never condemned this intervention despite the fact that it was carried out on humanitarian grounds (Henkin, 1999).

In addition to that the then UN Secretary General Kofi Annan showed lenience towards NATO’s unauthorized action. He said “this year’s conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority... On the one hand is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?” (Dana, 2000:37). Lastly, there was no serious objection of the intervention by the majority of UN member state including non-western states.

A thorough evaluation of incidences of unilateral humanitarian intervention as discussed here in this project shows that the international community is slowly moving towards accepting the doctrine of unilateral humanitarian intervention. The intervention in Iraq by Britain, France and US forces got a minimal support from the international community. The successive incidences got more support specifically from the UN. The UN commended ECOWAS invasion in Liberia. With NATO, it did not get a clear support as ECOWAS but the rejection of a proposal to condemn shows the support from the UN.

Taking into account these interventions especially ECOWAS in Liberia and NATO in Kosovo and respective responses they got, one can conclude that there is a shift toward acceptance of the doctrine in question under customary law. The rule has not yet fully evolved but the precedent has been laid.

## THE IMPACT OF NATO INTERVENTION ON THE RULES OF INTERVENTION

Both the supporters and critics of the NATO intervention in Kosovo share the same sentiment that it presented a paradigm shift from an old state practice in the field of intervention. The importance of this intervention owes to the fact that it was executed outside the United Nations' authority and there was no attempt to evoke law in its justification (Meggle, 2004). For the previous interventions the United States (US) had requested permission from the Security Council. This was the case with the First Gulf War, Somalia, Haiti and Bosnia but with Kosovo it did not even approach the Security Council, as a consequence the intervention fell outside the scope of the U.N. Charter (Meggle, 2004).

This change of behaviour by the NATO can be better explained through constructivism. The understanding is that states will always look for the justifications to legitimize its action using a well-established norm. The notion of constraint is derived from constructivist understandings of how actors are embedded with a normative context structured by rules. One should reiterate that norms are not physical barriers but are constraining devices within the international community of legitimate practice. As Wheeler noted that the change of norms provides actors with new legitimate reasons to justify their actions. However, the change in norms does not mean that an action will always take place. On interventions prior to Kosovo, there was an emphasis that interference from other states was considered a significant violation of sovereignty. However,

now this is no longer the case. States which violate human rights on its land now are seen as security threats. The normative shift allow for the international community to take responsibility.

For those who support the intervention in question like the former U.N. General Kofi Annan, it represented some kind of hegemony under the US command. For the critics like China and Russia it was the US' rejection of the U.N. and international law Secretary (Meggle, 2004). According to Wolfe (2002) for those who were more vigilant it points to the likely- wood of the emergence of the world order where human rights supersede the sovereignty of the state and interests of Security Council members. The advocates of these above positions seem to agree that Kosovo brought about important separation between law, military force and international institutions. For Wolfe it did not only represent a break from old practice but it set a new precedent which was followed in Afghanistan and Iraq (Wolfe, 2002).

Beyond the fact that NATO had no permission from the Security Council, two things stood out in relation to the nexus between international law, military intervention and the U.N. as an institution. The first one is that the US never appealed to international law, instead it cited humanitarian's reasons. The second one is that the U.N. was totally side-lined throughout the entire operation (Lowa, 2007).

Charney in his article *Anticipatory Humanitarian Intervention in Kosovo* he holds that "despite the prohibition of the use of force as enshrined in the U.N. Charter, the use of force under the guise of humanitarian intervention provides a convincing justification for the NATO's military action in Kosovo" ( 2007:34). Regrettably, humanitarian intervention does not form part of the

exception to the rule. The U.N. Charter by no means grants such a right. The situation like the one of Kosovo cannot be justified under the current international law, neither by the U.N.

Charter nor International Customary Law (Charney, 2007). The doctrine of humanitarian intervention can be applied when a state is protecting its diasporas from mass murder; however, this according to the U.N. Charter will be catered for under self-defence. Illustrations can be drawn from actions in Dominican Republic, Congo and Panama. These interventions themselves fell under the self-defence justification but ulterior motives were suspected to be the driving force (Charney, 2007).

The abuse of the exceptions as enshrined in the U.N. Charter necessitates that the prohibition part should be adhered to despite the legality of the intervention to protect own citizens (Murphy, 1996). Not only Kosovo, other interventions which appealed to the doctrine of humanitarian intervention fell short. Example can be drawn from intervention in East Pakistan by Indian forces to aid the Bengalis in the course of Pakistan's civil conflict. The General Assembly criticised this intervention and it was clear that India had other political scores to settle which were not humanitarian in nature. This was the indication that the international community is reluctant to accept such a doctrine (Murphy, 1996). The lack of clear evidence showing that states intervene solemnly on humanitarian grounds make it difficult for the state practice to be accepted as *opinio juris* in favour of the doctrine of humanitarian intervention. However, NATO's intervention in Kosovo is arguable the possible exception.

Long due after the intervention, its legality and its effect on bringing about change for developing international law is still in question. Joy (2000) holds that scholars and commentators of the international relations are confronted with the legal and moral dilemma between the prohibition on the use of force and the fight against human rights abuses. It is without doubt that

NATO's intervention through its bombing campaign was inconsistent with the U.N. Charter and international customary law (Joy, 2000). The U.N. Charter clearly stipulates that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". This means that NATO's actions threatened to weaken the law which prohibits the use of force by states without the UN nations' authority. Despite the good intentions by the NATO, its actions have a potential to establish a bad precedent for states to opt for use of force in stopping grave violations of human rights in other countries (Joy, 2000). Currently, the doctrine of humanitarian intervention has the potential to result in conflict, disorder and international violence which is likely to erode the protection of human rights (Joy, 2000).

It is visible that the international law and organizations are not capable of dealing with cases like the one of Kosovo, then the international law and international bodies need to be developed to avoid possible future horrors and bring about protection of human rights.

According to Tsagourias (2000) it is possible that the intervention in Kosovo laid the foundation for the development of a new law in relation to human rights protection. In principle, international law can be altered through the violation of existing law, the emergence of new state practice and *opinio juris* supporting such change. Even in this context the intervention in Kosovo is still hard to fit in. In the Nicaragua case, the International Court of Justice (ICJ) ruled that in order to admit an international law rule, the state practice in question must clearly be based on that different rule of law. However, NATO's intervention was never justified on the grounds of a specific rule of law (Tsagourias, 2000).

During the course of the NATO's operation no legal justification was offered. It was only before the ICJ that the respondent evoked legal justification. Still it was only Belgium which raised humanitarian intervention as the possible legal justification. An additional barrier for altering the current international law is that the rule which prohibit the use of force is enshrined in the U.N. Charter. The U.N. Charter is not subject to be altered by new general international law. The U.N. Charter overturns and supersedes all laws inconsistent with it (Gray, 2000).

The potential argument will be that the U.N. Charter itself should be amended on the grounds of a norm of equal status. Other scholars like Gray (2000) holds that humanitarian intervention doctrine is just a new and developed interpretation of the human rights provisions already in the U.N. Charter. This point can be backed by reference to the Vienna Convention on the Law of Treaties. It grants an agreement of treaty parties' persuasive value in relation to its interpretation, however, agreement of that nature is not likely to be seen in the UN (Gray, 2000).

It is difficult to establish whether or not the international community is willing to give authority to individuals or group of states to use force against aggressive state on their own. Even within the NATO itself there are differences, this might be due to the fact that neither *opinion juris* nor state practice supports this proposition (Krisch, 2002). The General Assembly on many occasions has resolved to condemn specific interventions including some declarations dealing with issues like intervention and the use of force, and this shows international opposition to the kind of rule. In addition to that, none of the international tribunals authorizes such intervention. For these reasons, the doctrine of humanitarian intervention seems to be accepted as neither legitimizing the Kosovo intervention nor establishing the new rules of intervention (Krisch, 2002).

Regardless of these shortcomings and risks, the call for humanitarian intervention is looming. However, it remains unclear whether states would agree to such a doctrine. As for the weak states, they are likely to be skeptical due to the possible abuse it entails while stronger states are likely to maintain their veto power in Security Council. Although it is an imperfect solution, maintaining the status- quo and allow states to break the law in extreme cases like in Kosovo might be the best solution currently. Should the international community opt for creation of the new law, such law should be limited to the cases of serious breach of human rights. Before NATO's intervention in Kosovo there was no support for such proposal but now one might suggest that the Kosovo intervention have changed the situation.

Now let turn to see how the international law can be developed to achieve the desired goals without risking the abuse and unnecessary damage. Currently it is the U.N. charter which gives authority to the Security Council to decide on interventions. In order for the vote to be passed three-fifth majority of Security Council members is required; in addition to that no veto by five permanent members should be raised (Wolf, 1988). This procedure has not proved to be effective except in early years of the UN inception and in the early 1990s. This calls for an alternative procedure that will legitimately provide for proper grounds for humanitarian intervention. The law to be established should be unambiguous and narrow (Simms & Trim, 2011). The agreement on that law can be reach either by overriding international law through *cogens* norm or through reinterpretation of the U.N. Charter (Simms & Trim, 2011). One takes into account the differences among the UN members which are likely to make this goal an imaginary goal. One should not underestimate the difficulty of accomplishing this objective. Nevertheless, several approaches might balance the interests well.

Possibly the following proposed procedural and factual requirements can form the base for suitable administration. Firstly, there must be clear evidence available to the international community verifying the widespread and grave international crimes as defined in the Rome Statute of the International Criminal Court (Ratner & Wippman, 2002). It should be evidently that a state in question aid, support or cannot control such criminal activities. Secondly, the regional organization in which the country in question is located must call upon the country in question to act against the abuse on its own or with the aid from other countries (Buergenthal & Murphy, 2002). Thirdly, the regional organization must attempt and exhaust all other non-forcible measures as political initiatives and economic sanctions. Fourthly, should the regional effort fail to yield desired results it should take the matter to the UN General Assembly for the immediate attention of the Security Council (Buergenthal & Murphy, 2002). The regional organization should appeal for Chapter VII authorization to take reasonable actions to stop the widespread and grave international crime. If the council grants the authority, the matter ought to be maintained under its control. Fifthly, the regional organization can now employ force to stop the widespread and grave violations of the international criminal law provided it takes the following precautionary measures: the targeted state must be informed in advance of the intension to employ force and upon intervention the collateral damage must be minimized. Such interventions are suitable to be executed by regional organizations as they require multiple states support as oppose to unilateral intervention (Buergenthal & Murphy, 2002).

## THE FUTURE OF HUMANITARIAN INTERVENTION

Lessons learnt from the case of Kosovo necessitate the bridge of gap between the legality and legitimacy of intervention (Chesterman, 2001). The commission set up to investigate Kosovo



atrocities suggested that now there is a need to set up a legal framework to be used in the future.

The commission suggested that the General Assembly pass this in a way that it resembles the Declaration on Human Rights. This framework would then be fused into the Charter to avoid overlapping. The commission further suggested the need to reinforce the importance of Human Rights protection and promotion (Chesterman, 2001).

The proposal of the framework by the commission will ideally constitute of three requirements to be fulfilled in order for the intervention to be legitimate. The first requirement would be the extreme abuse of Human Rights which brings about civilians suffering or total collapse of government. The second requirement would be overarching commitment to protect civilians. The last requirement would be the prospect for success of that intervention (Chesterman, 2001). Above that, the framework would be inclusive of eight relative principles. These can be utilized to test the level of legitimacy possessed by the potential intervention.

## CONCLUSION

In line with the history of the bipolarized world of the Cold War, now there is a serious discomfort regarding Western interventionism. The US-NATO domination in the post-Cold War has led to the state of vulnerability. This was demonstrated by NATO's decision to claim the right to intervene in Kosovo without the UN consent. In the same vein, this intervention displayed double standards on the side of international community in general and NATO in particular as they intervened in Kosovo but not in Rwanda.

There has been a pragmatic shift on how the international community view the issues of Human Rights and state sovereignty. Before the inception of the Charter, the humanitarian intervention was allowed in some cases but there were no many interventions as and states were careful not to

invoke humanitarianism alone as their justification. This normative shift on the decision to intervene or not is better understood when analysed using constructivism. From sovereignty era to human rights era display the normative shift on is refereeing to. With the inception of the Charter, Article 2 (4) intensified the non-intervention doctrine. Due to the non-intervention doctrine states used sovereignty to defend themselves in cases they are alleged of Human Rights violations. However, with the rise of Human Rights Law there was a significance change in international law in relation to humanitarian intervention. This change in law has been also effected by the state practice and *opinio juris*. This prominence of international humanitarian intervention brought about scepticism to its detractors. They are sceptical of the possible manipulation and abuse of emerging international humanitarian intervention doctrine. Even today, this doctrine has not been endorsed, however, there is an indication that it might come as an exception to the current rule.

It is one's view that the above proposed approach is likely to strike a balance between the need for human rights protection and the quest to minimize the use of force in the international relations. If the recent developments like the one in Kosovo present the turning point in the international community, then the new law allowing for a degree of humanitarian intervention might be emerging. The best way to achieve such mission is to amend the U.N. Charter; however, this is also the most difficult route to take. Several of the above proposed solutions are troublesome for the reasons discussed above. The latter proposal can be arguably to be in conformity with the Charter on the following basis: it promotes human rights and it implicitly gets U.N. authority.

As noted above, since the end of Cold War there has been a shift towards strict international human rights law accompanied by harsher enforcement measures. This changing of norms of

Intervention is evident clearly on Post-Cold War period. The justifications for the intervention in Somalia for example are not the same as those in Kosovo. What was unacceptable during the Cold War is now unacceptable. Norms which intervention takes place evolves not just static. However, there has been no authorization for the third party to stop the violation of these human rights using force. In line with this, NATO intervention in Kosovo was never authorized or approved by the U.N. Security Council as a result its legality is still problematic. This intervention revealed the underdevelopment of the law in relation to morality. It further uncovered the failure of the international law to bring about equilibrium between states' prerogatives and citizen's rights. While one might argue that the intervention was morally just given the then violation on human rights, but it created a bad precedent. If this precedent is really going to be followed then it likely to leave a room for superpowers to use force for purposes inconsistent with the law.

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