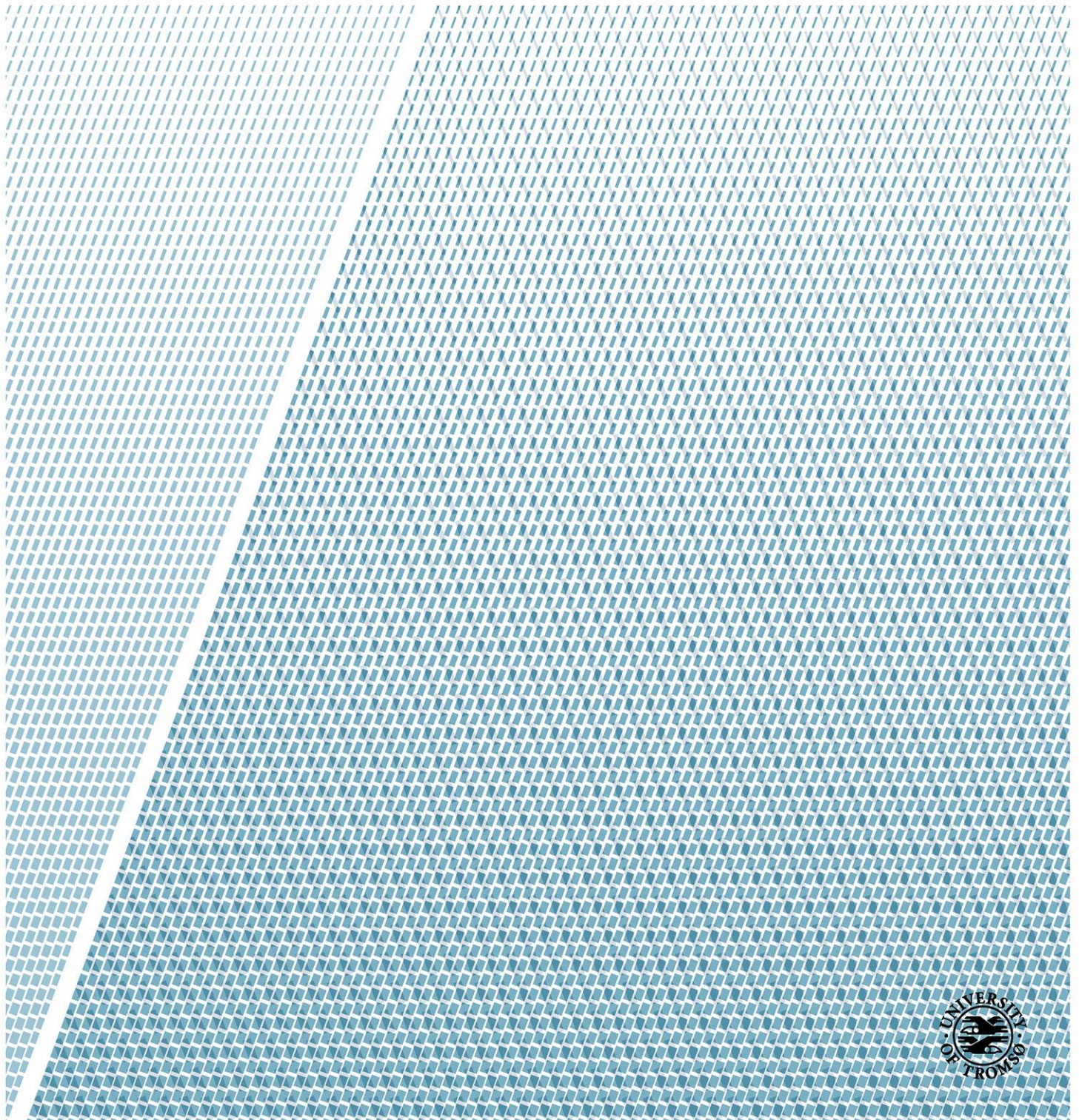


# **The Legality and Legitimacy of Using Armed Force for the Protection of Strangers: From Humanitarian Intervention to the Responsibility to Protect**

**Siwen Huang**

*Master's thesis in Peace and Conflict Transformation – SVF-3901, June 2015*





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## Table of UN Resolutions and Meeting Records

### *Security Council Resolutions*

SC Res 143 (1960)	SC Res 688 (1991)
SC Res 199 (1964)	SC Res 733 (1992)
SC Res 203 (1965)	SC Res 746 (1992)
SC Res 332 (1973)	SC Res 751 (1992)
SC Res 455 (1979)	SC Res 767 (1992)
SC Res 545 (1983)	SC Res 770 (1992)
SC Res 660 (1990)	SC Res 775 (1992)
SC Res 661 (1990)	SC Res 781 (1992)
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SC Res 665 (1990)	SC Res 872 (1993)
SC Res 666 (1990)	SC Res 929 (1994)
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SC Res 669 (1990)	SC Res 1199 (1998)
SC Res 670 (1990)	SC Res 1203 (1998)
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SC Res 677 (1990)	SC Res 1244 (1999)
SC Res 678 (1990)	SC Res 1386 (2001)

SC Res 1546 (2004)

SC Res 1970 (2011)

SC Res 1556 (2004)

SC Res 1973 (2011)

SC Res 1564 (2004)

SC Res 2016 (2011)

SC Res 1590 (2005)

SC Res 2043 (2012)

SC Res 1674 (2006)

SC Res 2139 (2014)

SC Res 1706 (2006)

SC Res 2165 (2014)

***Security Council Official Records***

S.C.O.R 873rd meeting (1960)

S.C.O.R 3988th meeting (1999)

S.C.O.R 1170th meeting (1964)

S.C.O.R 4011th meeting (1999)

S.C.O.R 1173rd meeting (1964)

S.C.O.R 6498th meeting (2011)

S.C.O.R 1176th meeting (1964)

S.C.O.R 6528 meeting (2011)

S.C.O.R 1200th meeting (1965)

S.C.O.R 6531 meeting (2011)

S.C.O.R 1606th meeting (1971)

S.C.O.R 6566 meeting (2011)

S.C.O.R 3106th meeting (1992)

S.C.O.R 6627th meeting (2011)

S.C.O.R 3145th meeting (1992)

S.C.O.R 6711th meeting (2012)

S.C.O.R 3392nd meeting (1994)

S.C.O.R 6810th meeting (2012)

S.C.O.R 3937th meeting (1998)

S.C.O.R 7180th meeting (2014)

***General Assembly Resolutions***

GA Res 377 (V) (1950)

GA Res 25/2625 (1970)

GA Res 38/7 (1983)

GA Res 44/240 (1989)

## **Table of Treaties and ICJ Cases**

### ***Treaties***

1648 Treaty of Westphalia

1774 Treaty of Kuchuk Kainarji

1827 Between Great Britain, France, and Russia, for the Pacification of Greece

1856 Treaty of Paris

1878 Preliminary Treaty of Peace between Russia and Turkey

1878 Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East

1919 Covenant of the League of Nations

1928 Kellogg-Briand Pact

1945 United Nations Charter

1948 Universal Declaration of Human Rights

1969 Vienna Convention on the Law of Treaties

1970 Declaration on Friendly Relations

1977 Panama Canal Treaty

1995 Dayton Peace Agreement

2000 Constitutive Act of the African Union

2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union

### ***ICJ Cases***

Congo-Uganda Case

Corfu Channel case

Certain expenses of the United Nations Case

Nicaragua v. United States of America Case

North Sea Continental Shelf Cases

Serbia and Montenegro v. Belgium Case

## Abbreviations

AUPSC	African Union Peace and Security Council
DOMREP	Mission of the Special Representative of the Secretary-General in the Dominican Republic
ECOWAS	Economic Community of West African States
EU	European Union
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
IDI	the Institut de Droit international
ISIL	Islamic State of Iraq and the Levant
KLA	Kosovo Liberation Army
KVM	Kosovo Verification Mission
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Union
OECS	Organization of the Eastern Caribbean States
OIC	Organization of the Islamic Conference
ONUC	Op ération des Nations-Unies au Congo
OSCE	Organization for Security and Cooperation in Europe
R2P	Responsibility to Protect
SFRY	Socialist Federal Republic of Yugoslavia
UNAMIR	United Nations Assistance Mission for Rwanda
UNMIS	United Nations Mission in Sudan
UNCIO	United Nations Conference on

	International Organization
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNOSOM	United Nations Operations in Somalia
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSMIS	United Nations Supervision Mission in Syria
USSR	Union of Soviet Socialist Republics
WEOG	Western Europe and Others Group

## Abstract

*The Legality and Legitimacy of Using Armed Force for the Protection of Strangers*

*--From Humanitarian Intervention to Responsibility to Protect*

The ceaseless State-made humanitarian atrocities in the past decades toll the bell for the whole international community to take a responsibility. The traditional doctrine of humanitarian intervention encourages States or States groups to use armed force in a foreign territory for the protection of civilians of the targeted State. This doctrine has lived through a long history of international relations, from an age when States-resorting-to-war was legal to the time when the use of force is generally prohibited by international law. The legality of humanitarian intervention is quite controversial under the modern international law since 1945. On the one hand, the UN Charter lays down strict rules of lawful use of force; on the other hand, State practice of humanitarian intervention in the new era always lead to intense debate about whether humanitarian considerations can serve as a justification for military intervention in a sovereign State. However, hardly there is a universal consensus among States and scholars on this question.

After the Cold War, a new form of humanitarian intervention, authorized by the UN Security Council, comes into the cause of international society, which is generally recognized as a lawful use of force. In the beginning of the new millennium, the emerging concept of Responsibility to Protect, which inherits the core spirit of humanitarian intervention—using armed force for the protection of strangers, has been quickly recognized by most States. This paper is going to assess the legality of humanitarian intervention by examine both the treaty laws and customary international law. Also, it attempts to address the legitimacy issue of using armed force for the protection of strangers without the Security Council authorization, by going through the changing position of the major States in this regard, especially those which always against.

**Keywords** sovereignty, human rights, use of force, Article 2(4), customary international law, State practice, *opinio juris*, R2P, humanitarian intervention





## Chapter 1: Introduction

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Starting from March 2011, the Syrian conflict, ignited by the government's bloody repression of largely non-violent protests, has entered its fifth year.<sup>1</sup> The Syrian government forces and pro-government militia, as well as armed rebel groups, have committed massive crimes against humanity and war crimes since the conflict broke up. Till April 2014, approximately 200,000 civilians have been documented killed and the death toll is still accumulating day by day.<sup>2</sup> In its fifth year, the Syrian crisis remains unsolved: The fighting is continuing between the warring parties; the civilian population is still suffering; and the perpetrators are shielded from accountability. The United Nations Human Rights Council (UNHRC) described the deteriorating Syrian situation as “a conflagration of an unparalleled scale and magnitude”.<sup>3</sup>

Responding to the severe security situation in Syria, in April 2012, the United Nations dispatched a *United Nations Supervision Mission in Syria* (UNSMIS)<sup>4</sup> to monitor a cessation of armed violence, and to monitor and support the full implementation of the Envoy's six-point proposal, which was issued with the support of the former Secretary-General Kofi Annan.<sup>5</sup> However, in the mandated period of UNSMIS, the six-point proposal was set aside by all the parties and the violence in Syria escalated from civilian unrest to civil war.<sup>6</sup> Considering the significant and rapid deterioration of the humanitarian situation in Syria during the past three years, in February 2014, the United Nations Security Council (UNSC) passed Resolution 2139,<sup>7</sup> demanding the Syrian authorities and other warring parties to allow humanitarian access in Syria. Due to the absence of cooperation from both the Syrian authorities and the opposite parties, this resolution has yet to make a meaningful difference in

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<sup>1</sup> This paper only covers facts before its finished date in May 2015.

<sup>2</sup> Megan Price, Anita Gohdes, and Patrick Ball, *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic*, 2014

<sup>3</sup> UNGA, A/HRC/28/69

<sup>4</sup> Established under UNSC Resolution 2043. Available at :

<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20SRES%202043.pdf>

<sup>5</sup> Six-Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States. Available at: [http://www.un.org/en/peacekeeping/documents/six\\_point\\_proposal.pdf](http://www.un.org/en/peacekeeping/documents/six_point_proposal.pdf)

<sup>6</sup> Report of the Secretary-General on the implementation of Security Council resolution 2043 (2012), S/2012/523. Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2012/523](http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/523)

<sup>7</sup> UNSC, Resolution 2139. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2139\(2014\)&referer=http://www.un.org/en/sc/documents/resolutions/2014.shtml&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2139(2014)&referer=http://www.un.org/en/sc/documents/resolutions/2014.shtml&Lang=E)

<sup>8</sup> Report of the Secretary-General on the implementation of Security Council resolution 2139 (2014), S/2014/208. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/208](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/208)

<sup>9</sup> UNSC, Resolution 2165. Available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2165.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2165.pdf)

<sup>10</sup> UNSC, Draft Resolution, S/2011/612. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2011/612](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/612)

the lives of millions of people.<sup>8</sup> In July, the Security Council authorized humanitarian assistance from the UN and its partners in the Syrian territory without *State consent*.<sup>9</sup> Though the international humanitarian assistance has made achievements in helping people in need, it is confronted with significant restraints. Firstly, the escalating violence in Syria, on the one hand, results in soaring humanitarian demands; and, on the other hand, it imposes great challenges to the humanitarian relief work and the security of humanitarian staff. Secondly, the warring parties remain uncooperative with the humanitarian organizations and restrict access to besieged areas. Especially after the extreme rebel group Islamic State of Iraq and the Levant (ISIL) greatly strengthened its forces in the fighting and now controls large areas of the northern Syria, the Syrian situation becomes more and more complicate and dangerous.

In the meanwhile, the international community continues to call for the Security Council to take more coercive measures to resolve the Syrian humanitarian and security crisis. However, these appeals have been constantly declined by the permanent member States holding veto power in the Security Council. For instance, on 4 October 2011, France, Germany, Portugal and the United Kingdom of Great Britain and Northern Ireland (UK) submitted a draft resolution<sup>10</sup> to the Security Council, which strongly condemned the Syrian authorities and called upon States to implement arms embargo against Syria. This draft resolution was vetoed by Russia, which is the major seller of arms and defence equipment to Syria, and China. Other three BRICS countries<sup>11</sup>—India, Brazil and South Africa—and Lebanon abstained. In the Security Council meeting considering this resolution, Russia and China claimed that they disagreed with the philosophy of confrontation expressed in the resolution, but rather preferred to seek a political resolution through peaceful dialogs with all parties.<sup>12</sup> By the end of 2011 and the beginning of 2012, the League of Arab States also attempted to mediate in the Syrian conflict. The Arab League Council<sup>13</sup> envisaged a Syrian-

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<sup>8</sup> Report of the Secretary-General on the implementation of Security Council resolution 2139 (2014), S/2014/208. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/208](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/208)

<sup>9</sup> UNSC, Resolution 2165. Available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2165.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2165.pdf)

<sup>10</sup> UNSC, Draft Resolution, S/2011/612. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2011/612](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/612)

<sup>11</sup> The BRIC countries refer to a selected group of four large developing countries, including Brazil, Russia, India and China. In 2010, South Africa was invited by China to join the group of the BRIC countries. Now the BRICS mean these five countries.

<sup>12</sup> S.C.O.R, 66th year: 6627th meeting, 4 October 2011, 3-5 (Russia), 5 (China). Available at: <http://repository.un.org/handle/11176/16005>

<sup>13</sup> The principal institution of the League of Arab States, established under Article 3 of the *Pact of the League of Arab States*, March 22, 1945. Available at: [http://avalon.law.yale.edu/20th\\_century/arableag.asp](http://avalon.law.yale.edu/20th_century/arableag.asp)

led democratic regime change plan for all the parties in Syria on 22 January 2012<sup>14</sup>, which was included in the text of a draft resolution submitted by 19 States to the Security Council on 4 February<sup>15</sup>. Russia and China vetoed again.

The same fate came to another two UNSC draft resolutions submitted respectively on 19 July 2012<sup>16</sup> and 22 May 2014<sup>17</sup>. The former determined that the Syrian situation constituted *a threat to international peace and security* and decided to take measures under Article 41<sup>18</sup> of the UN Charter if the Syrian authorities failed to comply with the rules of this resolution during a limited period. In the corresponding Security Council meeting, Russia claimed that this resolution would open a door for sanctions and subsequent military intervention against Syria, which was simply unacceptable for them. And China emphasized the principles of sovereign equality and non-interference in the internal affairs of other countries under the UN Charter.<sup>19</sup> The latter draft resolution, submitted jointly by 58 countries, called on the Security Council to refer the situation of Syria to the International Criminal Court (ICC), which was regarded by Russia as a stepping-stone for the eventual outside military intervention.<sup>20</sup>

Though the opponent position of Russia and China on the Syrian issues has been isolated and criticized by many States, the international effort to resolve the Syrian crisis through the Security Council has come to a dilemma: On the one hand, the simple humanitarian assistance which is supported by the UNSC can hardly prevent a further deterioration of the security and humanitarian situation in Syria; on the other hand, more coercive measures would unlikely be authorized by the Security Council due to the veto

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<sup>14</sup> Arab League Council Resolution 7444, 22 January 2012. Available at: [http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/syria/Syria\\_60\\_AL\\_Council\\_Resolution\\_7444.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/syria/Syria_60_AL_Council_Resolution_7444.pdf)

<sup>15</sup> UNSC, Draft Resolution, S/2012/77. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2012/77](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/77)

<sup>16</sup> UNSC, Draft Resolution, S/2012/538. Available at : [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2012/538](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/538)

<sup>17</sup> UNSC, Draft Resolution, S/2014/348. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/348](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/348)

<sup>18</sup> Article 41 of the UN Charter, “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” The text of the UN charter is available at: <http://www.un.org/en/documents/charter/index.shtml>

<sup>19</sup> S.C.O.R, 67th year: 6810th meeting, 19 July 2012, 8 (Russia), 13-14 (China). Available at: <http://repository.un.org/handle/11176/17350>

<sup>20</sup> S.C.O.R, 69th year: 7180th meeting , 22 May 2014, 12-13. Available at: <http://repository.un.org/handle/11176/32727>

power of Russia and China. A claim of humanitarian intervention, which typically advocates the unilateral use of foreign force to remove human suffering in another country, rises under this context.

As an interdisciplinary topic, humanitarian intervention is widely considered by several disciplines, such as law, political science and political philosophy. It is actually not a new and emerging doctrine, but is rather seeded in the early moral and political deliberations of sovereignty and human rights centuries ago. This paper will present the evolution of the doctrine of humanitarian intervention in a chronological way. And the primary object of this research is to explore the legality and legitimacy of this doctrine of defending the use of force for the protection of foreign civilians. During the past hundreds of years, there is a general evolution route of the doctrine of humanitarian intervention: From a right of humanitarian intervention, or *unilateral* humanitarian intervention, to the potential legality of *unilateral* humanitarian intervention, and clearly legal collective humanitarian intervention with UN Security Council authorization. Notably, in the recent one and a half decades, a new doctrine of the *Responsibility to Protect* (R2P) has emerged and has soon been recognized in the international community by States and scholars. While R2P has become a popular political doctrine, its legal effect and consequence are nevertheless unclear.

The protection dilemma in the Syrian case illustrates the deep struggle in international law between the maintenance of the fundamental principle of sovereignty and its sub-principle of non-interference and non-use of force enshrined in the UN Charter, and the responses to violations of essential human rights which is also emphasized by the Charter.<sup>21</sup> Actually, at the basis of the modern international law system and also a *jus cogens* rule,<sup>22</sup> the principle of sovereignty with its sub-principles constitute the biggest obstacle to implementing the doctrine of humanitarian intervention. Following a chronological order, the discussion of this paper will start with an introduction of the theory of sovereignty, including the emergence of the concept, the development of sovereignty in international relations and the interplay between the sovereignty principle and humanism. In Chapter 4, I will introduce

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<sup>21</sup> Stahn, "Between Law-Breaking and Law-Making," 25.

<sup>22</sup> Referring to Ian Brownlie's definition of *jus cogens*, which are "accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted", quote from James Crawford "Brownlie's Principles of Public International Law", p.596; Also referring to Article 53 of *Vienna Convention on the Law of Treaties* (1969), which gives a clear description to *jus cogens*, by stating that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

several interventions by European powers in the domestic affairs of the Ottoman Empire before the establishment of the UN Charter, where humanitarian consideration played an important role in the European powers' decision. The rules on the lawful use of force under the framework of the UN Charter will then be discussed in the following Chapter. Furthermore, in Chapter 6 and Chapter 7, by analyzing relevant State practice after 1945, I will examine whether there is a customary international law rule allowing for humanitarian intervention, and to which extent the use of armed force for the protection of strangers is legitimate, and may be legitimate even in the absence of legality. A discussion of the emerging concept of "*Responsibility to Protect*" will also be included in Chapter 6.

## Chapter 2: Methodology

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### 2.1 Research Questions

For the purpose of this thesis, my research questions are the following:

1. Is humanitarian intervention legal under current treaty law and customary international law?

2. If humanitarian intervention is illegal, could it nevertheless be legitimate?

### 2.2 Research Method

This paper conducts research in the field of public international law. The method of the legal doctrine sometimes called “*legal dogmatics*” (comes from the German words ‘*Rechtsdogmatik*’),<sup>23</sup> is the main research method used in this paper. As Grant and Barker point out, “[t]he first step prior to any empirical work is to check that the doctrine, properly interpreted, is being complied with, so the researcher can decide whether any perceived defects are a result of poor doctrine or lack of compliance with the doctrine”.<sup>24</sup> This method examines the essential features of legislation and case law to establish a sound argument of law on the matters in hand.<sup>25</sup> It appears to be both descriptive and normative, which means that it is not only engaged in inquiring the law as it is (*de lege lata*), but also deals with the issue of what the law ought to be (*de lege ferenda*).<sup>26</sup> Posner also indicates that the practitioner of the legal doctrine method “consider[s] not only whether an opinion is clear, well-reasoned, and consistent with the precedents, the statutes, and the Constitution, but also whether it is right in the sense that it is consistent with certain premises about justice and administrative practicality.”<sup>27</sup> The main task of the legal doctrine method is to systematize and interpret the norms of law<sup>28</sup>. The primary objects of interpretation are written treaties and the decisions of international organizations. Hoecke says, “[...] legal doctrine is a hermeneutic discipline [...] Interpreting texts has been the core business of legal doctrine since it started in the Roman Empire.”<sup>29</sup> Other documents, such as oral agreements, unilateral acts, international tribunals’ judgments and decisions, arbitral awards, and non-binding

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<sup>23</sup> Tammelo et al., *Objektivierung des Rechtsdenkens*. 137??

<sup>24</sup> Watkins and Burton, *Research Methods in Law*, 8.

<sup>25</sup> *Ibid.*, 10.

<sup>26</sup> *A Treatise of Legal Philosophy and General Jurisprudence*, vol. 4.

<sup>27</sup> Posner, “The Present Situation in Legal Scholarship,” 1114.

<sup>28</sup> Peczenik, “A Theory of Legal Doctrine,” 75.

<sup>29</sup> Hoecke, *Methodologies of Legal Research*, 4.

instruments, are also the subjects of interpretation<sup>30</sup>. In this paper, it will describe, systematically and comprehensively interpret and analyze the legal rules in relation to humanitarian intervention.

In the preliminary stage of research, I mainly consulted secondary sources, i.e. authoritative texts of scholars with a reputation in this topic area, to get a foundational understanding of this subject and to figure out the basic research outline. The secondary sources also helped to identify the first hand sources, such as relevant treaties and documents regarding customary international law and general principles in international law. Besides, the definition of the terms in this paper, i.e. “sovereignty” and “humanitarian intervention”, will mainly refer to the secondary sources. The great works of Simon Chesterman, Nicholas Wheeler, Fernando Tesón, Malcolm Evans, Ian Brownlie and several other outstanding scholars will be cited and emphasized in this paper.

For answering the first research question, a further investigation and examination rely on the primary sources of international law. As identified in Article 38 of the *Statutes of International Court of Justice (ICJ)*,<sup>31</sup> which is often referred to in the discussion of the sources of international law, “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”<sup>32</sup> In this paper, I will examine the legality of humanitarian intervention by resorting to treaty law and customary international law. The key convention or treaty engaged in this paper is the UN Charter, especially Article 2(4), (7) and Chapter VII. Besides, the Constitutive Act of the African Union, especially Article 4(h), will also be emphasized. The analysis of these treaty rules is based on the interpretations by treaty drafters, States parties, authoritative international institutions, i.e. ICJ, and influential scholars. Customary international law requires for its sake State practice and *opinio juris*. The identification of State practice rests on the secondary sources including the writings of historians, international lawyers and

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<sup>30</sup> Herdegen, “Interpretation in International Law.” para. 2

<sup>31</sup> International Court of Justice (ICJ) is the judicial body of the United Nations.

<sup>32</sup> “Statute of the Court | International Court of Justice.”, Article 38. Available at: [http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER\\_II](http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II)

political scholars specialized in the research of humanitarian intervention, and news coverages from the time of the incident. The examination of *opinio juris* in relation to humanitarian intervention mainly refers to the voting behavior and related speeches of States in relation to the relevant State practice. For cases lacking formal discussion and voting at the United Nations or other international organizations, other related official government statements will also be considered.

To address the legitimacy issue of humanitarian intervention, I will try to track States' positions on the righteousness of using armed force for the pure purpose of protecting strangers. The primary sources considered for this investigation are the meeting records of the UN Security Council, and other international documents, i.e. "*Responsibility to Protect*" and related records of States' negotiations. Due to the length restriction of the thesis, the discussion on State practice in relation to humanitarian intervention will not cover everything of relevance. Thus, a more limited amount of cases will be engaged and by no way all documents reflecting States' opinions will be used. I will nevertheless try to cover all the crucial cases, which are typically pointed out by other scholars specialized in this area, as much as possible.



## Chapter 3: The Theory of Sovereignty

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The debate of humanitarian intervention is always penetrated with the discussion of State sovereignty. On the one hand, the principle of sovereignty underlies the modern international legal order, which is accepted and recognized by some even as a *jus cogens* norm of international law; and, on the other hand, this principle implies that a State has the right of a *domaine réservé* protected from external intervention from other States or international organizations. In Article 2 (1) of the UN Charter, it provides that “[t]he Organization is based on the principle of the sovereign equality of all its Members”. The rules of non-use of force by States in international relations, written in Article 2(4) of the Charter, and non-interference of the UN in domestic affairs, written in Article 2(7) of the Charter, are the two essential corollaries of the principle of sovereignty, which constitute the major legal barriers for humanitarian intervention.

The elements in the principle of sovereignty constantly change in different history and political context. For example, the classical perspective of sovereignty corresponds to the absolute and ultimate power of States; while in the modern understanding, sovereignty is limited by the consent of sovereign States in domestic laws and international treaties, and general principles or customary rules of international law without consent of certain States.

### 3.1 Emerging concept of Internal Sovereignty

After the absolute monarchy, as well as the constitutional monarchy, came to rule in Europe, the idea of State sovereignty began to emerge.<sup>33</sup> The absolutist system, established in such States as France, Spain, Prussia, and Austria, appeared with several new features, such as the strengthening of territorial rule, expansion of the geographical domain of the major powers, and effective rule began to be built up by strong secular rulers.<sup>34</sup> With the establishment of an inalienable tie between political entities and substantial lands, the modern politics emerged.<sup>35</sup> Meanwhile, the interstate relationships were got enhanced through the development of diplomacy and the set of diplomatic institutions.<sup>36</sup> By the end of the seventeenth century, the principle of sovereignty and territory became privileged among other political principles. Mutual recognition spread among major States: States granted each other

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<sup>33</sup> Ibid, 174.

<sup>34</sup> Poggi, *The Development of the Modern State*, 60–61.

<sup>35</sup> Held and McGrew, *The Global Transformations Reader*, 121.

<sup>36</sup> Held et al., *Global Transformations*, 36.

the rights and jurisdictions over their own territory and recognized each other as equal entities with a right of self-determination in international relations.<sup>37</sup>

One most important event at this time is the signing of the Peace Treaties of Westphalia in 1648 to end the Thirty Years War in Europe, which is regarded as the origination of international law. The Peace of Westphalia affirmed that the international order consisted of independent States which had *exclusive* control and jurisdiction over their own territory and population.<sup>38</sup> The principle of sovereignty was figured for the first time by official documents between States. In the Peace of Westphalia, State sovereignty implied the equality between States, the exclusive and ultimate jurisdiction of the State over its territorial area, and a self-limited sovereignty that the consent of States was the only restriction to sovereignty.<sup>39</sup>

Before the Peace of Westphalia, however, the concept of sovereignty had long existed in the writings of ancient political and philosophical theorists. We can find early references to it, *kurios* (sovereign), in Aristotle's *Politics*, which implies "a simple power relation", that the *kurios* body has absolute power over his people.<sup>40</sup> Aristotle considers citizens as the sovereign body, "those who share in the judicial and deliberative functions of the state."<sup>41</sup> Besides, sovereignty, in Aristotle's view, is not a necessary source of law since legal means are only one of various measures that the sovereign body would employ in its political control; neither is it law-based—though there is a rule of law which may limit the sovereign power, the laws does not determine everything in the *polis*, and the sovereign body and rulers can make new laws or modify the existing laws on their own will.<sup>42</sup>

Bodin's statement on sovereignty is a landmark in the conceptual development of sovereignty, which for the first time systematically illustrated the denomination of "sovereignty".<sup>43</sup> In Bodin's *Six livres de la république* (1576),<sup>44</sup> sovereignty is defined as "the absolute and perpetual power of a commonwealth."<sup>45</sup> Bodin argues that sovereignty "is

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<sup>37</sup> Ibid., 37.

<sup>38</sup> Krasner, "Rethinking the Sovereign State Model," 17.

<sup>39</sup> International law at that point just provided a minimal guarantee for the coexistence of States, and acted as an intermediary in the disputes between States where States were nevertheless free to use force to deal with interstate issues. Text of the *Treaty of Westphalia* is available at:

[http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp)

<sup>40</sup> Mulgan, "Aristotle's Sovereign," 518.

<sup>41</sup> Johnson, "The Hobbesian Conception of Sovereignty and Aristotle's Politics," 333.

<sup>42</sup> Mulgan, "Aristotle's Sovereign," 520–522.

<sup>43</sup> Philpott, "Sovereignty."

<sup>44</sup> It was first translated into English as *The Six Bookes of a Common-weale* in 1606

<sup>45</sup> Bodin, *Bodin: On Sovereignty*, 1.

not limited either in power, or in function, or in length of time”<sup>46</sup> and it is the power attributed to one or more persons by the people or the prince. The sovereign persons rather act as trustees but not as owners of the power.<sup>47</sup> In this sense, Bodin separates the person from the sovereign.<sup>48</sup> In the relationship between sovereignty and law, Bodin regards sovereignty as a source of law and he writes that “law is the command of the sovereign affecting all the subjects in general, or dealing with general interests”.<sup>49</sup> However, the sovereign for Bodin is not limited by its own law but by the law of God and of nature.<sup>50</sup>

Decades after the publication of Bodin’s *Republic*, another noticeable absolutist work arises, which holds a concord with Bodin’s conception of sovereignty. Hobbes in *Leviathan* (1651) conceives that the sovereign has an absolute power, which is derived from the social contract of the people, and it cannot be overthrown by violent revolution of the people in order to install a new form of State.<sup>51</sup> Sovereignty for Hobbes is less a person but an “office”, and the crucial function of this “office” is to provide internal peace and security.<sup>52</sup> Hobbes has also emphasized an undivided and unlimited nature of sovereignty power. He thinks the law is what the sovereign commands, which is known as the doctrine of legal positivism.<sup>53</sup> Since the sovereign is the only source of law and consequentially the only source of rules of justice, Hobbes draws the infamous conclusion that the sovereign as law-maker can never act unjust.<sup>54</sup> Hobbes nonetheless distinguishes a just law from a good law in that all laws can be said to be just, but not all laws are good.<sup>55</sup> In the writings of Bodin and Hobbes, they have expressed a strong preference for a monarchical government.<sup>56</sup>

Another Enlightenment “giant” born in the mid-seventeenth century is John Locke, whose work is believed to have had a world-shaping effect on a range of subjects such as politics, philosophy and law. Locke conceives that the people are the rightful bearer of sovereignty. He elaborates a significant doctrine of the separation of legislative, executive and federative powers. Legislative power is supreme and is in the hands of a varied group of

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<sup>46</sup> Ibid., 2., 3.

<sup>47</sup> Ibid.

<sup>48</sup> Besson, “Max Planck Encyclopedia of Public International Law: Sovereignty,” para.16.

<sup>49</sup> Bodin, *Bodin: On Sovereignty*, 51.

<sup>50</sup> Ibid., 34.

<sup>51</sup> Johnson, “The Hobbesian Conception of Sovereignty and Aristotle’s Politics,” 329.

<sup>52</sup> Cohen, *Globalization and Sovereignty*, 331.

<sup>53</sup> Dyzenhaus, “Hobbes and the Legitimacy of Law,” 467.

<sup>54</sup> May, *Limiting Leviathan*, 70.

<sup>55</sup> “A good law is that, which is *Needful*, for the *Good of the People*, and withal *Perspicuous*.” Hobbes, *Leviathan*, 239.

<sup>56</sup> Kalmo and Skinner, *Sovereignty in Fragments*, 28.

persons. The legislative persons make laws and are also subjected to the laws they made and the law of nature.<sup>57</sup> Though regarded as supreme authority, the legislative power is not and cannot be “absolutely arbitrary over the lives and fortunes of the people”.<sup>58</sup> The executive power is to enforce the laws and remain in force, whereas the federative power is envisaged to deal with the affairs with the States outside of the commonwealth. Some authors argue that Locke’s view of federative power implies a support for universal punishment, and thus a right of intervention. The whole community of mankind is in the State of nature, and they are bound by the law of nature. Thus the commonwealth has a right to punish the violation of the law of nature which happens outside it.<sup>59</sup> A similar view has also been articulated in the work of one significant jurist and philosopher in the seventeenth century—Grotius, *De iure belli ac pacis* (On the Law of War and Peace). This book was published first in 1625, and argues that the right of punishing allowed by the law of nature and the punishment can be inflicted by anyone to the offender.<sup>60</sup> However, another contemporary jurist, Samuel von Pufendorf, rejects the idea of universal punishment. He argues that universal punishment opposes the equality of sovereign States and could easily lead to abuse.<sup>61</sup> In brief, Locke’s sovereignty is different from that of Bodin or Hobbes in two aspects: The sovereignty is both limited—not only a source of law but also is law-based—and divided.

In line with the social contract tradition, Jean-Jacques Rousseau advocates that the legitimate rule of the sovereign is derived from the general will, which is the right that surrendered by the people individually to the community as such when they developed from the State of nature.<sup>62</sup> In his view, “[t]here is no tangle of contradictory interests” in the State,<sup>63</sup> and the particular wills of private individuals are integrated into a general will.<sup>64</sup> The general will aims at advancing the common interest of the community as a whole, but not private individuals.<sup>65</sup> And the State should protect the liberty and freedom of its people in all circumstances. As a consequence thereof, Rousseau holds that sovereignty is the exercise of

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<sup>57</sup> “[M]unicipal laws of countries, which are only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted”, Locke, *Locke: Two Treatises of Government*, para.12; also refer to para. 143.

<sup>58</sup> *Ibid.*, para.135.

<sup>59</sup> Kalmo and Skinner, *Sovereignty in Fragments*, 69.

<sup>60</sup> Grotius, *The Rights Of War And Peace*, Book II, Chapter XX.

<sup>61</sup> Kalmo and Skinner, *Sovereignty in Fragments*, 69.

<sup>62</sup> Maritain, “The Concept of Sovereignty,” 352–354.

<sup>63</sup> Rousseau, *The Social Contract*, 134.

<sup>64</sup> Post, “Democracy, Popular Sovereignty, and Judicial Review,” 433.

<sup>65</sup> “[E]very authentic act of the general will, creates an obligation or a benefit for all the citizens equally[...]” Rousseau, *The Social Contract*, 69.

the general will.<sup>66</sup> If the sovereign State and the government contravene the general will of the people, the people correspondingly have the right to discard it. The general will is an essential part of the republican thought. Noticeably, unlike his republican predecessors and contemporaries who fear the rule by a large majority, Rousseau propounds a vote by great assemblies when it comes to the lawmaking of the sovereign State.<sup>67</sup> By that, the idea of popular sovereignty was elaborated for the first time.<sup>68</sup> However, Rousseau's general will has been criticized by some scholars in the sense that it will be easily used by radicals and lead to destructive consequences, such as manifested themselves in the French Revolution and the totalitarian rules in the 20<sup>th</sup> century.<sup>69</sup>

The above classical political theories of sovereignty can be divided into two groups: The absolutist, represented by Bodin and Hobbes, and the populist, represented by Rousseau. The former conceives sovereignty as an absolute and ultimate power, and the individual will of the people is subjected to the sovereign will; while the latter suggests that sovereignty is limited and subjected to the general will of the people, and the legitimate rule of the State is depended on the consent of the people governed.<sup>70</sup> However, these classical theories of sovereignty are mainly concerned with its internal part. As Hensley points out, a systematic illustration of external sovereignty, in the sense of a claim of authority, has been absent in political thinkers' work till the 18<sup>th</sup> century.<sup>71</sup>

### **3.2 Concept of External Sovereignty and Humanism**

In the 18<sup>th</sup> century, on the one hand, an independent, equal and autonomous sovereignty principle was elaborated and established in the scholarly debate, as well as in customary international law; on the other hand, humanism rose in scholar's thinking of sovereignty.

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<sup>66</sup> Ibid., 63.

<sup>67</sup> Plato makes a metaphor of democracy as "a fearful, friendless "many-headed Beast", 99; Aristotle "criticizes rule by the Many as a venal form of governance despite its notable mitigating virtues", 101; Hobbes has also expressed a strong criticism to the rule of the Many. He believes that, "large assemblies are deleterious to good Statecraft because, at best, men ignore reason in their deliberations and, at worst, degenerate into a rabble", 105. See Putterman, *Rousseau, Law and the Sovereignty of the People*, 96–106.

<sup>68</sup> Among the three most prominent members of the social contract school, it is clear that Hobbes stands in the opposition of the majority rule; while Locke, who is less absolute as Hobbes, has not given a clear expression about the numbers of people in State deliberations.

<sup>69</sup> Cunningham, *Theories of Democracy*, 132–134.

<sup>70</sup> Salmon, "The Legacy of Jean Bodin," 501.

<sup>71</sup> Thompson, "The Case for External Sovereignty," 253.

In the *Jus Gentium Methodo Scientifica Pertractatum*(1749), Christian Wolff makes an analogy of nations and individuals in the State of nature, “[b]y nature all nations are equal the one to the other. For nations are considered as individuals free persons living in a State of nature. Therefore, since by nature all men are equal, all nations too are by nature equal the one to the other.”<sup>72</sup> He suggests that no ruler of a State has a right to intervene in other States or an entitlement to pass judgement on another State; no intervention which is contrary to the natural liberty of the States concerned is allowed.<sup>73</sup> Besides, two famous legal doctrines, the *jus voluntarium* and the *civitas maxima*, were proposed in Wolff’s work. The *civitas maxima* is the State made up by all nations. “All nations are understood to have come together into a State, whose separate members are separate nations, or individual States.”<sup>74</sup> This society is purported to promote the common welfare of all the nations and hence determines “the actions of the individual nations and can force them to fulfill their obligations”.<sup>75</sup> The *jus voluntarium* (which means “volitional” rather than “voluntary” law or rules<sup>76</sup>) is the “civil” law of this society of nations, which is the merging of the wills of all the nations.<sup>77</sup> The *jus voluntarium* is derived from the concept of the *civitas maxima* and is subjected to natural law<sup>78</sup>.

Wolff’s thoughts have been greatly inherited and adopted by his disciple, the Swiss jurist, Emmerich de Vattel. In Vattel’s masterpiece *The Law of Nations or the Principles of Natural Law* (1758),<sup>79</sup> he states that, “[e]very nation that governs itself, under what form soever, without dependence on any foreign power, is a Sovereign State, Its rights are naturally the same as those of any other State.”<sup>80</sup> However, Vattel rejects Wolff’s idea of *civitas maxima*. He recognizes that it is inappropriate to mention the States and personal individuals in the same breath. In the civil society of personal individuals, each member will resign certain rights to society and society retains a compelling power to ensure the obedience of its members. However such rules cannot apply to the States. As he points out, “no other natural

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<sup>72</sup> Wolff, “Jus Gentium Methodo Scientifica Pertractatum,” 15, §16.

<sup>73</sup> Ibid., 131, §256, 257.

<sup>74</sup> Ibid., 12, § 9.

<sup>75</sup> Ibid., xl.

<sup>76</sup> Grant and Barker, *Parry and Grant Encyclopaedic Dictionary of International Law*, 325.

<sup>77</sup> Cassese, *International Law*, 200, footnote 3.

<sup>78</sup> Wolff, “Jus Gentium Methodo Scientifica Pertractatum,” 17–18, §22.

<sup>79</sup> In French is *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. The French version is available at:

<https://archive.org/details/ledroitdesgenso00fenwgoog>. The English version is available at: <http://www.State-citizen.org/The%20Law%20of%20Nations%20or%20the%20Principles%20of%20Natural%20Law%20%281758%29Emmeric.pdf>.

<sup>80</sup> Vattel, *The Law of Nations*, 83, § 4.

society between nations than that which nature has established between mankind in general [...]Each sovereign State claims and actually possesses an absolute independence on all the others.”<sup>81</sup> Besides, different from Wolff, Vattel claims that the non-intervention aspect of the concept of sovereignty is not absolute. It is lawful for every foreign power to “succour an oppressed people” to the extent that the sovereign violates fundamental laws and with the request of the suppressed people.<sup>82</sup>

Following Wolff and Vattel, Kant in his prominent work *Perpetual Peace: A Philosophical Sketch* (1791) writes that, “[n]o independently existing State, whether it be large or small, may be acquired by another State by inheritance, exchange, purchase or gift.”<sup>83</sup> Kant conceives the State as a society of men which is only ruled by itself.<sup>84</sup> As he points out, “there is the right of every people to give itself a civil constitution of the kind that it sees fit, without interference from other powers.”<sup>85</sup> Kant stands in opposition to random forcibly interferences by an external power.<sup>86</sup> However, his objection to the interference is also conditional. He does not deny the existence of the justified interference, which serves as a warning rather than injury to another State for its lawlessness. He also specifies an exceptional condition—a State is split into two separate parts and each claims an authority over the whole—which constitutes an exception to the general prohibition of external interference, in which the external support for one of the parties does not constitute unlawful interference against that other State.<sup>87</sup>

By the middle of the 19<sup>th</sup> century, the dichotomy between non-interventionism based in an absolute independent sovereignty principle and conditional-interventionism, which calls for intervention under certain circumstances, becomes much clearer.<sup>88</sup> The Italian scholar Carnaza-Amari, quoting Mamiani, claims that, “[t]he actions and the crimes of a people within the limits of its territory do not infringe upon anyone else's rights and do not give a basis for a legitimate intervention.”<sup>89</sup> This non-intervention position is supported by the Germany scholar Heffter, who claimed that “no State is entitled to pass judgment upon another”, thus “even the most outrageous inequities, that are committed in a State, cannot

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<sup>81</sup> Ibid., 13, Preface.

<sup>82</sup> Ibid., 290, § 56. Also see Kant, "Perpetual Peace: A Philosophical Sketch" in *"Kant: Political Writings"*, 96.

<sup>83</sup> Ibid., 94.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., 182.

<sup>86</sup> Ibid., 96.

<sup>87</sup> Ibid.

<sup>88</sup> Fonteyne, "Customary International Law Doctrine of Humanitarian Intervention," 215.

<sup>89</sup> Carnazza-Amari, *Traite De Droit International En Temps De Paix*, 557 (Montanari-Revest transl. 1880).

provide another [State] with a legal ground for *unilateral* intervention against the former.”<sup>90</sup> The English publicist Phillimore also rejects intervention on behalf of the general humanitarian interest. He states that humanitarian intervention “can scarcely be admitted into the code of international law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence.”<sup>91</sup>

On the contrary, many contemporary scholars advocate that intervention would be permitted under certain conditions. The English jurist Creasy claims that intervention may be justifiable in certain exceptional cases, where a racial element is included in the States’ oppression of its people.<sup>92</sup> The Russian diplomat Friedrich Martens argues that intervention by the civilized powers against non-civilized nations, when a Christian population is in danger of persecutions or massacres, is legitimate on the basis of common religious interests and humanitarian considerations. However, he holds that this rule cannot be applied when both parties are civilized powers.<sup>93</sup> Some scholars at that time further provide a legitimization argument for the *pure* humanitarian intervention, without the consideration of religious or racial reasons. Wheaton, a jurist from the United States, commenting on the intervention of Christian Powers in Greece in the middle of the 19<sup>th</sup> century, argues that international law authorizes such intervention in the case that “the general interests of humanity are infringed by the excesses of a barbarous and despotic government.”<sup>94</sup> A similar view is also expressed in the works of other 19<sup>th</sup> century jurists like, Bluntschli, Woolsey, and Fiore.<sup>95</sup>

### **3.2 Modern principle of Sovereignty in International Law**

Though the norms of sovereign equality and sovereign independence has been embodied in the Westphalia Peace Treaties, the State practice, from the signing of these treaties till the end of 19<sup>th</sup> century, was directed against the above norms. The weak or defeated States have often been disintegrated and absorbed into one or more powerful States in this period. For example, under a set of treaties signed in the Congress of Vienna, the great

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<sup>90</sup> Heffter writes that, “[a]s far as no imminently threatening violations of the law or [actual] perils are involved, even the most outrageous inequities, that are committed in a State, cannot provide another [State] with a legal ground for unilateral intervention against the former; for no State is entitled to pass judgment upon another.” Quoted by Fonteyne in “Customary International Law Doctrine of Humanitarian Intervention,” 216-217.

Original copy of Heffter’s work is available at:

<https://ia601407.us.archive.org/25/items/daseuropischev103heffgoog/daseuropischev103heffgoog.pdf>

<sup>91</sup> 2 R. Phillimore, *International Law* 24 (1854), paras. 394 ff. Quoted by Fonteyne in *Ibid.*, 218.

<sup>92</sup> Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 219.

<sup>93</sup> F. de Martens, *Traite de droit international*, 398 (Leo transl., 1883).

<sup>94</sup> H. Wheaton, *Elements Of International Law*, 113 (8th ed. R. Dana 1866).

<sup>95</sup> See J. Bluntschli, *Le Droit International Code*, 272 (Lardy transl. 1874); T. Woolsey, *Introduction to the Study of International Law*, 73 (1876); and P. Fiore, *Nouveau Droit International Public*. (Antoine transl. 1885).



powers demarcated the future borders of the European Continent on their own will and some at the same time enlarged their own territory. The modern principle of sovereignty has only been recognized by States in the treaties to establish the United Nations.<sup>96</sup>

Since 1945, the concept of sovereignty is generally conceived of comprising territoriality, equality of States, independence between equal States, duty of non-intervention in affairs under domestic jurisdiction, and the ultimate dependence on State consent.<sup>97</sup> As a foundation of the concept of sovereignty, territoriality implies that, on the one hand, there are clear boundaries between sovereign States; on the other hand, legal competence, often in the term of jurisdiction, within its boundaries. The jurisdiction over a certain territory and corresponding population is exclusive, which means States beyond the territory should not interfere in the domestic issues under the jurisdiction of the State in question.<sup>98</sup> Independence is another core aspect of sovereignty, which referring to the autonomy in both the domestic and foreign affairs of the State.<sup>99</sup> As Brownlie says, it is a “the decisive criterion of Statehood.”<sup>100</sup> Independence of sovereign State implies the principle of equality and its corollaries. Sovereign States are equal in the relation to other States and also the organizations of States.<sup>101</sup> The principle of equality also implies the exclusive jurisdiction and non-intervention. In addition, since there is no superior power over the sovereign States, State consent, either embodied in treaties or the customary international law, is the ultimate authority in dealing with issues among nations.

Though the principle of sovereignty is regarded as the fundamental part of the modern legal order, it is facing increasing contests in recent years. From the history evolution of the concept of the sovereignty, it is easy to see the changing characters of this term. The view that a certain universal value is resided in the very meaning of sovereignty can be hardly maintained. As Henry Schermers States, “[s]overeignty has many different aspects and none of these aspects is stable.”<sup>102</sup> The former United Nations secretary-general Boutros Boutros-Ghali also said, “[t]he time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality”. Besides, there is an increasing tension between the

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<sup>96</sup> Thompson, “The Case for External Sovereignty,” 256.

<sup>97</sup> Crawford, *Brownlie’s Principles of Public International Law*, 447–451.

<sup>98</sup> Evans, *International Law*, 316.

<sup>99</sup> Blay, “Territorial Integrity and Political Independence.”

<sup>100</sup> Crawford, *Brownlie’s Principles of Public International Law*, 129.

<sup>101</sup> *Ibid.*, 447.

<sup>102</sup> Henry Schermers, “Different Aspects of Sovereignty”, in *State, Sovereignty, and International Governance*, 185.

principle of independence, and the unavoidable reality of the interdependence of States in current international relations. The interdependence is commonly bond with the ambiguous concept of globalization. However, it is clear that, on the one hand, the intimate international cooperation especially in dealing with the issues of arms trafficking, terrorism, and international security has tied States up; on the other hand, benefited by the rapid advance of the modern means of communication, people with different citizenships are getting closer and closer to each other. Needless to say the growing integrality of global economy and States' universal interests in the economy sector, so as to make States weigh their economy interests before reaching political decisions. In addition, the promotion of human rights, which is recognized as a universal value of human beings since establishment of the United Nations, also asks transnational cooperation. Under this circumstance, many scholars call for "global governance."<sup>103</sup>

As the derivatives of the fundamental principle of sovereignty in international legal system, the principles of political independence and territory integrity, non-use of force in foreign affairs, and non-interference by the United Nations, have also been affirmed by international law. It is accepted as a general doctrine that no State should interfere into other State's internal affairs, which is applicable to forbid foreign States to judge and prevent State's inhuman treatments on its own people. The core objection to humanitarian intervention, which is one kind of intervention, in current international law system, is rooted in the modern principle of sovereignty and the general prohibition of the use of force. It is generally argued that the observance of the principle of sovereignty and non-use of force is essential to preserving international peace and security, and recourse to intervention will open the door for abusing and aggression. However, it has been often argued that the international community has an obligation to protect and promote human rights. Especially the historical and present humanitarian atrocities are continually tolling the bells to the whole humankind; there is always a voice advocating international intervention to end the domestic inhumanities.

The argument of humanitarian intervention in the modern time raises a tension between order and justice. It needs to be mentioned that before the general prohibition of the use of force being recognized by the international law, though some aspects of the principle of sovereignty was reflected in international politics and some treaty clauses, there was no substantial guarantee for excising this principle in State practice; in fact at that time war is

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<sup>103</sup> Schermers and Blokker, *International Institutional Law*, 1–2.

legitimate, needless to say the intervention.<sup>104</sup> In the next Chapter, I will introduce early State practice regarding the interplay between the pre-modern sovereignty principle and humanitarian interventionism.

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<sup>104</sup> Stowell, "Humanitarian Intervention," 734.

## Chapter 4: The Definition of Humanitarian Intervention and pre-Charter State Practice

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### 4.1 Defining humanitarian intervention

Though the term humanitarian intervention often appears in political and legal debates, scholars may hold different definitions of it. Humanitarian intervention has nevertheless not been mentioned in international conventions and seldom been referred to in official documents of States. Scholars define this term in diverse ways according to their different focuses of study, where some may weigh one or several aspects of a humanitarian intervention more than others. It attempts to give a definition of this term at the beginning of this chapter, as well as distinguish it from other similar concept, i.e. humanitarian assistance. By quoting several outstanding scholars' definitions of humanitarian intervention, it would determine the central aspects of humanitarian intervention.

First of all, humanitarian intervention is an *action or a range of actions*. The conceptual analysis will then proceed from the following four aspects of this specific action: its subject, object, purpose, and means.

Humanitarian intervention is undertaken by an external agent. The range of the possible *external agents* differs in scholars' definitions. Some scholars consider that the humanitarian intervention should be conducted by a group of States;<sup>105</sup> while other scholars claim that single State, a group of States and international organizations are the proper subject of humanitarian intervention.<sup>106</sup> State practice may support the view of the latter. For example, the UK' intervention in Sierra Leone in 2000 was conducted by a single State; while the intervention of the US, the UK, and France in northern Iraq in 1991 was carried out by a group of States, and the intervention in Kosovo in 1999 was actually commenced by a international organization, NATO. Though whether these cases can be categorized as humanitarian intervention remains debatable, it is generally recognized that all single State, a group of States and international organizations have the capability to use force in international community.<sup>107</sup> The nature of interveners seems of minor importance in defining this term<sup>108</sup>

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<sup>105</sup> Tesón, *Humanitarian Intervention*, 5; Walling, *All Necessary Measures*, 16; Brownlie, "Humanitarian Intervention", in John N Moore (ed), *Law and Civil Modern World*, 217; Vincent, *Non-intervention and International Order*, 13

<sup>106</sup> *Ibid.*, Brownlie, 217; Vincent, 13.

<sup>107</sup> Pattison, *Humanitarian Intervention and the Responsibility To Protect*, 1.

and here I will accept the view of Brownlie and Vincent that the potential subject of humanitarian intervention can be a single State, a group of States and also an international organization.<sup>109</sup>

State is generally considered as the *object* of a humanitarian intervention. Nevertheless, in the definition made by the ICISS, leaders of the State are also regarded as proper objects.<sup>110</sup> Due to the length limitation inherent in a master thesis, this issue will not be discussed and I here adopt a general view, which only considers the targeted State itself, more exactly the “authority structure of the target State”,<sup>111</sup> as the object of humanitarian intervention. It might be arguable here that whether the absence of a targeted State’s consent is a necessary condition for humanitarian intervention. The majority view on this issue supports a non-consent argument.<sup>112</sup> Krieg nevertheless claims that humanitarian intervention can be undertaken “with or without the consent of the receiving State.”<sup>113</sup> In order to narrow the discussion, in this paper, the definition will follow the majority opinion of non-consent.

Considering the *purpose or motive* of humanitarian intervention, first of all, the external agent is involved in the targeted State not for the direct interest of its own citizens. This is the main feature which differentiates humanitarian intervention from self-defence. The latter is supported by the UN Charter and does not violate the sovereignty principle and general prohibition of the use of force. It seems commonsensical that humanity is the core motivation for humanitarian intervention, which is emphasized by many scholars in their definitions. Holzgrefe states that humanitarian intervention is “aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens”.<sup>114</sup> Tesón notes that humanitarian intervention is to provide help to the people “who are being denied basic human rights” by their own State.<sup>115</sup> The purpose of protecting human rights of the citizens of another State has also been demonstrated in Welsh’s definition,

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<sup>108</sup> Hehir, *Humanitarian Intervention*, 16.

<sup>109</sup> Brownlie (1974) defined humanitarian intervention as “*the threat or use of armed force by a State, a belligerent community, or an international organization, with the object of protecting human rights*”, and Vincent (1974) gave a definition that “*an activity undertaken by a State, a group within a State, a group of States, or an international organization which interferes coercively in the domestic affairs of another State ... It is not necessarily lawful or unlawful but it does break a conventional pattern of international relations.*” (cited in Aidan Hehir, *Humanitarian Intervention: An Introduction*, 17)

<sup>110</sup> ICISS Report, *The Responsibility to Protect*, 8.

<sup>111</sup> Vincent, *Nonintervention and International Order*, 3.

<sup>112</sup> Hehir, *Humanitarian Intervention*, 18.

<sup>113</sup> Krieg, *Motivations for Humanitarian Intervention*, 9.

<sup>114</sup> Holzgrefe and Keohane, *Humanitarian Intervention*, 18.

<sup>115</sup> Tesón, *Humanitarian Intervention*, 5.

as well as in Walling's.<sup>116</sup> Meanwhile, a minority view ignores the significance of motives in humanitarian intervention but rather emphasizes on its outcomes.<sup>117</sup> One contentious issue as to the motives of humanitarian intervention is that whether the motives should be purely humanitarian, or whether mixed-motives can be tolerated. While the traditional just war theory underlines the importance of a right contention, many modern scholars claim that mixed-motives, especially States' self-interested motives, are unavoidable in *de facto* State practice. Walzer notes that in practice there will "only [be] mixed cases where the humanitarian motive is one among several".<sup>118</sup> Some writers further argue that self-interested motives are required if States are to show sufficient commitment, something which is essential to the effectiveness of humanitarian intervention.<sup>119</sup>

The notion of human rights includes multitudinous rights of individuals and groups, which are recognized in international treaties, declarations and customary international law, and the weight of different human rights varies in international law.<sup>120</sup> The range of the human rights which might trigger humanitarian intervention is restricted. Rawls provides a concept of *human rights proper*. The human rights proper are a series of rights illustrated by Articles 3 and Article 5 of the *Universal Declaration of Human Rights* of 1948, including the right to life, liberty and security of person, and non-subjected to torture or to cruel, inhuman or degrading treatment or punishment. The direct implications of these rights also constitute human rights proper, such as what is described by the special conventions on genocide and apartheid.<sup>121</sup> Many scholars agree that the human right which may be guarded by humanitarian intervention is limited to the right to life—where grievous suffering or loss of life is impending or ongoing.<sup>122</sup>

The *means* employed by humanitarian intervention is generally confined to military forces. The threat or the use of armed forces is the primary feature which distinguishes humanitarian intervention from humanitarian assistance. The definition adopted by the *Institut de Droit international* (IDI) in its Bruges Resolution of 2003 states that, "[h]umanitarian

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<sup>116</sup> Welsh defines that humanitarian intervention "with the purposes of addressing massive human rights violations or preventing widespread human suffering" (refer to Welsh, 2006, p.3). Walling States "for the purpose of preventing, halting, or punishing widespread and gross violations of the fundamental human rights of individuals" (refer to Walling, 2013, p.16)

<sup>117</sup> Hehir, *Humanitarian Intervention*, 19.

<sup>118</sup> Walzer, *Just and Unjust Wars*, 101.

<sup>119</sup> Pattison, *Humanitarian Intervention and the Responsibility To Protect*, 159.

<sup>120</sup> "Max Planck Encyclopedia of Public International Law: Human Rights," para. 1.

<sup>121</sup> Rawls, *The Law of Peoples*, 80.

<sup>122</sup> Pattison, *Humanitarian Intervention and the Responsibility To Protect*, 28.

assistance means all acts and activities for the provision of materials and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters.” The ICJ also confirmed the non-force character of humanitarian assistance in the judgment of the *Nicaragua v. United States of America case*.<sup>123</sup> It claimed that humanitarian assistance requires an “altruistic, apolitical concern for human welfare”;<sup>124</sup> while such an ideal is not reflected in the general definitions of humanitarian intervention.

Based on the characters described above, humanitarian intervention could be defined as a military operation employed by a State, a group of States, or international organizations against another State, without the consent of authorities of the targeted State, for the purpose of protecting individuals of the targeted State from the grievous sufferings or loss.

## **4.2 Pre-Charter State Practice**

From the 19th century, with the progressively weakening and disintegrating of the Ottoman Empire, the European powers had been in a State of enduring rivalry by diplomatic or military means. On the one hand, Russia always attempted to expand its influence and control over the Balkan provinces of the Ottoman Empire; while on the other hand, other European powers made every effort to curb the penetration of Russia in the Balkans.<sup>125</sup> In this period, the European powers were highly sensitive to any internal changes in the Empire. The succeeding insurrections in the Ottoman Empire stirred the tension among the European powers and triggered a series of foreign interventions in the internal conflicts of the Empire. And some of these foreign military operations have obvious humanitarian characters.

### **4.2.1 1827-1830 Intervention in Greece**

The intervention in Greece, which resulting in its independence in 1830, is generally regarded as the first case of humanitarian intervention in history.<sup>126</sup> From the 15<sup>th</sup> century, the Greeks have been under the rule of the Ottoman Empire. At the beginning of the 19<sup>th</sup> century, the Greek population launched constant revolts again the Turkish authorities. As a response, the Ottoman government perpetrated several bloody massacres against the Ottoman Greeks. In 1827, the existing three European major powers— France, Great Britain, and Russia—held

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<sup>123</sup> Military and Paramilitary Activities in und against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14, para.242.

<sup>124</sup> Hehir, *Humanitarian Intervention*, 12.

<sup>125</sup> Referring to the entry “Eastern question” in Scruton, *The Palgrave Macmillan Dictionary of Political Thought*, 196.

<sup>126</sup> Simms and Trim, *Humanitarian Intervention*, 119.

a meeting in London and signed the *Treaty of London*,<sup>127</sup> in which the contracting parties ask for a reconciliation and armistice between the Ottoman Porte<sup>128</sup> and the Greeks. It provided that the Ottoman Porte should accept Greece as a dependency of Turkey under Article II of the Treaty, which endowed the Greeks limited local autonomy. In the Additional Articles, the three major powers decided that in case, within a space of one month, the Ottoman Porte did not accept the mediation proposed in the treaty, they would establish commercial relations with Greece; and if the Porte did not observe the armistice, the high contracting parties would take all necessary measures to give effect to the armistice.<sup>129</sup> Most significantly, the three major powers introduced the humanitarian concern as a justification for their following operations upon the Treaty, as it provided that what they would do was “for the object of re-establishing peace between the contending parties, by means of an arrangement called for, no less by sentiments of humanity, than by interests for the tranquility of Europe.”<sup>130</sup>

Three months after the signing of the Treaty of London, upon a rejection by the Porte of the treaty provisions, France, Great Britain, and Russia launched an armed intervention against Turkey. The military operation was mainly carried out by Russia, though with support of the other two powers. Some scholars argue that this operation might not be sufficient to be counted as precedent for humanitarian intervention, since Russia could find a justification of its action upon another treaty between it and the Ottoman Empire.<sup>131</sup> In 1774, as a termination of the war between Russia and Ottoman which started in 1768, these two parties signed the *Treaty of Kuchuk Kainarji*. In this treaty, the Ottoman Porte made a significant concession to Russia in that it placed the Orthodox Christian population of the entire Empire in the protection of Russia, and as a result gave Russia the right to intervene into Empire affairs on the behalf of the Christian population. In Article VII it provides that “[t]he Sublime Porte<sup>132</sup> pledges to protect the Christian religion and its churches constantly; and also it grants permission to the Ministers of the Imperial Court of Russia to make representations in all

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<sup>127</sup> Namely “*Treaty Between Great Britain, France, and Russia, for the Pacification of Greece*”

<sup>128</sup> Also “*Sublime Porte*”, the court or palace of the Ottoman sultan at Istanbul (formerly Constantinople). Hence: the Ottoman government. Referring to the entry of “*Porte*” in *Oxford English Dictionary*. Available at: <http://www.oed.com/view/Entry/148139?rskey=6uD623&result=2&isAdvanced=false#eid29314694>

<sup>129</sup> Treaty of London, 1827, available at <http://ecommons.library.cornell.edu/bitstream/1813/662/1/Treaty%20of%20London%2c%201827.pdf>

<sup>130</sup> *Ibid*, para. 3

<sup>131</sup> Schmitt, “The Diplomatic Preliminaries of the Crimean War,” 39. Also see Jean-Pierre L. Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention Its Current Validity under the U.N. Charter”, 207-208.

<sup>132</sup> Also “*Ottoman Porte*”.



circumstances, in favor of the new church at Constantinople...”<sup>133</sup> Russia might therefore have had a definite right to intervention since the massacres in the 19<sup>th</sup> century were mainly enforced on the Christians in Greece.

Although Russia was the main executor of military operation, Great Britain and France did participate in, at least gave their consent to, the operation. Bernadotte E. Schmitt did a diplomatic analysis of that time, and held that the other two Great Powers would nevertheless object the claim that Russia had a definite right to intervene in the religious issues of the Ottoman Empire, since it would convert the Sultan control of the Empire territory into the virtual rule of the Tsar. And this was opposed to their interests.<sup>134</sup> Moreover, the *London Straits Convention* of 1841 between the five Great Powers of Europe—Russia, the United Kingdom, France, Austria and Prussia—had further confirmed their position against a right of religious intervention, where they agreed to recognize the independence and integrity of the Ottoman Empire and that no nation should have exclusive influence in the Empire.<sup>135</sup> In fact, Russia did not attempt to justify its operation unilaterally on the basis of the *Treaty of Kuchuk Kainarji*. Furthermore, the words in Article VII are rather ambiguous. They do not directly indicate that Russia could use military force on Ottoman territory. Especially in the context that a Prince enjoyed an absolute jurisdiction over the population of his territory, which is a central character of the concept of sovereignty that time,<sup>136</sup> it might be unlikely that the Ottoman Porte would have surrendered such a fatal right which implied an alternation of its authority over the Empire to other States.

Nonetheless, even if the intervention in Greece can be considered as a qualified *precedent* of humanitarian intervention, there is still a big distance between it and the humanitarian intervention in the modern sense. One important reason is that, at that time, there are neither general international treaties which forbid the recourse to war and use of force as a way to solve the differences between nations; nor did national States give a commitment to the non-use of force and apply it in practice. In this sense, humanitarian intervention at that time, whether by single State or States coalition, was entirely legal.

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<sup>133</sup> This Article text can be found in Jelavich, *History of the Balkans*, 70. The whole text of the Treaty of Kuchuk Kainarji, as cited in this book, may be found in Thomas Erskine Holland, *A Lecture on the Treaty Relations of Russia and Turkey from 1774-1853*, 36-55.

<sup>134</sup> Schmitt, “The Diplomatic Preliminaries of the Crimean War,” 39.

<sup>135</sup> *Ibid.*

<sup>136</sup> Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 207.

#### 4.2.2 1860-1861 Intervention in Syria

In the beginning of 1860, as the British and French consular reports shows, a series of conflicts between the local Druze and Christians broke out in Lebanon and sectarian murders of the civilian population occurred. Soon such skirmishes evolved into massive massacres and atrocities. In July, the conflict in Lebanon spread to a Syrian province, Damascus, where the Lebanese Christian refugees sought shelter. A violent mob, which mainly consisted of Druze and Muslims, poured into Damascus and initiated a series of plunders and killings in the town for a period of several days. About 2000 Christians were killed during the riots.<sup>137</sup>

In August, France, Great Britain, Prussia, Russia and Turkey signed a Protocol at a Conference held in Paris. In this Protocol, the five Major Powers decided to send a body of European troops to Syria to reestablish the tranquility (Article 1), and the Sublime Porte undertook to facilitate the military operations of the collective troops (Article 6). In the second Protocol of the Conference, the high contracting powers state that they “neither mean to, nor will pursue, while fulfilling their engagements, any territorial advantage, nor any exclusive influence, nor any concession with regard to the commerce of their subjects, which would not be conceded to the subjects of all other nations”.<sup>138</sup> The French took a leading role and sent a six-thousand troop under Article 2 of the Protocol to Syria, and afterwards, a multilateral *ad hoc* commission was created. The latter was a big innovation. In the middle of 1861, the French troops were pulled out of Syria after fulfilling their mission.<sup>139</sup>

Whether these military operations can be counted as humanitarian intervention is questionable, since they were endorsed by the consent of Turkey. Nevertheless, it cannot be denied that there are significant humanitarian characters in this case. First of all, the intervention was mainly motivated by the protection of the Christian populations in Lebanon and Syria, who had experienced or been experiencing bloody massacres. The French identified the Orthodox as the main victims and both the Turkish authorities and Druzes were accountable for the perpetration; while Great Britain also regarded the Druzes as victims of the massacre.<sup>140</sup> Secondly, the European Powers recognized the Ottoman government as a sovereign entity, which should not subject to the arbitrary disposition by any other States.

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<sup>137</sup> The fact of this case is mainly taken from Simms and Trim, *Humanitarian Intervention*, 159–183. And also Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 208-209

<sup>138</sup> *Ibid.*, 181. Protocols of the Conference held at Paris, 1860, available at

<http://www.nytimes.com/1860/08/20/news/the-syrian-outbreak-protocols-of-the-conference.html>

<sup>139</sup> Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 208.

<sup>140</sup> Simms and Trim, *Humanitarian Intervention*, 181.

Some scholars argue that the right to intervene is based upon the fact that thousands of Turkish civilians were massacred by the Empire, but not upon the very text of the treaty. It is a humanitarian intervention, but not an execution of the treaty provisions.<sup>141</sup> Fonteyne suggests not placing much emphasis on the official documents, since in *Treaty of Paris* 1856 between these five major powers and Austria and Sardinia, it provided that the *Firman*<sup>142</sup> “could not, in any circumstance, give the right to the said Powers to intervene either collectively, or separately, in the relations of his Majesty the Sultan with his subjects, nor in the internal administration of his Empire.” However, it is generally recognized as valid that a successive treaty may modify a precedent treaty with the consent of the contracting parties.

The existing consent of the targeted State during the intervention in Syria cannot be ignored. However, the question whether the consent or humanitarian reasons severed as the justification for the foreign military operation seems not that important, at least when comparing with today, in the context of the 19<sup>th</sup> century. On whatever ground, the use of force in dealing with international issues was not prohibited at that time. More important feature of this intervention is that it was triggered by the existing humanitarian atrocities and the intervening States expressed such a claim. It is still a good example to show how the humanitarian reasons did affect the early thinking of States on issues of sovereignty.

#### **4.2.3 1866-1868 Intervention in the Island of Crete<sup>143</sup>**

There is a long-standing hostility between the Cretan Christians, which were the majority of the population on this island, and Turks. Right after the occupation by the Ottoman Empire in 1699, the Christian population on the island of Crete started restive resistance against their Turkish rulers. Motivated by the Greek war of independence which began in 1813, the Turkish corps conducted bloody massacres on the Cretan Christians between 1821 and 1822. Tension between the Christians and Turks was accumulating with age. When the promised reforms, *Tansimat*<sup>144</sup>, failed to be enforced by the Ottoman Porte in

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<sup>141</sup> Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 209.

<sup>142</sup> An edict or order issued by an Oriental sovereign, esp. the Sultan of Turkey. Referring to the entry “firman” in the Oxford English Dictionary. Available at:

<http://www.oed.com/view/Entry/70589?redirectedFrom=firman#eid>

<sup>143</sup> The representing of the fact of this case is mainly based on Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914*, 118–140. Also referring to the entries of “Cretan Rebellion of 1821-1822”, and “Cretan Uprising of 1866-1867” in Kohn, *Dictionary of Wars*, 132.

<sup>144</sup> Turkish word of *reform* or *reorganization*. “The *Tanzimat* were a series of laws promulgated by the Ottoman government between 1839 and 1876 and intended to improve efficiency in governance, centralization, uniformity, and professionalism of the central and peripheral administration of the empire. Europeans used *Tanzimat* to mean a whole movement of reforms including reforms of the Ottoman Army, changes in Ottoman

the island of Crete, the Christian population launched open revolts against its Turkish rulers and proclaimed *Enosis* (union) with Greece.<sup>145</sup> The Ottoman Porte relied by dispatching the Turkish troops to Crete and brutally repressed the Cretan rebellion.

In order to avoid the predictable bloodshed on this island, France and Britain cooperated at the beginning in some rescue operations. However, their policies diverged soon after the French government turned to support the use of armed force to solve the Cretan problems. With the tension exacerbating on Crete, the major European powers, led by France and Russia, with the exception of the British government, started to advocate supporting the Cretan Christians by intervention. The French government demanded from the Ottoman Porte to take serious actions to enforce reforms and to grant the secession of Crete. It further argued that Greece should annex Crete to avoid the situation of quasi-independence spreading to every part of the Ottoman Empire.<sup>146</sup> In 1867, in the name of humanitarian assistance, the Russian government preached other European powers to remove the Cretan Christians to Greece with their warships, by seeking consent from the Ottoman Porte.<sup>147</sup> Though this proposal was refused by the Porte, foreign vessels continued transporting persons. In the meanwhile, foreign volunteers landed incessantly on Crete. Among which, there were fully armed volunteers who aimed at the annexation of Crete by Greece.<sup>148</sup> In opposition to the other European powers, the British government did not regard the massacre and atrocities as serious enough to invoke humanitarian intervention and resolutely refused foreign intervention in Crete.<sup>149</sup> The Ottoman rulers gradually lost their control over the situation of Crete.

In the middle of 1867, the France-Russia league gradually split up, since the French found that the stories of massacre in Crete might be overstated by the one-sided consults and Russia did deliver personnel and ammunitions to the Island.<sup>150</sup> To solve the crisis of Crete without excessive sacrifice, the Ottoman Porte attempted to communicate with the European powers in a diplomatic way.<sup>151</sup> Russia insisted on the annexation of Crete by Greece. While

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diplomatic procedures, reforms in the administrative machinery of the State, attempts at introducing equal individual citizenship under secular law, and representative government.” Referring to Rodogno, *Against Massacre*, 25.

<sup>145</sup> Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 210.

<sup>146</sup> Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914*, 127.

<sup>147</sup> *Ibid.*, 128.

<sup>148</sup> *Ibid.*, 126.

<sup>149</sup> *Ibid.*, 118.

<sup>150</sup> *Ibid.*, 134.

<sup>151</sup> *Ibid.*, 136.

France and Britain, who had re-built the union at this date, preferred to solve the Cretan problem in a way similar to the “Lebanese solution”, referring to administrative reforms to endow the majority of Christians governorship of Crete, but keeping the island subject to the Ottoman Porte.<sup>152</sup> Finally, the Ottoman Porte accepted the latter proposal, and promulgated a new Constitution for Crete in 1868, which gave consideration to the rights and interests of both the majority of the population (Christians) and the minority (Muslims) in Crete.<sup>153</sup>

The nature of the foreign naval operations for rescuing the Christian population in the ports of the Ottoman Empire without authorization is quite arguable. It is seldom mentioned as a case of humanitarian intervention by international lawyers or political analysts when they refer to the late-nineteenth century. On the one hand, some scholar argued that the naval operations to rescue the Cretan Christians might not be counted as humanitarian intervention since there was no direct use of armed force against the Ottoman Empire, though it still infringed the sovereignty of the Empire; it might rather be seen as an act of humanitarian assistance. On the other hand, it is questionable whether these operations of European powers were motivated by pure humanitarian purpose or other political considerations. Actually, there was obvious discrimination in these operations that only the Christian populations were transferred by vessels of the European powers and the Muslim victims did not receive equal treatment. This fact heavily corroded their goodwill. Furthermore, the gravity of the humanitarian situation in Crete might be below the threshold of a humanitarian atrocity. The Porte’s repression of the insurrection of the Cretan Christians might be regarded as a not-that-bad way of dealing with a revolt, since the insurrection was mainly motivated by the Christians’ seeking independence but not due to any serious grievances. Though the Porte had conducted savage killings, these might not reach the degree of a massacre.<sup>154</sup>

#### **4.2.4 1875-1878 Intervention in Bosnia, Herzegovina, and Bulgaria<sup>155</sup>**

From 1871, unrest had been brewing in the Herzegovina province and the Bosnian province of the Ottoman Empire. In 1875, an open uprising took place in Herzegovina and speedily spread to Bosnia. The Austro-Hungarian government proposed the Andrassy Note to solve the crises, which requested the Ottoman Porte to “grant the two rebellious provinces

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<sup>152</sup> *Ibid.*, 113.

<sup>153</sup> *Ibid.*, 136.

<sup>154</sup> *Ibid.*, 138–140.

<sup>155</sup> The discourse of fact is mainly based on *Ibid.*, 118–140. Also referring to the entries of “Cretan Rebellion of 1821-1822”, and “Cretan Uprising of 1866-1867” in Kohn, *Dictionary of Wars*, 132.

religious liberty and to abolish tax farming.”<sup>156</sup> This note was upheld by the European powers except Great Britain. However, the Andrassy Note was rejected by the rebels. Then the two contemporary ruling powers, Russia and Austria-Hungary, met and provided a new proposal to the Ottoman Porte, which requested the Port to implement a two-month armistice, to carry out a series of reforms under the surveillance of the European consults, and to compensate and maintain the lives of the Herzegovinian and Bosnian victims.<sup>157</sup> A concealed threat was attached to this proposal in that if the Ottoman Porte failed to implement the proposal, Russia, Austria-Hungary and Germany would take effective measures in order to maintain the general peace of Europe. This proposal was obviously adverse to the interests of the Porte and impossible for the Porte to fully execute. It was opposed by the British government which held a stern non-intervention policy towards the Ottoman Empire and undoubtedly refused by the Porte.<sup>158</sup>

In 1876, a series of killings of Ottoman officials and members of the Muslim populations took place in the province of Rumelia which had a majority population of Christian Bulgarians. The Ottoman Porte responded by massacring thousands of people and destroying vast villages by using bashi-bazouks.<sup>159</sup> The Conservative British government attempted in the beginning to uphold its non-intervention policy and defended the Porte by claiming that the central government was not behind the operations of the irregular bashi-bazouks. Even later, when it had to decide on the guilt and responsibility of the Porte for these atrocious events after having investigated the truth, the British government still avoided intervention by holding that any change of the existing power structure on the European continent would be most detrimental to the British people. However, the British government ultimately changed its attitude on account of several factors, including the mounted domestic public pressures, the defeat of Serbo-Montenegrin by the Ottoman Empire, and a new signed agreement between Russia and Austro-Hungary.<sup>160</sup>

By the end of 1876, the European powers held a conference in Constantinople to elaborate a collective solution to the crisis. They declared to respect the territorial integrity and independence of the Ottoman Empire, and any concluded measures did not direct to seek

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<sup>156</sup> Rodogno, *Against Massacre*, 145.

<sup>157</sup> Simms and Trim, *Humanitarian Intervention*, 188–190.

<sup>158</sup> Rodogno, *Against Massacre*, 140–146.

<sup>159</sup> Mercenary soldiers belonging to the skirmishing or irregular troops of the Turkish army; notorious for their lawlessness, plundering, and savage brutality. Referring to the entry “Bashi-Bazouk” in Oxford English Dictionary. Available at: <http://www.oed.com/view/Entry/15898?redirectedFrom=bashi-bazouks#eid>

<sup>160</sup> Rodogno, *Against Massacre*, 146–151.

territorial advantage and exclusive influence of the European powers. Russia's initial proposal was to take military occupation of the Ottoman Empire, in order to compel the Empire to implement a set of reforms. The British delegates didn't regard military intervention as the only measure to solve the problem; on the contrary, they sought a "*Lebanese solution*"—issuing a new constitution—for Bosnia, Herzegovina, and Bulgaria and they opposed to foreign intervention. The European policy-makers nevertheless came to a final decision with mutual compromise, which demanded the Ottoman Porte to initiate reforms in the provinces of Bosnia, Herzegovina, and Bulgaria under the control and supervision of an international commission. They also envisaged sending troops if the Porte was unwilling or incapable to implement these measures. The Porte rejected the above solution and the subsequent London Protocol of March, 1877, proposed by Russia and endorsed by the other five European powers.<sup>161</sup>

In April 1877, Russia declared war on the Ottoman Empire, with an official assertion of protecting the Ottoman Christians from inhumane treatments at the hands of the Porte. In the beginning of 1878, as a consequence of a Russian military victory, the two warring parties signed the *Treaty of San Stefano*.<sup>162</sup> The other European powers objected to this treaty and decided to hold a Congress in Berlin to deal with territorial issues and negotiate their multiple interests in the middle of that year. As a significant result of the Congress, the *Treaty of Berlin*<sup>163</sup> was signed by all the European major powers at that time. The treaty held that territorial issues regarding the Ottoman Empire should be and had been disposed by the European powers as a collective rather than individual enterprise.

Some scholars hold that Russia's intervention in this case should not be seen as humanitarian intervention. One significant reason for this is that Russia intended to seize parts of the territory of the Empire through that armed operation, which was clearly revealed in the *Treaty of San Stefano*. The humanitarian atrocities which happened in Bulgaria just provided a compassionate pretext for the dirty war. Besides, the humanitarian motive of both Russia and other European powers was very subjective. They only committed to protect the Ottoman Christians and showed little sympathy to the massive Muslim refugees, which was largely a result of the war. The motives in this case were very complex, and it is not easy to conclude whether the humanitarian reason was beyond the political interests or in the converse.

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<sup>161</sup> *Ibid.*, 160–164.

<sup>162</sup> "Preliminary Treaty of Peace between Russia and Turkey," 387–401.

<sup>163</sup> "Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East," 401–424.

Furthermore, the military operations of the Russian army against the Ottoman Empire exceeded far more a scope of humanitarian intervention. They did not only take place in the atrocity-affected areas, but advanced even to the capital.<sup>164</sup> However, it is certain that the humanitarian evidence was indispensable in the decisions of the European policy-makers, and for Russia launching the war. As I have mentioned above, it might be more important to see how the humanitarian motive influenced States' decisions in the whole event, how the concept developed and was practiced, how it became integrated in the foreign policies of States during the 19<sup>th</sup> Century, and how it had been objected as a proper justification for intervention.

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<sup>164</sup> Rodogno, *Against Massacre*, 165.



## Chapter 5: Humanitarian Intervention and the Prohibition of the Use of Force <sup>165</sup>

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The intense confrontation between the principle of sovereignty and the doctrine of humanitarian intervention is brought to the fore when the principle of sovereignty and its derivative principles like the non-use of force by States in foreign affairs and no-interference by the UN in certain domestic affairs are written into the UN. From this point in time, humanitarian intervention is presumably no longer legal according to the international treaty law.

### 5.1 Article 2(4): Prohibition of the Use of Force

The international effort to restrict the use of force starts at the end of World War I.<sup>166</sup> From then on, the non-use of force in foreign affairs is fused with the concept of State sovereignty. In the early 1900s, the League of Nations had tried to limit the use of force in international relations. As provided in the preamble of the *Covenant of the League of Nations*, it was created “... to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war...”<sup>167</sup> It established peaceful procedures for the member States to deal with serious disputes with other State or States, such as “submit the matter either to arbitration or judicial settlement or to enquiry by the Council.”<sup>168</sup> However, the League of Nations did not aim at entirely abolishing the recourse to war, but prohibited States to “resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.”<sup>169</sup> The League’s attempts to limit the recourse to war rarely came through. In 1928, 15 nations, including the United Kingdom, France, Germany, Italy, Japan and the United States, concluded “*the General Treaty for Renunciation of War*”, which is also known as the “*Kellogg-Briand pact*”, outside the League of Nations. In this Pact, they affirmed, for the first time in the form of a universal treaty, to abandon the recourse to war as a national policy.<sup>170</sup> Till today, the “*Kellogg-Briand Pact*” remains in force. Nevertheless, the Pact doesn’t live up to its aim to end the war among national States, due to a lack of enforcement provisions.

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<sup>165</sup> This section is partly extracted from my former paper of the examination of the course SVF-3021, 2014.

<sup>166</sup> Mansell and Openshaw, *International Law*, 183.

<sup>167</sup> Covenant of League of Nations, please see [http://avalon.law.yale.edu/20th\\_century/leagcov.asp](http://avalon.law.yale.edu/20th_century/leagcov.asp)

<sup>168</sup> *Ibid.*, Article 12

<sup>169</sup> *Ibid.*

<sup>170</sup> Wade Mansell and Karen Openshaw (2013), *International Law: A Critical Introduction*, p.186

Taking Lessons from the catastrophe of the two world wars, it lays down in the preamble of the UN Charter that the United Nations purports “to save succeeding generations from the scourge of war”. The use of force, which replaces the term of “war”, is generally prohibited in the UN Charter. As provided in Article 2(4), “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.”<sup>171</sup> The ICJ, in the *Congo-Uganda* Case, regards Article 2(4) as “a cornerstone of the United Nations Charter.”<sup>172</sup> The non-use of force is also recognized as customary international law and even as *jus cogens*. In the case of *Nicaragua v. United States of America*, the ICJ decided that, by twelve votes to three, “by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce.”<sup>173</sup> In this case, the ICJ also affirmed that the prohibition of the use of force has the conspicuous character of *jus cogens*, which is expressed by the International Law Commission in its “*Draft Articles on the Law of Treaties with commentaries, 1966*”.<sup>174</sup> Though national States generally agree on the abstract principle of the prohibition of the use of force, there are vast controversies on the interpretation of nearly all the key terms of this article.<sup>175</sup>

Some defenders of humanitarian intervention, like Anthony D’Amato, Fernando Tesón, build their arguments on a restrictive interpretation of this article. The restrictive interpretation advocates that, according to the very text of this article which has been deliberated by the drafter of the Charter, there should be two qualifications of the refrainment of the threat or use of force:<sup>176</sup> 1) against the territorial integrity or political independence of any State, and 2) in any other manner inconsistent with the Purposes of the United Nations. Thus if the use of force does not meet these two conditions, it does not violate the Charter and therefore is legitimate.

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<sup>171</sup> Ibid.

<sup>172</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para. 148.

<sup>173</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, p. 14, para. 292(6).

<sup>174</sup> Ibid, para. 190.

<sup>175</sup> Schachter, “The Right of States to Use Armed Force,” 1624.

<sup>176</sup> According to the interpretation principle of *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of the other), see Chesterman, *Just War Or Just Peace?*, 48.

As to the first qualification, D'Amato thinks that these terms do not exclude all the trans-border use of force.<sup>177</sup> In his defense for the United States' military intervention in Panama, D'Amato claimed that the US' use of force did not violate Article 2(4) since it did neither impair the territory integrity of Panama, nor attempted to colonialize, annexe or incorporate Panama, thus not against Panama's political independence.<sup>178</sup> Referring to the negotiations of Article 2(4), D'Amato argues that it was not certain whether this article was intended by the drafters to encompass all kinds of inter-State use of force. In his historical review of the *travaux préparatoires* of the UN Charter, D'Amato gives a quite controversial comment on the US opinion regarding the re-drafted phrase of Article 2(4). The delegate of the US claimed that Article 2(4) implied a general prohibition to all trans-boundary threats or uses of force. D'Amato says that "the United States did not understand the long history behind the terms 'territory integrity' and 'political independence'".<sup>179</sup> Tesón also argued that if the drafters intended to prohibit all inter-State use of force, they should have just done that.<sup>180</sup>

However, such a restrictive interpretation is rejected by the dominant view of international lawyers since it would be inconsistent with the general rules of the interpretation.<sup>181</sup> In the commentary on the Article 2(4) of the UN Charter, Randelzhofer suggests that "[t]he terms 'territorial integrity' and 'political independence' are not intended to restrict the scope of the prohibition of the use of force". And the use of force expressed in this Article should include "any possible kind of trans-frontier use of armed force". As to the purposes of the United Nations, Randelzhofer regards the maintenance of international peace and security under Article 1(1), which is the ultimate end of the prohibition of the use of force, as the paramount purpose of the UN. Thus, in his view, the humanitarian purpose may not justify military action violating the prohibition.<sup>182</sup>

As written in Article 31(1) of the *Vienna Convention on the Law of Treaties*, which is referred to as a general guide for interpreting treaty rules and potential customary international law applied by the ICJ, "[a] treaty shall be interpreted in good faith in

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<sup>177</sup> Ibid., 51.

<sup>178</sup> D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," 5.

<sup>179</sup> D'AMATO, *International Law*, 71.

<sup>180</sup> Chesterman, *Just War Or Just Peace?*, 50, 51. See also Anthony D'Amato, *International Law: Process and Prospect*, 57-73. And Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 150.

<sup>181</sup> Ibid., 50.

<sup>182</sup> Randelzhofer, "Article 2(4)" in Simma et al. edit, *The Charter of the United Nations: A Commentary*, Vol I, 123.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31(3) (b) also states that “[t]here shall be taken into account, together with the context: [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;” Scholars rejecting the restrictive interpretation have provided two persuasive arguments: 1) it is neither in accordance with the context of the drafting of the UN Charter, 2) nor reflected in the subsequent States practice.

Referring to the *travaux préparatoires* of the UN Charter, Ian Brownie asserts that the drafters of the Charter did not intend to use the phrase “against the territorial integrity or political independence” to limit the prohibition of the use of force, but to “give more specific guarantees to small States and that it cannot be interpreted as having a qualifying effect.”<sup>183</sup> Giraud and Waldock have also expressed a similar view.<sup>184</sup> In Chapter II of the Dumbarton Oaks Proposals,<sup>185</sup> this phrase was not mentioned, in which the fourth principle simply read as “[a]ll members of the Organization shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered.” During the San Francisco Conference, an Australian amendment introduced this phrase, which was adopted by the Conference as the present text of Article 2(4).<sup>186</sup> Among the amendments, observations, and comments on the Dumbarton Oaks Proposals, proposed by delegates of States at this conference, the term “territorial integrity or political independence” was mainly referred to by several smaller States, including Brazil, Ecuador, and Czechoslovakia. The Brazilian amendment of paragraph 4 stated that, “[...] [i]n the prohibition against intervention there shall be understood to be included any interference that threatens the national security of another member of the Organization, directly or indirectly threatens its territorial integrity, or involves the exercise of any excessively foreign influences on its destinies.”<sup>187</sup> Likewise,

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<sup>183</sup> Brownlie, “Use of Force in Self-Defense” 235.

<sup>184</sup> Giraud argues that “[a]t the San Francisco Conference, that portion of the sentence referring to ‘the territorial integrity or the political independence’ was added to the text merely to satisfy the small Powers who wished to see the guarantee of article 10 of the Pact of the League of Nations reStated in the Charter, [...]”. Waldock says that “article 2(4) prohibits entirely any threat or use of force between independent States except in individual or collective self-defense under article 51 or in execution of collective under the Charter for maintaining or restoring peace.” See Fonteyne, “Customary International Law Doctrine of Humanitarian Intervention,” 242–243.

<sup>185</sup> Generated in the Dumbarton Oaks Conference at which the United States was formulated.

<sup>186</sup> 6 UNCTAD Documents, 543. The UNCTAD Documents is available at <http://heinonline.org/HOL/Index?index=unl/unctadorg&collection=unl>

<sup>187</sup> Ibid, 558

Czechoslovakia suggested that, “Chapter II should include: ‘[...] respect for the territorial integrity and political independence of States-members.”<sup>188</sup>

In the First Committee of Commission I, which considered the draft text of Chapter II of the UN Charter, as to the incorporation of the Australian amendment in the text of paragraph 4, the delegate of New Zealand suggested this new text was not the adequate substitute for the original suggestion of New Zealand, though he voted to it. The delegate of Brazil retained his insistence on the Brazilian amendment, which had been rejected by the Committee by two votes to twenty-six,<sup>189</sup> and stated that the incorporation did not make the words of the text less ambiguous. He suggested interpreting the present text as authorizing the *unilateral* use of force by States as long as it was in accordance with the purpose of the United Nations. Also delegate of Norway held that the present language did not reflect its intentions well. He suggested that the paragraph 4 should not contemplate any use of force, beyond the actions by the UN, and individual and collective self-defense. The delegate himself preferred to omit the phrase of “the territorial integrity or political independence”, which might be abundant in his view.<sup>190</sup> However, the delegate of the United Kingdom claimed that “the wording of the text had been carefully considered so as to preclude interference with the enforcement clauses of Chapter VIII of the Charter.” The delegate of the United States also argued that the intention of the drafters of the original text is to implement “an absolute all-inclusive prohibition” which should have no loopholes.<sup>191</sup> By the records of the UNCIO, the drafters of the UN Charter did not have any obvious intention of giving the incorporated phrase a restrictive meaning.<sup>192</sup>

In addition, the restrictive interpretation is also on contrary to subsequent States practice. When Israel landed its troops on the Entebbe airport in Uganda in 1976 to rescue its citizens from a jet hijacked by terrorists, the Israeli government defended its action as a necessary mean to secure its citizens and not as an aggression to Ugandan territory. Israel’s claim received extensive supports from the European countries and the United States, but was condemned by a large amount of African, Arabic and Communist States.<sup>193</sup> In the *Corfu*

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<sup>188</sup> *Ibid*, 560

<sup>189</sup> *Ibid*, 335.

<sup>190</sup> He suggested that this phrase was “on the one hand, a permanent obligation under international law and, on the other hand, could be said to be covered by the phrase ‘sovereign equality’, as suggested in the commentary by the Rapporteur.” *Ibid*, 335.

<sup>191</sup> *Ibid*, 334, 335.

<sup>192</sup> Brownlie, “Use of Force in Self-Defense, The,” 234.

<sup>193</sup> Chesterman, *Just War Or Just Peace?*, 76.

*Channel* case, the UK attempted to justify its forcible mine-clearing operations in Albanian territorial waters with the claim that a State's intervention for the purpose of securing "possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task",<sup>194</sup> did not infringe the territorial integrity or political independence of any State. The ICJ rejected the UK's claim.<sup>195</sup> In the 1986 Nicaragua Judgment, the Court has referred to the principle of the non-use of force in a general sense, which, in Yoram Dinstein's understanding, expressed a non-restrictive interpretation of Article 2(4).<sup>196</sup> Moreover, numerous declarations and resolutions adopted by United Nations have presented non-restrictive interpretations of the non-use of force or non-intervention. In the *Declaration on Friendly Relations*, adopted by the General Assembly, it declares that "[n]o State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States."<sup>197</sup> The Security Council has also condemned the unauthorized use of force in many cases.<sup>198</sup>

Some exponents of a right to *unilateral* humanitarian intervention also attempt to give a justification based on the argument that *unilateral* humanitarian intervention is in accordance with the so-called second qualification for the use of force.<sup>199</sup> It is argued that humanitarian intervention is use of force for the reason of protecting human rights, avoiding or stopping humanitarian disaster, which is to fulfill one of the important purpose of the United Nations: To promote and encourage the respect for human rights under Article 1(3) of the Charter. Fernando Tesón argues that the purpose of human rights is as important as the purpose of international peace and security.<sup>200</sup> However, such a view is questionable, because it is, on the one hand, inconsistent with the original intention of the founders of the United Nations, and on the other hand, contravenes to the general view of international lawyers. In the First Session of Commission I of the *United Nations Conference on International Organization* (UNCIO), which considered the Egyptian amendment of Article 1 of the Charter, the delegate of Panama, Professor Alfaro pointed out that "the supreme purpose of the organization is the maintenance of international peace and security."<sup>201</sup> Louis Henkin has

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<sup>194</sup> ICJ *Corfu Channel case*. More details please see "THE CORFU CHANNEL CASE (MERITS) JUDGMENT OF APRIL 9th, 1949", p.34, <http://www.icj-cij.org/docket/files/1/1645.pdf>

<sup>195</sup> Also see Malcolm D. Evans (2010), *International Law*, 3rd ed., p.619

<sup>196</sup> Dinstein, *War, Aggression and Self-Defence*, 90. See also *Nicaragua case* (Merits), *supra* note 14, at 100.

<sup>197</sup> UNGA, RES/25/2625. Available at: <http://www.un-documents.net/a25r2625.htm>

<sup>198</sup> Chesterman, *Just War Or Just Peace?*, 52. See UNSC, Resolution 332, 455, and 545.

<sup>199</sup> *Ibid.*

<sup>200</sup> Tesón, *Humanitarian Intervention*, 151.

<sup>201</sup> 6 UNCIO Documents 15

also written that “[i]t declares peace as the supreme value, to secure not merely State autonomy, but fundamental order for all. It declares peace to be more compelling than inter-State justice, more compelling even than human rights or other human values.”<sup>202</sup> Chesterman also argues that the literal text of Article 1 does not support the equality between these two purposes. On the contrary, a hierarchy of all purposes of United Nations has been implied by the sequence of the sentences, where the purpose of peace and security is listed at the first place (Article 1(1)) and the purpose of human rights at the third place (Article 1(3)).<sup>203</sup>

## **5.2 Exceptions to Article 2(4)**

Though the prohibition of the use of force is regarded as a basic principle of international law, two exceptions from this principle are formulated in the UN Charter itself. One exception is self-defence under Article 51. The other one is the authorization of the UN Security Council under the rules of Chapter VII. Besides these two written exceptions, the intervention by invitation is also recognized as a legal use of force by the international community, which is mainly embodied in the customary international law.

### **5.2.1 Self-defence**

Self-defence is the major exception to the non-use of force principle. As provided by Article 51 of the UN Charter, “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [...]” The right of self-defence was first identified in the *Caroline* case between the United States and Great Britain.<sup>204</sup> This affair took place in the context of the Canadian rebellions in 1837. The *Caroline* was a vessel belonging to an American private militia and used for supporting the Canadian rebels. The British set a fire on the *Caroline* and casted it adrift over the Niagara Falls when it was docked in New York State. This issue was finally disposed of by the negotiation between a British diplomat, Lord Ashburton, and U.S. Secretary of State, Daniel Webster. Daniel Webster admitted “a just right of self-defence attaches always to nations, as well as to individuals, and is equally necessary for the preservation of both.”<sup>205</sup> However, he also identified the limitations on the right of self-defence. The exercise of self-defence needs to meet the condition that there is “a necessity of

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<sup>202</sup> Henkin, *International Law*, 146.

<sup>203</sup> Chesterman, *Just War Or Just Peace?*, 52–53.

<sup>204</sup> Wade Mansell and Karen Openshaw (2013), *International Law: A Critical Introduction*, p.192

<sup>205</sup> Letter from Webster to Lord Ashburton, Enclosure 1, 1842. More details please see

[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp#web1](http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1)

self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation” and States should do “nothing unreasonable or excessive”.<sup>206</sup> Though war remained lawful in the era of the *Caroline* case, the *Caroline* criteria of self-defence—necessity, proportionality and imminence—are widely acknowledged in the international community and are still in use today.<sup>207</sup>

There has been a little controversy as to the scope of self-defence. Is it lawful for States to exercise the right of self-defence as a reply to an anticipatory imminent attack, or do such a right only arise when the attack is already underway? The defenders of pre-emptive self-defence often claim that it would be too late for States to respond after the attack really happened and it is also unrealistic for States to wait. The opponents often doubt the precision of the prediction. They assert that pre-emptive self-defence would escalate the situation and lead to excessive military reaction.<sup>208</sup> In the *National Security Strategy of the 2002* release by the Bush government, it asserts that pre-emptive self-defence is in accordance with customary international law.<sup>209</sup> However, many international lawyers dispute such a claim since it violates the *Caroline* criterion of imminent threat and insist on the traditional interpretation of self-defence.<sup>210</sup> Besides, though a wider right of self-defence is often proposed by States, such as the U.S., the UK and Israel, pre-emptive self-defence has been scarcely claimed in practice.<sup>211</sup> Actually, a big departure is made from the above mentioned *National Security Strategy* in the two most recent issued *National Security Strategy* reports issued by President Obama, where the notion of pre-emptive self-defence is discarded.<sup>212</sup>

### 5.2.2 Authorization of the UNSC

The UNSC is the main body envisaged to control the use of force by the drafters of the Charter. Even, under Article 43 to 47, there should have been “a standing army at its disposal to enable it to take enforcement action against aggression in order to restore international

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<sup>206</sup> Ibid.

<sup>207</sup> Wade Mansell and Karen Openshaw (2013), *International Law: A Critical Introduction*, p.194

<sup>208</sup> Malcolm D. Evans (2010), *International Law, 3rd ed.*, p.628

<sup>209</sup> In the *National Security Strategy of the 2002*, it states that “[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.” p.15. More details please see <http://www.State.gov/documents/organization/63562.pdf>

<sup>210</sup> Wade Mansell and Karen Openshaw (2013), *International Law: A Critical Introduction*, p.194

<sup>211</sup> Malcolm D. Evans (2010), *International Law, 3rd ed.*, p.628

<sup>212</sup> National Security Strategy of May 2010, see:

[https://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)

National Security Strategy of February 2015, see:

[https://www.whitehouse.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf)



peace and security.”<sup>213</sup> However, in practice, these words have never come true since the member States are unwilling to concede their military forces to the Security Council.<sup>214</sup>

Generally, the Security Council is prohibited from interfering in the domestic affairs of member States which “are essentially within the domestic jurisdiction of any State” under Article 2 (7). However, the provision holds one exception for “the application of enforcement measures under Chapter VII”. Under Article 39 of Chapter VII, the UNSC is empowered to “determine the existence of any threat to the peace, breach of the peace, or act of aggression... shall make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.” Article 41 and 42 rule what measures the UNSC can employ to give effect to its decisions: Peaceful measures, such as economic sanctions and diplomatic severance, are the primary choice; if these measures nevertheless are i.e. proved to be inadequate, the Security Council may authorize the member States to take military measures to maintain or restore international peace and security.

Throughout the Cold War, due to the tension between the major powers, the Security Council was extremely cautious about taking actions in response to domestic conflicts. Even the lesser peacekeeping missions were seldom authorized by the Security Council for helping keep the peace in a State where civil war or other internal conflicts were taking place.<sup>215</sup> And, almost no coercive measures were decided by the Security Council solely due to a domestic humanitarian atrocity.<sup>216</sup> After the dissolution of the Soviet Union, the Security Council took more initiative in response to mass violations of human rights. Besides sending peacekeeping missions, the Security Council also authorized member States or organizations to take all necessary measures to protect foreign civilians in some cases. These cases will be discussed in the next chapter. However, due to the general principle of no-interference under Article 2 (7), when the Security Council authorizes Chapter VII measures, it often determines earlier in

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<sup>213</sup> Malcolm D. Evans (2010), *International Law, 3rd ed.*, p.633

<sup>214</sup> Wade Mansell and Karen Openshaw (2013), *International Law: A Critical Introduction*, p.191

<sup>215</sup> The Mission of the Special Representative of the Secretary-General in the Dominican Republic (DOMREP), the United Nations Observation Group in Lebanon (UNOGIL), and the United Nations Yemen Observation Mission (UNYOM) are the exceptions.

<sup>216</sup> The nature of the United Nations Operation in the Congo (ONUC), mandated by the Security Council from 1960 to 1964, is controversial. The ONUC was authorized to use force when necessary for the purpose of implementing its mandate. Commentators argue whether ONUC was in fact a peace enforcement action under Chapter VII, or rather a peacekeeping operation. The ICJ in 1962 nevertheless Stated that “the operations known as UNEF and ONUC were not enforcement actions within the compass of Chapter VII of the Charter”. However, even without being strictly speaking an enforcement action, ONUC actually intervened actively in domestic matters of the Republic of Congo, i.e. the Congolese civil war. See Franck, “United Nations Law in Africa: The Congo Operation as a Case Study”. And also see *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: ICJ. Reports 1962, p. 151.

the same resolution that the humanitarian crisis in a State constitutes a threat to international peace and security. The rationale behind these words might be an exodus of refugees across international border following humanitarian atrocities, or other border issues linked to the internal conflicts, impose large risks to e.g. regional peace and stability.

### 5.2.3 Invitation

Intervention with the consent of the government of the State concerned is generally considered legal under customary international law. The justification of invitation is presumably rooted in the cardinal principle of sovereignty, which endorses State to deal with its domestic affairs on its own will. However, invitation by the insurgents against the government is generally regarded as unlawful. In *Nicaragua v USA*, the ICJ allowed the assistance of the foreign State to the government of the State concerned,<sup>217</sup> but rejected that any “general right of intervention, in support of an opposition within another State, exists in contemporary international law.”<sup>218</sup> In the case *Armed Activities on the Territory of the Congo*, the ICJ reaffirmed that “a State may invite another State to assist it in using force in self-defence.”<sup>219</sup>

Views may differ on whether invitation serves as an exception to the general prohibition of the use of force, or rather falls outside of the prohibition in Article 2(4). In the case of invitation, since the foreign forces fight with the government of the State concerned, the armed conflict or other uses of force takes place between State actors and non-State actors. To the extent the threshold of an armed conflict is reached, it is presumably a non-international armed conflict (NIAC). As Article 2(4) rules, the non-use of force shall be observed by States in their *international relations*. Thus, some may argue that the use of force by invitation is to address an internal conflict of some sort, but not to deal with *international relations* between the intervening State and the targeted State. Due to the length limitation of the thesis, this will not be discussed further.

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<sup>217</sup> Malcolm D. Evans (2010), *International Law, 3rd ed.*, p.624

<sup>218</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, p. 14. Para.209. For more details please see: <http://www.icj-cij.org/docket/files/70/6503.pdf>

<sup>219</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168. For more details please see: <http://www.icj-cij.org/docket/files/116/10455.pdf>

### 5.3 The African Union Constitutive Act

Noticeably, the Constitutive Act of African the Union authorizes a “right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”<sup>220</sup> Literally, under this rule, the Union is allowed to deploy military force in its member States without the authorization of the Security Council when relevant occasion occurs. In the 2002 Durban Protocol to establish the Peace and Security Council of the African Union (AUPSC),<sup>221</sup> the implementation of the decision on intervention is included in the major functions of the AUPSC. In principle, the military deployment the AUPSC in this regard does not need *ad hoc* consent from the government of the targeted State, as long as certain circumstances occur and the Assembly of the Union makes a recommendation to intervene.<sup>222</sup> If the member State concerned continuing consents to this Protocol, the military intervention by the AUPSC would be justified on the grounds of invitation. Once the member State concerned withdraws its consent, however, the legality of the AUPSC’s intervention falls into doubt.

Nevertheless, under Article 103 of the UN Charter, the Charter’s obligations should prevail over any obligations of the member States under other international agreement. Also, due to the *jus cogens* nature of Article 2(4), the AU shall always observe the rule of non-use of force. If the member State concerned objects to the intervention, consequently withdrawing its consent to the Protocol, the AUPSC shall ask the authorization of the UN Security Council before taking any forcible actions. Actually, in practice, the AU has shown no will to challenge the preeminence of the Security Council authority since the Constitutive Act entered into force in 2001. For instance, in the Darfur conflict, the Union dispatched forces with the consent of the Sudanese government; in the Libyan conflict, the Union refused to intervene in Libya themselves by force and also strongly opposed to NATO’s military intervention, even the latter acted, at least partly, on the mandate of the Security Council.<sup>223</sup>

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<sup>220</sup> Article 4(h) of the Constitutive Act of African Union. Available at: [http://www.au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf)

<sup>221</sup> “Protocol Relating to the Establishment of the Peace and Security Council of the African Union”, 2002. Available at: [http://www.au2002.gov.za/docs/summit\\_council/secprot.htm](http://www.au2002.gov.za/docs/summit_council/secprot.htm)

<sup>222</sup> Dinstein, *War, Aggression and Self-Defence*, 122.

<sup>223</sup> Gray, “The Use of Force for Humanitarian Purposes,” 237.

## Chapter 6: Humanitarian intervention in Customary International Law and the New Concept of Responsibility to Protect

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### 6.1 General Introduction

In modern international law, the use of force by States in international affairs is generally prohibited, but with three exceptions. These are self-defence, authorization of the UNSC and by invitation. In Chapter 4, the term humanitarian intervention, by reference to the common features of this term in several prominent scholars' works, is defined as *a military operation employed by a State, a group of States, or international organizations against another State, without the consent of the authorities of the targeted State, for the purpose of protecting individuals of the targeted State from grievous sufferings or the loss of life*. Rejecting a narrow interpretation of the rule in Article 2(4) that the prohibition of use of force is given a wide reach, it would seem that humanitarian intervention is prohibited by the Charter rules about the lawful use of force.

Firstly, self-defence is provoked by “an armed attack against a Member of the United Nations.” Only the victim State (individual self-defence) and its supportive States coalition (collective self-defence) enjoy the right of self-defence. In the case of humanitarian intervention, neither the civilians of the intervening States and their allies nor the intervening States and their allies themselves are the victims of the humanitarian atrocities conducted by the targeted State. Thus humanitarian intervention is beyond the scope of self-defence. Secondly, humanitarian intervention is presumably never justified by a relevant invitation, due to a lack of consent from the government of the targeted State. Finally, since the use of force can always be legalized by the UNSC authorization, if humanitarian intervention with the UNSC authorization, namely collective humanitarian intervention, it would be legal; if not, namely *unilateral* humanitarian intervention it is presumably illegal.

Thus, according to the rules of the UN Charter, humanitarian intervention is in principle illegal without authorization from the Security Council. Many scholars advocating a right of humanitarian intervention often seek to base the legality of this norm rather in customary international law. As is well known, customary international law has two principal elements: (1) General State practice, and (2) *opinio iuris*. The effort to find a customary international law justification for a right of *unilateral* humanitarian intervention often follows this route: (1) There is general State practice on humanitarian intervention and (2) this

practice is accepted by States as law (*opinio iuris*). In the rest part of this Chapter, I will examine the related State practice after the establishment of the UN Charter and try to assess whether there is an existing customary international law of humanitarian intervention in this period.

## **6.2 Humanitarian Intervention in Customary International Law**

### **6.2.1 Cold War Stage**

#### **6.2.1.1 1971 India's Intervention in East Pakistan**

The partition of the Indian sub-continent in 1947 by the former British ruler led to many subsequent territorial issues and military confrontations between India and Pakistan. The latter had been split into two wings which were separated geographically by 1, 200 miles of Indian and Nepalese territory. The West Pakistan and East Pakistan were vastly different from each other: the former was populated mainly by Urdu-speaking Muslims, while the latter mainly by Bengali-speak Muslims. There was also a Hindu minority living in the East Pakistan, who made up most of the landlords, merchants and the educated class.<sup>224</sup> The tension between the eastern and the western parts mounted with the increasingly economic prosperity of the latter, which further facilitated West Pakistan's control of the bureaucracy and military. In 1969, the new president General Yahya Khan decided to transfer the military government, controlled by the West, into a civilian government by elections.<sup>225</sup> In subsequent elections, the Awami League, founded in East Pakistan, won a majority of seats in both the East Pakistan assembly and the Pakistan National Assembly. However, the West wing was not willing to hand the power to the East. The Awami League responded by launching non-violent and non-cooperative demonstrations in East Pakistan and further claimed total independence.<sup>226</sup> The two parts attempted to solve the issue through peace negotiation; however, it fell through in the end. In March of 1971, the Pakistani government decided to dispatch the army to repress the unrest in the East, which resulting in mass indiscriminate killings of civilians, detention, torture, rape and the looting of properties.<sup>227</sup>

There was consensus among states that the humanitarian atrocities in East Pakistan amounted to genocide. However, the international community, especially the United Nations, was reluctant to take action. The most common reaction of States towards this affair was to

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<sup>224</sup> International Commission of Jurists, *The Events in East Pakistan, 1971*, 9.

<sup>225</sup> Wheeler, *Saving Strangers*, 56.

<sup>226</sup> Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 113.

<sup>227</sup> International Commission of Jurists, *The Events in East Pakistan, 1971*, 26–27.

respect the sovereignty of Pakistan and not to intervene.<sup>228</sup> On the opposite side, India strongly condemned the savage actions of the Pakistani government. After vainly requesting the UN and other States to do something,<sup>229</sup> India opened hostility against Pakistan. On 3 December, a full-scale war broke out. Responding to the deteriorated situation on the subcontinent, the Security Council immediately organized an emergency meeting, and invited representatives of the non-member States India and Pakistan to take part in the debate in the meeting, under Article 31 of the UN Charter.<sup>230</sup>

In the debate, the representative of Pakistan claimed that India had launched aggression against the territory of Pakistan in order to bring about the disintegration of Pakistan.<sup>231</sup> India denied this and counter-claimed that it was Pakistan itself, not India, which sought to break up Pakistan by suppressing militarily the wishes of the people as expressed in the outcome of the elections; and, in this process, it acted aggressively against India.<sup>232</sup> India defended itself by presenting three reasons. First of all, India argued that its troops only went into the territory of Pakistan as an exercise of the right of self-defence. It cited numerous complaints of border violations and shelling of Indian villages by the Pakistani army since March of 1971. Secondly, the representative of India claimed that the flux of millions of Pakistani refugees to India had jeopardized its regular political and economic structures, thus constituting an aggression to India. In the last, India emphasized its “pure” motive and stated that its intention of launching attacks against Pakistan was to *rescue* the East Bangladesh people from what their suffering. As the Indian Ambassador Sen said, “I wish to give a very serious warning to the Council that we shall not be a party to any solution that will mean continuation of oppression of East Pakistani people...So long as we have any light of civilized behavior left in us, we shall protect them.”<sup>233</sup> This reason is often regarded as a plea of humanitarian intervention.

The majority of States participating in the meeting opposed India’s intervention in Pakistan. The representative of the United States expressed that India’s intervention in the affairs of Pakistan with military force had violated the Charter. China was in the same camp

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<sup>228</sup> Wheeler, *Saving Strangers*, 58.

<sup>229</sup> Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 144.

<sup>230</sup> Article 31 of the UN Charter, “[a]ny Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.”

<sup>231</sup> “Repertoire of the Practice of the Security Council,” 1969-1971, 155. Available at:

[http://www.un.org/en/sc/repertoire/69-71/69-71\\_c.pdf](http://www.un.org/en/sc/repertoire/69-71/69-71_c.pdf)

<sup>232</sup> *Ibid.*, 156.

<sup>233</sup> Quoted from Wheeler, *Saving Strangers*, 67.

as the United States. It strongly condemned India's intervention and declared that the question of East Pakistan was purely the internal affair of Pakistan, in which no one had any right to interfere. The representative of China had also rejected India's justification of "self-defence", by asserting that it was India which committed aggression against Pakistan, not Pakistan which menaced the security of India. The representative of France also considered what happened in East Pakistan as the internal affair of Pakistan, and India's justification of "refugee aggression" was partial and superficial. Only the Soviet Union and Poland condoned the military operations of India. The Soviet representative also held that the humanitarian crisis inside Pakistan had threatened international peace and security, and the Security Council should deal with the root causes of the crisis. Other States, like the United Kingdom, Italy, Japan, Somalia, Syria, Belgium, Argentina, Burundi, and Nicaragua, demanded an immediate cease-fire between the warring parties. Since no compromise had reached between the major powers, in the Security Council meetings, no resolution on the Indian-Pakistan conflict was passed. Then the issue was referred to the General Assembly, under the UNGA resolution 377(V), *Uniting for Peace*.<sup>234</sup>

Tesón sees this case as "an almost perfect example of humanitarian intervention", by arguing that, first, the intervention of India facilitated the Bangladesh people to exercise the human right of self-determination; and second, it ended the ongoing genocide.<sup>235</sup> Despite that many States and scholars criticizing India's primary motive for launching the war as rather political rather than humanitarian, it is clear that India acted in a context of mass humanitarian abuses imposed on the Bengali people by the Pakistani government and the intervention actually achieved a positive humanitarian consequence. In addition, the Indian government had defended itself partly on humanitarian grounds. It may thus be proper to take this case as a State practice of humanitarian intervention.

Tesón also points out that the dominant concern of the States was to recover peace and security on the subcontinent, not to condemn neither warring parties, which implied that the majority of States implicitly acknowledged that "Article 2(4) recedes where acts of genocide

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<sup>234</sup> It provides that, "if the Security Council, because of lack of unanimity of the permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security..." , which is quoted by Wheeler in *Saving Strangers*, 68. Available at: <http://www.un.org/en/sc/repertoire/otherdocs/GAres377A%28v%29.pdf>

<sup>235</sup> Tesón, *Humanitarian Intervention*, 248.

are concerned.”<sup>236</sup> This assumption is quite suspicious, since, besides China’s strong refutation of the humanitarian justification, many States had clearly declared in the debates of both the Security Council and the General Assembly the need to respect the principles of sovereignty and non-interference. In the subsequent meetings of the General Assembly, representative of Sweden even stated directly that, “the Charter of the United Nations forbids the use of force except in self-defense. No other purpose can justify the use of military force by States.”<sup>237</sup> The Iranian representative also argued that “no matter how grave has been the situation in Pakistan with regards to the humanitarian question of the refugees, nothing can justify armed action against the territorial integrity of a Member State.”<sup>238</sup> Thus, this case does not prove *opinio iuris* of humanitarian intervention among the majority of States at that point.

#### **6.2.1.2 1978 Vietnam’s Intervention in Cambodia**

Vietnam’s Intervention in Kampuchea (Cambodia) provided another illustration of (unilateral) humanitarian intervention in the pre-Cold War area. Soon after the communist regime Khmer Rouge came to power in 1975, its leader Pol Pot embarked on a campaign of reorganizing the Cambodian society by purging political dissenters and people linked with the former Republican government and western countries.<sup>239</sup> Amnesty International estimates that the number of political killings was about 300,000 from 1975 to 1978, and “between one and two million died, mostly through malnutrition and disease as they worked in forced labour camps.”<sup>240</sup> The Chairman of the UN Human Rights Subcommission called it “the most serious to have occurred anywhere since Nazism”.<sup>241</sup> On 25 December 1978, Vietnamese troops, accompanied by forces of the Kampuchean United Front for National Salvation (formed by the Cambodian refugees in Vietnam), invaded Kampuchea. Within two weeks, these forces overthrew the Khmer Rouge and stopped the ongoing genocide.<sup>242</sup>

It is generally conceived that Vietnam’ intervention was not primarily motivated by the sufferings of the Cambodian people; even when Vietnam defended itself before the Security Council, the justification was not firstly on humanitarian grounds. Rather, the political considerations were thought to play a more significant role. A long time before

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<sup>236</sup> Ibid., 210.

<sup>237</sup> Quoted by International Commission on Intervention and State in *The Responsibility to Protect*, 72.

<sup>238</sup> Ibid.

<sup>239</sup> Murphy, *Humanitarian Intervention*, 103.

<sup>240</sup> Wheeler, *Saving Strangers*, 78.

<sup>241</sup> Quoted by Abiew in *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 127.

<sup>242</sup> Ibid., 128; Also see Murphy, *Humanitarian Intervention*, 103.



Vietnam's intervention, due to unsettled territory issues, hostility and conflict had fermented between Vietnam and Cambodia. After 1975, the Pol Pot regime implemented a policy of "resolving contradictions" in dealing with Cambodia's foreign relations. Referring to the Cambodia-Vietnam relation, the Khmer Rouge attempted to manipulated people's fears and to invoke their hatred against Vietnam.<sup>243</sup> In the meanwhile, the Khmer Rouge continually showed its military power before Hanoi. Numerous border clashes had broken out from 1977 till 1978. After hundreds of Vietnamese living in a border area had been killed in an attack launched by the Khmer Rouge on 24 September 1977, Vietnam fought back with military force. After several rounds of confrontation, Vietnam put forwards several proposals to bring about a peaceful settlement of the conflict;<sup>244</sup> however, the Pol Pot regime rejected all of them. This further encouraged the Vietnamese government to remove the Pol Pot regime. Balancing between a purpose of toppling and the fear of a war with China, which was a powerful backing of the Khmer Rouge, the Vietnamese government tried to stir up thousands of Cambodian refugees sheltered in Vietnam to overthrow the Pol Pot regime, by spreading Pol Pot's domestic atrocities in Vietnamese radios. The insurgent group, Kampuchean United Front for National Salvation, emerged under the propaganda and support of Vietnam.

When Vietnam defended itself in the Security Council debate following the intervention, it attempted to distinguish a Vietnam-Kampuchea border war and a Kampuchean civil war.<sup>245</sup> In the 2108<sup>th</sup> meeting of the Security Council, Vietnam accused the Khmer Rouge of starting a border war against itself and that its reaction was to exercise the legitimate right of self-defence to "repel aggression and to punish the aggressors, to put down the forces that have unleashed this war of aggression against it."<sup>246</sup> Then the representative of Vietnam turned to distance Vietnam from the internal uprisings of the Kampuchean United Front for National Salvation and the final toppling of the Pol Pot regime. He denied that Vietnam intervened in the internal affairs of Kampuchea.<sup>247</sup> However, these justifications appeared to be quite weak due to the fact that: the Vietnamese government had dispatched over 100,000

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<sup>243</sup> Wheeler, *Saving Strangers*, 80–81.

<sup>244</sup> According to the Vietnamese representative in the Security Council meeting, Vietnam had proposed separately on 5 February, 10 April, and 6 June 1978. See SCOR, 2108<sup>th</sup> meeting, 11 January 1979, 12. Available at: [http://repository.un.org/bitstream/handle/11176/68016/S\\_PV.2108%28OR%29-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/68016/S_PV.2108%28OR%29-EN.pdf?sequence=2&isAllowed=y)

<sup>245</sup> Ibid.

<sup>246</sup> Ibid, 12-13.

<sup>247</sup> The representative of Vietnam Stated, "The Socialist Republic of Viet Nam firmly supports the United Front on the basis of respect for the principles of the independence, sovereignty and territorial integrity of Kampuchea, and of non-interference in its internal affairs." Ibid, 14.

troops to the territory of Kampuchea; an intimate cooperation existed between the Vietnamese army and the forces of the domestic insurgent groups, while the former was generally recognized as playing a decisive role in the process of toppling the Pol Pot regime. Vietnam's two-war argument was criticized a lot in the Security Council debates.

The representative of the Soviet Union first confirmed the legality of the new-established Vietnam-supported Kampuchean government and expressed that the Security Council was now interfering in the internal affairs of Kampuchea. He condemned the "flagrant genocide" of the Pol Pot regime, in order to justify the legality of the new government built on the Kampuchean people's will.<sup>248</sup> As an intimate ally of Vietnam, the Soviet Union persisted with the two-war argument. The representative claimed that the overthrow of the old regime only resulting from the military operations of the Salvation Front, without the involvement of Vietnam. Czechoslovakia, Cuba, Poland, Hungary and the German Democratic Republic also stood on the side of Vietnam and the Soviet Union, by endorsing the two-war justification and hailed the new government. However, none of them sought to justify Vietnam's use of force under the doctrine of humanitarian intervention.<sup>249</sup>

The representative, Prince Sihanouk, of the removed government of the Democratic Kampuchea rejected Vietnam's claim. He exposed the obvious lie of Vietnam on the establishing time of the Salvation Front. According to the Vietnamese government and its domestic media, the Salvation Front existed only since 2 December 1978. In only 22 days after its establishment, this Front finished all the preparation work, and was capable to launch a war against and successfully overthrew the existing government of the Democratic Kampuchea; that really appeared to be unrealistic. Prince Sihanouk also pointed out that the Vietnamese government was directly and majorly involved in the subversion conspiracy, sheltered by the smoke-screen of the Salvation Front.<sup>250</sup> China conceived as a controlling power behind the Khmer Rouge, strongly condemned the aggression of Vietnam against Kampuchea and called for an immediate withdrawal of the Vietnamese troops and military installations.<sup>251</sup>

Apart from Vietnam and its allies, most other States joined the debate expressing antipathy towards Vietnam's "two-war" justification. Wheeler divides these States into three

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<sup>248</sup> *Ibid.*, 15-17.

<sup>249</sup> Wheeler, *Saving Strangers*, 96.

<sup>250</sup> SCOR, 2108th meeting, 11 January 1979,, 8.

<sup>251</sup> *Ibid.*, 11.

groups: the USA and its allies; the ASEAN countries; and the neutral and non-aligned States.<sup>252</sup> In the 2110<sup>th</sup> meeting of the Security Council, the representative of the United States described the situation in Kampuchea as follows: “[T]he troops of one country are now occupying the territory of another and have imposed a new government upon it by force of arms.”<sup>253</sup> He claimed that Vietnam conquered Kampuchea and that the current rule of the Salvation Front in Kampuchea was because of the “Vietnamese bayonets”. He rejected Vietnam’s justification of self-defence, by stating that “[b]order disputes do not grant one nation the right to impose a government on another by military force.”<sup>254</sup> The United Kingdom echoed the response of the United States. In addition, the representative of the United Kingdom claimed that whatever human rights condition in Kampuchea, it could not excuse Vietnam’s violation of the territory integrity of Kampuchea.<sup>255</sup> France was in the same boat with the United States and the United Kingdom. It condemned Vietnam’s occupation of the sovereign State of Kampuchea in the 2109<sup>th</sup> meeting.<sup>256</sup> Several States, namely Norway, Portugal, New Zealand and Australia, which had a tradition of honoring and strongly defending human rights, expressed strong objection to the humanitarian atrocities perpetrated by the Pol Pot Regime, however, they refused to regard the violations of human rights as a justification for Vietnam.<sup>257</sup>

The representative of Malaysia informed that at their special meeting in Bangkok on 12 and 13 January 1979, the Foreign Ministers of the ASEAN announced a joint statement to

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<sup>252</sup> Wheeler, *Saving Strangers*, 89–90.

<sup>253</sup> SCOR, 34th year: 2110th meeting, 13 January 1979, 7. Available at: [http://repository.un.org/bitstream/handle/11176/68024/S\\_PV.2110%28OR%29-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/68024/S_PV.2110%28OR%29-EN.pdf?sequence=2&isAllowed=y)

<sup>254</sup> *Ibid.*, 8.

<sup>255</sup> *Ibid.*, 6.

<sup>256</sup> SCOR, 34th year: 2109th meeting, 12 January 1979, 4. Available at: [http://repository.un.org/bitstream/handle/11176/68744/S\\_PV.2109%28OR%29-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/68744/S_PV.2109%28OR%29-EN.pdf?sequence=2&isAllowed=y)

<sup>257</sup> The representative of Norway stated, “[t]he Norwegian Government and public opinion in Norway have expressed strong objections to the serious violations of human rights committed by the Pol Pot Government. However, the domestic policies of that Government cannot-we repeat, cannot-justify the actions of Viet Nam over the last days and weeks.” *Ibid.* 2. The representative of Portugal said, “[n]either do we have any doubts about the appalling record of violation of the most basic and elementary human rights in Kampuchea...In any case, there are no nor can there be any sociopolitical considerations that would justify the invasion of the territory of a sovereign State by the forces of another State;” SCOR, 2110th meeting, 3. New Zealand claimed, “the misdeeds of one State do not, in our view, justify the invasion of its territory by another.” SCOR, 2110th meeting, 6. Australia declared, “[l]ike other Governments, we cannot accept that the internal policies of any government, no matter how reprehensible, can justify a military attack upon it by another government.” SCOR, 34th year: 2111th meeting, 15 January 1979, 3. Available at: [http://repository.un.org/bitstream/handle/11176/68017/S\\_PV.2111%28OR%29-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/68017/S_PV.2111%28OR%29-EN.pdf?sequence=2&isAllowed=y)

deplore “the armed intervention against the independence, sovereignty and territorial integrity of Kampuchea and called for appropriate measures to restore peace, security and stability to the region.”<sup>258</sup> This position was supported by the member States, namely Indonesia, Malaysia, the Philippines, Singapore and Thailand. The representative of Singapore further addressed the question whether humanitarian reason can be used to justify the use of force in another country. He stated that, “[w]e hold the view that the Government of Democratic Kampuchea is accountable to the people of Democratic Kampuchea. No other country has a right to topple the Government of Democratic Kampuchea, however badly that Government may have treated its people.”<sup>259</sup>

The non-aligned States, such as Bolivia, Gabon, Kuwait, Zambia, Nigeria, and Bangladesh, generally chose a neutral position of not defending any side: neither directly condemning Vietnam, nor welcoming the new-established government. Instead, they emphasized the non-intervention principle, peaceful settlement of disputes, and called for an immediate cease-fire.

Though Vietnam’s intervention brought out a positive humanitarian consequence, ending the ongoing genocide of the Pol Pot Regime, it is hard to assume this case as a State practice of *unilateral* humanitarian intervention due to the lack of a humanitarian motive. Different from India’s justification which partly was based on humanitarian ground, there is no evidence to support that Vietnam invoked any humanitarian justification for its use of force. Even, the Vietnamese Foreign Minister had declared that “Vietnam was primarily concerned with its security and that human rights were the concern of the Cambodian people.”<sup>260</sup> As to the *opinio iuris* of other States, though most States just responded to the two-war justification, it appears clear that any attempt to justify the use of force on the ground of human rights would have been rejected.

### **6.2.1.3 1979 Tanzania's Intervention in Uganda**

In 1971, Idi Amin seized the power of Uganda by a military *coup*. During his eight years in power, Amin is believed to have committed extensive atrocities against his people. According to Amnesty International, up to 300,000 people have been killed by the doctoral Amin regime.<sup>261</sup> President Nyerere of Tanzania opposed Amin’s military *coup* at the

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<sup>258</sup> SCOR, 34th year: 2110th meeting, 13 January 1979, 4.

<sup>259</sup> *Ibid.*, 5.

<sup>260</sup> Quoted by Wheeler in *Saving Strangers*, 88.

<sup>261</sup> *Ibid.*, 111.

beginning and provided shelter to the former President Obote and his supporters. Nyerere had repeatedly expressed his repugnance of Amin in public. He strongly condemned the State-organized brutality in Uganda and described Amin as a murderer.<sup>262</sup>

Besides imposing perpetuated domestic horrors, the Amin government employed an aggressive foreign policy. In October of 1978, Amin dispatched troops across the Tanzanian border and occupied Tanzanian territory, the Kagera Salient. The Ugandan troops committed appalling crimes against the life and property of Tanzanian people during the invasion. Nyerere deemed Amin's action to be tantamount to an act of war and stated the military preparations to counterattack Amin's aggression.<sup>263</sup> At the same time, Nigeria and Libya attempted to mediate in this dispute, which was strongly rejected by Nyerere. The Amin government also proposed to withdraw the military forces, as long as Tanzania no more supported the anti-Amin forces. This proposal was turned down by Tanzania.<sup>264</sup> Tanzania began to fight back in mid-November and drove the Ugandan force back to the border by the early December of 1978.

The invasion from Uganda deepened Nyerere's determination to topple the unpredictable and brutal Amin regime. At this point, the Organization of African Union (OAU) came to mediate between these warring parties. It recommended a cease-fire and withdrawal of forces. However, Tanzania requested the OAU to deplore the aggression of the Amin government. The OAU's refusal of this request reinforced Nyerere's belief that the rules of the OAU Charter provided an umbrella to tyrants like Amin. OAU's mediation collapsed. By January 1979, the Tanzanian troops crossed the border and forwarded into the territory of Uganda. The forces of Uganda's political exile groups fought alongside the Tanzanian troops. To avoid a flagrant violation of the fundamental principles of sovereignty and non-intervention of the society of States, the Tanzanian government had planned a long time to overthrow the Amin regime by an internal uprising. It secretly united the exile groups, and provided arms and military training to them.<sup>265</sup> However, the defeat of the exile forces by the Ugandan army and Libya's involvement in support of the Amin army compelled Tanzania to change its strategy.<sup>266</sup> In order to achieve their purpose of overthrowing the Amin regime and to avoid their past military input in vain, Nyerere had to advance his troops deeper into

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<sup>262</sup> *Ibid.*, 112.

<sup>263</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 61.

<sup>264</sup> Wheeler, *Saving Strangers*, 114.

<sup>265</sup> *Ibid.*, 116.

<sup>266</sup> *Ibid.*, 119.

the territory of Uganda. On 10 April, Tanzanian troops and exile forces occupied the capital Kampala, and this led to the downfall of Amin regime.

In the early stage of the war, Nyerere also employed the two-war argument to justify his use of force. Comparing with Vietnam, it appeared more credible for Tanzania to claim self-defence, due to the uncontested fact of Uganda's invasion in the Kagera Salient. However, it might be more difficult for Tanzania to distance itself from the insurgent forces, since Tanzania had flagrantly supported the anti-Amin groups. With the deeper penetration of the Tanzanian troops into Uganda, it was hard to maintain the two-war argument any more.<sup>267</sup> Nyerere admitted that both Tanzanian armed forces and Ugandan rebel forces contributed to the occupation of Kampala.<sup>268</sup> After removing the Amin regime, Nyerere held self-defence as its primary justification. It might be seen as a pre-emptive self-defence in this occasion. Uganda's invasion of Uganda and the annexation of the the Kagera Salient constituted a great threat to the security of Tanzania. Although Tanzania had driven the Ugandan troops back to the territory of Uganda, it might not be enough for avoiding a second attack from the Amin regime. Thus, the toppling of the Amin regime is prerequisite for the survival of Tanzania. This justification of pre-emptive self-defence, likewise, was untenable: Neither enough evidence supported an imminent attack from Uganda,<sup>269</sup> nor the removal of a regime met the principle of proportionality.<sup>270</sup> However, even the weakness of the self-defence justification was clear, at no point Nyerere had attempted to his overthrown of the Amin regime under the doctrine of humanitarian intervention. It might be understandable since the doctrine of humanitarian intervention was not a recognized legitimate rule at that time.

Contrary to the case of Vietnam's intervention in Cambodia, the international community responded to Tanzania's use of force with surprising silence: it had neither been discussed in the meeting of Security Council nor of the General Assembly.<sup>271</sup> The Soviet Union endorsed Tanzania's intervention as legal. Western States did not express any commends on the legality of Tanzania's use of force. However, they recognized the new Ugandan government soon after its establishment. China and the ASEAN countries, which

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<sup>267</sup> *Ibid.*, 121.

<sup>268</sup> *Ibid.*, 127.

<sup>269</sup> *Caroline* standard for self-defence, there must be a "necessity of self-defense [that] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Letter from Daniel Webster to Lord Ashburton, Aug. 6, 1842.

<sup>270</sup> Wheeler, *Saving Strangers*, 121.

<sup>271</sup> Amin had called for a meeting of the Security Council. He finally withdrew the request on the advisement of the African group at the UN.

were strong condemning Vietnam's "aggression" and denying the new government of Cambodia, did also recognize the new regime in Kampala without hesitation. Wheeler conceived that the silence of the major powers on the Tanzanian-Ugandan conflict was owing to a lack of geopolitical rivalry in this area.<sup>272</sup>

The legality of Tanzania's intervention was discussed at the OAU Summit in Monrovia in July 1979. However, the discussion of this subject ended without a decision.<sup>273</sup> Nigeria, Libya and Sudan rejected Tanzania's justification of self-defence and condemned Tanzania as an "aggressor". The four front-line States, Angola, Botswana, Mozambique, and Zambia all supported Nyerere's claim and accepted the new regime in Uganda.<sup>274</sup> The new Ugandan president, Godfrey Binaisa, upheld the legality of Tanzania's intervention. Most significantly, besides reinforcing Nyerere's claim of self-defence, Binaisa attempted to defend Tanzania's use of force as humanitarian intervention. He pointed out that the Amin regime lost its legitimacy by killing thousands of Ugandan citizens; thus Tanzania's overthrow of an illegitimate sovereign did not violate the OAU Charter.<sup>275</sup>

A lot of scholars agree that Tanzania's use of force constituted humanitarian intervention,<sup>276</sup> since considerations of humanity had played a significant role in Nyerere's decision to intervene, and the intervention also achieved a positive humanitarian outcome. Besides, Nyerere never hid his sympathy for the sufferings of the Ugandan people, and he repeatedly condemned Amin's brutal rule in public. Tesón further claims that "on the whole the Tanzanian action was legitimized by the international community",<sup>277</sup> since no sanctions were imposed on the Tanzanian government by the Western countries or the OAU, and the new government in Uganda was quickly recognized by other States. However, this argument

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<sup>272</sup> Wheeler, *Saving Strangers*, 123–125.

<sup>273</sup> *Briefing on OAU Summit at Monrovia hearing before the Subcommittee on Africa of the Committee on Foreign Affairs, House of Representatives, Ninety-Sixth Congress, First Session, July 27, 1979.*, 4.

<sup>274</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 62.

<sup>275</sup> Wheeler, *Saving Strangers*, 129.

<sup>276</sup> Tesón, *Humanitarian Intervention*, 234–235; Wheeler, *Saving Strangers*, 132–136; Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 120–127; Chesterman, *Just War Or Just Peace?*, 77–79. Several other scholars disagree with this view. They rejected the interpretation of humanitarian intervention partly because Tanzania did never tried to justify itself on a humanitarian ground, and partly due to the multiple purposes of intervention. See Arend and Beck, *International Law and the Use of Force*, 125. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, 110. Akehurst, 'Humanitarian Intervention,' in H. Bull (ed.) *Intervention in World Politics*, 98. Here I do not agree with this point of view. On the one hand, as argued above, it might be excessive to request Tanzania to claim a doctrine of humanitarian intervention since this doctrine had seldom been recognized by States at that time. On the other hand, mixed motives are ineluctable in State practice. Whether the motive to intervene is pure humanitarian or not is not a proper criterion to define a practice of humanitarian intervention.

<sup>277</sup> Tesón, *Humanitarian Intervention*, 233.

does rather exaggerate the *fait accompli*. And Wheeler provides two critical objections to this argument: First, Uganda's invasion was decisive for Tanzania's use of force. The humanitarian sympathy and dissent against Amin's rule were not enough for Nyerere to openly breach the cardinal rules of sovereignty and non-intervention. Second, no State except the new Ugandan government supported Tanzania's intervention by the doctrine of humanitarian intervention.<sup>278</sup> The international community apparently had not reached a consensus on the legality and legitimacy of humanitarian intervention at that time. States did rather acquiesce in Tanzania's right to defend itself against an armed attack on a self-defence ground. Chesterman also claims that little evidence of *opinio iuris* is present in this case.<sup>279</sup>

#### **6.2.1.4 Other Conflicts during the Cold-War**

In addition to these three cases listed above, which are popular examples of humanitarian intervention in the Cold-war era, the humanitarian elements in the following conflicts are also considered by scholars. Due to the limited length of a thesis like this, I will merely shortly introduce and assess these conflicts.

#### **1960 Belgium's intervention in the Congo**

Shortly after independence from Belgian colony rule in June 1960, the Republic of the Congo (now known as the Democratic Republic of the Congo, DRC)<sup>280</sup> fell into the turmoil of civil war. Numerous Congolese and foreign citizens were killed in the chaos. After an outbreak of mutinies against Belgians and other European citizens, Belgium dispatched troops to the territory of the Congo to protect people fleeing towards French Congo (the later Republic of the Congo). However, it was demonstrated later that these Belgian troops had also been engaged in the fight against the Congolese soldiers in the Province of Katanga, which led to the temporary independence of the latter.<sup>281</sup> Here, Belgium actually attempted to justify its action as legitimate humanitarian intervention, which was strongly supported by the member States of the North Atlantic Treaty Organization (NATO). In the following debate of the Security Council, the delegate of Belgium described the rescue operation as humanitarian intervention without any political purpose, but only for the purpose of "ensuring the safety of European and other members of the population and of protecting human lives in general".

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<sup>278</sup> Wheeler, *Saving Strangers*, 135–136.

<sup>279</sup> Chesterman, *Just War Or Just Peace?*, 79.

<sup>280</sup> The French Congo also chose the name "Republic of the Congo" after independence.

<sup>281</sup> Chesterman, *Just War Or Just Peace?*, 65–66; International Commission on Intervention and State, *The Responsibility to Protect*, 49–51.



Belgium also claimed that the operation was under consent of the Congolese authority.<sup>282</sup> The United Kingdom and France upheld this humanitarian justification: The former admired the “humanitarian task” performed by the Belgian troops; while the latter claimed that the mission of protecting lives and property was “in accordance with a recognized principle of international law, namely intervention on humanitarian grounds.”<sup>283</sup> However, the United States did not mention the humanitarian justification, but simply claimed that no aggression had been committed by the Belgian government, due to a situation of emergency and a request from the central Congolese government.<sup>284</sup> These Western claims had been objected and criticized by the Soviet Union, Poland, and some African countries in the debate: They condemned that the Belgium’s intervention was a colonialist aggression against the new independent State of the Congo. This Security Council meeting ended by passing the Resolution 143,<sup>285</sup> which called an immediately withdrawal of the Belgian troops from the territory of the Congo, and mandated the Op ération des Nations-Unies au Congo (ONUC, the UN Operation in the Congo).

### **1964 Belgium and US’ Intervention in the Congo**

In 1964, Belgium and the United States intervened in the Congo again. After the departure of the UN troops of the ONUC, a rebel group took about 2,000 persons as hostages in Stanleyville, most of whom were foreigners such as Belgians, Britons, Canadians, Greeks, and Italians, in order to demand a concession from the central government.<sup>286</sup> Authorized by the Congolese Prime Minister at that time, Moise Tshombe,<sup>287</sup> Belgium sent troops to rescue the hostages, with the aid of the United States. Most foreigners and some Congolese were evacuated with a week. And the Belgian troops were withdrawn from the Congolese territory soon after completing the rescue mission. This conflict was intensely debated in the Security Council with 17 sessions. The delegate of Belgium declared that it was not a “military operation” to help the Congolese National Army, but a “humanitarian operation” to save thousands of persons in danger. Belgium also emphasized that the consent of the legitimate

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<sup>282</sup> S.C.O.R, 15th year: 873rd meeting, 13/14 July 1960, 34-35, 37.

<sup>283</sup> Ibid., 26, 28.

<sup>284</sup> Ibid, 15.

<sup>285</sup> UNSC, Resolution 143. Available at :

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/143\(1960\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/143(1960))

<sup>286</sup> Murphy, *Humanitarian Intervention*, 93; International Commission on Intervention and State, *The Responsibility to Protect*, 51; Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 103.

<sup>287</sup> He was dismissed from the position in 1965.

Congolese government gave credence to its operation.<sup>288</sup> The United States echoed these claims. The DRC affirmed that “[t]he Belgian-American intervention took place with [the DRC’s] agreement, for a humanitarian purpose and for a limited period.”<sup>289</sup> These justifications were also supported by Brazil, the Republic of China, and Norway.

The Soviet Union and Czechoslovakia condemned the operation as blatant colonist aggression against the Congo. As many African countries refused to recognize the legitimacy of the Thombe government, which was believed to be a puppet regime under control of the forces of colonialism, they strongly objected to the intervention of Belgium and the United States.<sup>290</sup> Some of them rejected the humanitarian justification by pointing out that there were many foreigners, especially Belgians, among the hostages. Others believed that the humanitarian reason was merely a pretext for protecting Belgium’s political and economic interests in the Congo. Ghana and Congo (Brazzaville) held that the operation was racist due to an “abominable discrimination” in rescuing the white over the colored people.<sup>291</sup> In contrast, Nigeria affirmed that Belgium and the United States gone to the Congo with being invited by the legitimate Congolese government. It opposed to the interference of other African States in the affairs of the Congo.<sup>292</sup> These Security Council meetings resulted in the passing of Resolution 199.<sup>293</sup>

### **1965 The US’ Intervention in the Dominican Republic**

In April 1965, an armed revolt broke out and led to a breakdown of rule and law in the Dominican Republic. Several days later, the US intervened in the name of protecting American and foreign civilians in the Dominican Republic. After evacuating thousands of US nationals and foreigners, the US did not withdraw its troops but reinforced them. These troops were observed to be engaged in restoring order in the Dominican Republic.<sup>294</sup> Furthermore, President Johnson of the US declared openly that an imminent threat of the establishment of a Communist regime in the Dominican Republic determined the launch of the operation.<sup>295</sup> At the request of the Soviet Union, the Security Council held meetings to discuss this conflict in

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<sup>288</sup> S.C.O.R, 19th year: 1173<sup>rd</sup> meeting, 11 December 1964, 2-22.

<sup>289</sup> Ibid, 37

<sup>290</sup> Such as Guinea, Sudan, Mali, Algeria, Kenya, Burundi, Uganda, and Tanzania.

<sup>291</sup> S.C.O.R, 19th year: 1170<sup>th</sup> meeting, 9 December 1964, 13-26.

<sup>292</sup> S.C.O.R, 19<sup>th</sup> year: 1176<sup>th</sup> meeting, 15 Dec 1964, 2-15. Available at:

[http://dag.un.org/bitstream/handle/11176/80671/S\\_PV.1176%28OR%29-EN.pdf?sequence=2&isAllowed=y](http://dag.un.org/bitstream/handle/11176/80671/S_PV.1176%28OR%29-EN.pdf?sequence=2&isAllowed=y)

<sup>293</sup> UNSC, Resolution 199. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/199\(1964\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/199(1964))

<sup>294</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 53.

<sup>295</sup> Chesterman, *Just War Or Just Peace?*, 70.

May. The US claimed two purposes of its action: The first was to preserve the lives of foreign nationals; and the second was to preserve the capacity of the Organization of American States (OAS) to advance peace and democracy in the Republic.<sup>296</sup> Several States, such as France, the United Kingdom, the Netherlands, and the Republic of China, approved the US' justification. However, many States objected to the US' justification. They condemned the US' intervention as a blatant violation of Article 2(4) of the UN Charter. With a general compromise among the arguing parties, the Security Council passed Resolution 203,<sup>297</sup> which did not condemn the US' action, but just called for a strict cease-fire and decided to send a fact-finding commission to the Dominican Republic.

### **1979 France's Intervention in Central Africa**

The Bokassa regime of Central Africa was notorious for its terrible human rights record in the 1970s, which ashamed its former colonial power France. In January 1979, a public demonstration held by school children broke out. The government gave order to the army to suppress the protestors. Hundreds of school children were killed in this event. The government's savage action outraged more secondary and university students, who later replied by a widespread strike. In the following months, many students were put into prisons, and many of them were tortured and killed. France had planned to remove the Bokassa regime at some time during the summer. In September, while Bokassa was away to Libya, a bloodless coup took place in the capital with help from the French troops and a new pro-France government was installed. However, this conflict did not draw much attention from the international community. Neither in the meetings of the UN or the OAU was it discussed. At that time, States were rather more engaged in debating Vietnam's intervention in Cambodia.<sup>298</sup>

### **1983 The US' Intervention in Grenada**

In October 1983, a communist coup d'état led by a radical anti-US governing party was staged on the Caribbean island of Grenada. Two weeks later, some thousands of the US troops and several hundreds of soldiers from other Caribbean countries landed on the island and quickly shifted the regime of the country to a civilian government.<sup>299</sup> Three official

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<sup>296</sup> S.C.O.R, 20th year, 1200th meeting, 5 May 1965, 3-14.

<sup>297</sup> UNSC, Resolution 203. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/203\(1965\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/203(1965))

<sup>298</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 63–64.

<sup>299</sup> McPherson, *Encyclopedia of U.S. Military Interventions in Latin America*, 244.

justifications were delivered by the US government.<sup>300</sup> First of all, the US claimed that they had been invited to intervene by Grenadian Governor General, Sir Paul Scoon. Secondly, it was a collective security operation at the request of the Organization of the Eastern Caribbean States (OECS). Thirdly, it was also aimed at protecting the US citizens in Grenada. The US' intervention was criticized a lot in the following meetings of the Security Council. Guyana, Nicaragua and Zimbabwe even submitted a draft resolution, in which they held that the US' invasion of Grenada constituted a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State.<sup>301</sup> This draft resolution was vetoed by the US, with other 11 in favor and 3 abstentions. However, a resolution was passed in the General Assembly, which deeply deplored the armed intervention in Grenada.<sup>302</sup>

### **1989 The US' Intervention in Panama**

In December 1989, the US landed approximately 24,000 troops in Panama to overthrow the regime of General Manuel Noriega. US President George Bush (senior) declared that the purpose of their action was to “safeguard the lives of Americans; to defend democracy in Panama, to combat drug trafficking and to protect the integrity of *the Panama Canal Treaty*.”<sup>303</sup> The US' position was not favored in the UN. After a drafted resolution,<sup>304</sup> which strongly condemned the US' intervention, was vetoed by the US, France and the UK in the Security Council, the General Assembly voted for a resolution by 75-20-40 to condemn the US' flagrant violation of international law.<sup>305</sup>

#### **6.2.1.5 Evaluation of State practice and *opinio iuris* in the Cold War period**

The US government, responding to *the International Committee of the Red Cross study Customary International Humanitarian Law*, provides several suggest for the assessment of customary international law. As to State practice, it needs to meet *extensive* and virtually *uniform* standard; the evaluation should make meaningful assessment the practice in actual military operations and not just the views found in written materials, such as non-binding resolutions of General Assembly; considering whether a particular rule, which deemed to constitute customary international law by non-State organizations, is accepted by

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<sup>300</sup> Tesón, *Humanitarian Intervention*, 257. Chesterman, *Saving Strangers*, 100-101.

<sup>301</sup> UNSC, S/16077/Rev.1, 27 October 1983. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/16077/Rev.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/16077/Rev.1)

<sup>302</sup> UNGA, RES/38/7, 2 November 1983. Available at: <http://www.un.org/documents/ga/res/38/a38r007.htm>

<sup>303</sup> Quoted by Chesterman in *Just War Or Just Peace?*, 102.

<sup>304</sup> UNSC, S/21048, 23 December 1989. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/21048](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/21048)

<sup>305</sup> UNGA, RES/44/240, 29 December 1989. Available at:

<http://www.un.org/documents/ga/res/44/a44r240.htm>

States; balancing the weight given to the negative practices among States which remain non-parties to relevant treaties; paying attention to the practice of specially affected States.<sup>306</sup> The ICJ has also pointed out, State practice “including that of States whose interests were specially affected, should have been both *extensive* and *virtually uniform* in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved.”<sup>307</sup> As to *opinio iuris*, it should avoid merging “the practice and *opinio iuris* requirements into a single test”;<sup>308</sup> avoiding undue relying on military manuals whose guidance might be for policy, but not legal reasons; distinguishing between policy considerations and legal considerations in treaties; establishing positive evidence that States “consider themselves legally obligated to follow the courses of action reflected in the rules.”<sup>309</sup>

Whether there is any *extensive* and *virtually uniform* State practice of humanitarian intervention in this period? First of all, here I adopt a relatively loose standard of State practice of humanitarian intervention which includes all the uses of armed force by States for the protection of strangers, regardless of a pure humanitarian motive or mixed motives, but excluding the practices of self-defence and intervention by the consent of targeted States. According to this standard, the cases of the *1971 Indian Intervention in East Pakistan*, the *1979 Tanzanian Intervention in Uganda*, and the *1979 French Intervention in Central Africa* might be regarded as proper State practice of humanitarian intervention. However, in the Indian-Pakistan case, the Indian government primarily defended itself on the grounds of self-defence, although it also declared to have had a *pure* humanitarian motive. In fact, the objective humanitarian elements in this case seem to me to have prevailed and India’s use of force obviously exceeded a proper range of self-defence. It would seem to be better labeled as humanitarian intervention. The same rationale applies to the Tanzania-Uganda Case.

Although containing humanitarian elements (i.e. led to some positive humanitarian consequences), the other six cases mentioned above are not proper State practice of humanitarian intervention: Firstly, the 1978 Vietnamese intervention in Cambodia was not intended to save strangers. Secondly, in the 1960 Belgium-Congo case and the 1964

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<sup>306</sup> Bellinger III and Haynes II, “A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law,” 444–445.

<sup>307</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, I.C.J. Reports 1969, pp. 4.

<sup>308</sup> Bellinger III and Haynes II, “A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law,” 446.

<sup>309</sup> *Ibid.*, 446–447.

Belgium/US-Congo case, the intervening States acted with the consent of the Congolese authority. And the self-defence element was here significant since the States sought to a large extent to save their own civilians and those of their allies. Thirdly, the 1965 US' intervention in the Dominican Republic was mainly aimed at protecting US civilians and other non-Dominican civilians. Fourthly, the 1983 US' intervention in Grenada was invited by a representative of the Grenadian authorities and not mainly aimed at saving Grenadian civilians; and finally, in 1989, the US acted to safeguard the lives of Americans in Panama.

It is clear that these three instances of State practice for humanitarian purposes over the period of 44-year-long Cold War are not *extensive*, but, fair to say, quite rare. Apparently, uniformity can hardly be established only based on such rare instances. On the contrary, even in these three instances, France, as an intervening State, was not coherent in its actions. Eight years before its intervention in Central Africa, France firmly opposed India's use of force in East Pakistan. The delegate of France stated in the Security Council meeting on the Indian-Pakistan conflict that, India's intervention "could only add additional burdens to a population that has already been decimated and severely devastated."<sup>310</sup>

Thus, the State practice on humanitarian intervention in the Cold War period have not met the standard of *general*, which is a necessary condition for the affirmation of customary international law. Furthermore, there is hardly any *opinio iuris* connected with these cases. On the Indian-Pakistan conflict, although the delegate of India mentioned a humanitarian motive in the Security Council debates, neither the Indian government nor governments supporting India explicitly proposed a legitimate right of humanitarian intervention. Certainly, governments against India's intervention did not recognize the existing of such a right. Likewise, in the Tanzania-Uganda case, no State formally provided a justification for Tanzania's military operations on grounds of humanitarian intervention, except the new government of Uganda. And the France-Central Africa case was not even discussed in the UN or OAU. However, from the contemporary conflict, the Vietnamese-Cambodian conflict, where Vietnam's intervention was criticized by most States in the debate of the Security Council and many States chose a position of non-interference; it is unlikely that States at that time accepted a legal doctrine of *unilateral* humanitarian intervention.

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<sup>310</sup> S.C.O.R, 26th year, 1606th meeting, 4 December 1971, 21. Available at: [http://repository.un.org/bitstream/handle/11176/74490/S\\_PV.1606%28OR%29-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/74490/S_PV.1606%28OR%29-EN.pdf?sequence=2&isAllowed=y)

## 6.2.2 Post-Cold War Stage

### 6.2.2.1 Unilateral Humanitarian Intervention

#### 1991 Safe Havens and No-Fly Zones in Iraq

There were three to four millions of Kurds living in northern Iraq, who had strived for independence from the 19<sup>th</sup> century. Although they gained a certain amount of autonomy under a 1974 decree, the Iraqi authorities had never ceased to suppress them.<sup>311</sup> In February 1988, at the end of the Iraq-Iran war, the Iraqi government launched the notorious Anfal Campaign to eradicate the Kurds in the north. In these eight-stage military operations, the Kurds villages and towns were attacked heavily by the government's air force, artillery fire and ground troops. Soldiers were permitted to kill innocents in the targeted villages and surrounding areas. Mass executions were carried out and thousands of Kurds were arrested and transported by military trucks to prisons in central and south Iraq.<sup>312</sup> On 15 March, 1988, chemical weapons were used in the attack on the town of Halabja, immediately resulting in the death of more than 5,000 civilians.<sup>313</sup> The UN was requested to investigate in this conflict, but due to the objection of Iraq, the UN refrained from further interfering in their domestic issue.<sup>314</sup>

In August 1990, Iraq's invasion of Kuwait shocked the international community. The Security Council organized an emergency meeting in few hours and passed Resolution 660.<sup>315</sup> It condemned Iraq's invasion of Kuwait and demanded an immediate withdrawal of the Iraqi troops in the territory of Kuwait. Walling argues that the effectiveness of the UNSC in this conflict, by contrasting its general stagnancy in the Cold-war period, boosts the positivist's view on the role of the UNSC in maintaining international peace and conflict in the new era.<sup>316</sup> In the following months of that year, the Security Council escalated its measures, by carrying 11 other resolutions,<sup>317</sup> by condemning Iraq and demanding a withdrawal. At the early stage, the Security Council imposed economy sanctions on Iraq for its further usurpation

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<sup>311</sup> Wheeler, *Saving Strangers*, 139.

<sup>312</sup> O'Leary, Carole A, "The Kurds of Iraq: recent history, future prospects", 18

<sup>313</sup> Solis, *The Law of Armed Conflict*, 605.

<sup>314</sup> However, at the same period, Iraq was strongly condemned by the UNSC for using chemical weapons in the Iraq-Iran war. In the related resolutions of the UNSC, it did not mention Iraq's use of chemical weapons against the Kurdish population. See Walling, *All Necessary Measures*, 33-34.

<sup>315</sup> UNSC, Resolution 660. Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510.pdf?OpenElement>

<sup>316</sup> Walling, *All Necessary Measures*, 34-35.

<sup>317</sup> Resolution 661, 662, 664, 665, 666, 667, 669, 670, 674, 677, and 678. Available at: <http://www.un.org/Docs/scres/1990/scres90.htm>

of the authority of the Kuwaiti government.<sup>318</sup> As a result of Iraq's fragrant rejection of resolutions of the Security Council, the latter passed Resolution 678 in November 1990. In this resolution, it authorized the member States to use "*all necessary means*" to implement all the relevant resolutions and to restore peace and security in the areas. And no endpoint had been given to this mandate. A Coalition of military forces from 34 countries was formed in January 1991. The Coalition, led by the US, commenced a series of air campaigns against Iraq, which were titled *Operation Desert Storm*, in January and February. The overwhelming air power of the Coalition army soon destroyed most of the military capabilities of Iraq. Straight after the air campaigns, the Coalition's ground troops advanced to liberate Kuwait and occupy parts of Iraq in just a few days.<sup>319</sup>

While the Iraqi government was severely weakened through the attacks of the Coalition forces, the Kurds in the north and Shiite Muslims<sup>320</sup> in the south seized the opportunity to revolt against the government of Saddam Hussein. The rebels occupied several major cities in both the South and the North within few weeks. However, by the end of March, the uprisings were bloodily crushed by the Iraqi military forces and the government of Saddam Hussein regained the control of these areas.<sup>321</sup> The brutal suppression of the uprisings was characterized as a humanitarian catastrophe.<sup>322</sup> According to Human Rights Watch, in March and April, over 1.5 million Iraqis fled from strife-torn cities into Turkey and Iran, zones controlled by Kurdish rebels, and marshes in the south. The government launched a series of indiscriminate artillery shelling and helicopter-gunship attacks on rebel positions. Iraqi troops also massively slaughtered patients and medical staffs of hospitals where the rebels sought shelter.<sup>323</sup>

The exodus of Iraqi civilians into neighboring countries such as Turkey and Iran threatened the peace and stability of the border areas. On 2 April, Turkey brought this issue before the Security Council and requested the latter to convene an urgent meeting to discuss the humanitarian situation in Iraq and to "adopt the necessary measures to put an end to this

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<sup>318</sup> UNSC, Resolution 661.

<sup>319</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 86.

<sup>320</sup> The Baath regime (1968-2003) of Iraq was dominated by the minority Sunni Muslims. Though Shiite Muslims represented almost half populations of Iraq at the beginning of the 1990s, they were often subjected to political and economic repressions of the regime. See Walling, *The United Nations Security Council and Humanitarian Intervention*, 63.

<sup>321</sup> Wheeler, *Saving Strangers*, 141.

<sup>322</sup> Walling, *The United Nations Security Council and Humanitarian Intervention*, 66.

<sup>323</sup> Human Rights Watch World Report 1992, *Iraq and Occupied Kuwait*. Available at: [http://www.hrw.org/reports/1992/WR92/MEW1-02.htm#P210\\_89593](http://www.hrw.org/reports/1992/WR92/MEW1-02.htm#P210_89593)



inhuman repression being carried out on a massive scale.”<sup>324</sup> France was very concerned about the Iraqi Massacres against the Kurds. The French Prime Minister suggested establishing a “duty of intervention” when facing massive violations of human right, which, however, was not supported by other members of the Security Council.<sup>325</sup> A letter with similar content from France was also sent to the UN on the same day.<sup>326</sup> On 5 April, the Security Council passed a resolution drafted by Belgium, France, the UK, and the US, namely Resolution 688.<sup>327</sup> This was a great breakthrough for the Security Council in addressing the domestic issues of human rights. As Wheeler points out, it was not only an immediate response to the sufferings of Kurds, but also a reconsideration of the meaning of Article 2(7) of the Charter in the post-Cold War period, which would set precedent to the future actions of the Security Council.<sup>328</sup> It also implied a softening of the “absolute” doctrine of sovereignty on matters of relieving massive human sufferings in the international community.

In the 2982th meeting of the Security Council, where Resolution 688 was passed, most States expressed their deep concerns on the terrible sufferings of the Iraqi population, and requested the Security Council to take urgent and forcible measures. Turkey, in conclusion, claimed that the UN should act since the enormous flow of refugees caused by the Iraqi repression did pose a serious threat to international stability, security and peace in the region. This view was shared by many States like the USSR, the US, the UK, France, Austria, Italy, German, Spain, the Netherlands, Canada, Iran, Romania, Ecuador, and Cote d’Ivoire. In contrast, Iraq, supported by Cuba, Yemen and Zimbabwe, rejected this claim. It argued that the UN should not intervene in the internal affairs of Iraq under Article 2(7) of the Charter.<sup>329</sup> Resolution 688 was adopted by 10 votes to 3 with 2 abstentions. In this resolution, the Security Council condemned the repression of civilian population by the Iraqi government and affirmed that the consequence of the repression did threaten international peace and security. It permitted international humanitarian organizations access to Iraqi territory in need of assistance.

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<sup>324</sup> Letter from Turkey to the United Nations, S/22435, 2 April 1991. Available at: [http://repository.un.org/bitstream/handle/11176/55586/S\\_22435-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/55586/S_22435-EN.pdf?sequence=3&isAllowed=y)

<sup>325</sup> Wheeler, *Saving Strangers*, 141.

<sup>326</sup> Letter from France to the United Nations, S/22442, 2 April 1991. Available at: [http://repository.un.org/bitstream/handle/11176/55566/S\\_22442-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/55566/S_22442-EN.pdf?sequence=3&isAllowed=y)

<sup>327</sup> UNSC, Resolution 688. Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement>

<sup>328</sup> Wheeler, *Saving Strangers*, 143.

<sup>329</sup> Provisional verbatim record of the 2982nd meeting, 5 April 1991. Available at: <http://repository.un.org/handle/11176/55536>

Although Article 2 (7) prohibits the United Nations to intervene in matters which are essentially within the domestic jurisdiction of State, there is one explicit exception to this rule, which is “the application of enforcement measures under Chapter VII.” Article 39 of Chapter VII authorizes the Security Council to determine a threat to international peace and to decide what measures shall be taken to maintain or restore international peace and security. It is arguable whether the passing of Resolution 688 was made under Chapter VII. Wheeler thinks that the employing of the words “a threat to international peace and security” in Resolution 688 did not explicitly invoke this exception. However, the legitimacy of this resolution was not impaired by this fact, since the threat to international peace and security was a key element in activating the enforcement provisions of Chapter VII. Nevertheless, in any event, no military enforcement measure was authorized in this resolution.

In addition to the concern for international peace and security, only Britain proposed a humanitarian justification for the UN’s interference in Iraq during the Security Council meeting. The delegate of Britain stated that Article 2(7) does not exclude fields which are not essentially domestic from the work of the UN, and this where human rights belong. However, since the Security Council had never accepted a sole humanitarian justification before, he still mentioned international peace and conflict as a supplementary justification.<sup>330</sup> However, this argument did not resonated with the other States in the formal consultations of the Security Council. Though the French Prime Minister called for “a duty of intervention” before the vote of Resolution 688, the latter was not explicitly expressed by the delegate of France in the 2982th meeting.<sup>331</sup>

The idea of establishing the safe-havens was first revealed in a speech by the President of Turkey two days after Resolution 688 was passed.<sup>332</sup> Although the Turkish government sympathized with the sufferings of the victims in Iraq and did render certain humanitarian assistances, it was deeply troubled by the influx of hundreds and thousands of replaced people. The rationale of the Turkish government for supporting a creation of safe-havens inside Iraq

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<sup>330</sup> Ibid.

<sup>331</sup> The French delegate used a very ambiguous language in the meeting that, “[t]he Security Council, which has adopted no fewer than 14 resolutions designed to restore peace and security in the region, would have been remiss in its task had it stood idly by, without reacting to the massacre of entire populations, the extermination of civilians, including women and children.” Wheeler believes that these words imply a duty of the Security Council to respond to the humanitarian disasters. However, the delegate did not clearly point out what the task of the Security Council was. It might be humanitarian task, or task of addressing issues of peace and security. Ibid. Also see Wheeler, *Saving Strangers*, 145.

<sup>332</sup> Wheeler, *Saving Strangers*, 148.

was mainly its concern for the stability of its border areas.<sup>333</sup> In the meanwhile, the media, by showing western families live pictures of the Kurds suffering terribly, was greatly changing people's ideas towards the sufferings in Iraq. The public pressure for a response to the humanitarian catastrophe was rising among western countries during this time.<sup>334</sup>

France, the UK and the US responded to this call from the Turkish government. At the Luxembourg summit meeting of the European Council in April 1991, the UK Prime Minister suggested creating UN-protected Kurdish enclaves in northern Iraq, in accordance with Resolutions 678 and 688.<sup>335</sup> On 10 April, France, the UK and the US declared a no-fly zone north of the 36<sup>th</sup> parallel which covered nearly ten thousand square kilometers of Iraqi territory and they demanded of the Iraqi government that it ceased firing in this area, for the purpose of delivering relief supplies to Kurdish refugees and protecting them from air attacks.<sup>336</sup> And hundreds of troops from the US, the UK, France and the Netherlands entered into northern Iraq in the following weeks. With the military assistance from these countries, the humanitarian relief work in the north achieved notable effect: In less than a week, almost 6,000 tons of relief supplies were dropped to the refugees; by the end of April, the death rate of the refugees had declined from between 400-1000 people per day to about 60 people per day.<sup>337</sup> On 26 August 1992, the US and its allies declared a second no-fly zone in southern Iraq below the 32<sup>nd</sup> parallel, which was extended to the 33<sup>rd</sup> parallel in September of 1996.<sup>338</sup>

No subsequent authorization of military enforcement measure had been given in relation to Iraq by the Security Council after Resolution 688 and some scholars suggest this was because of the likelihood of a Chinese veto.<sup>339</sup> The coalition defended their operations as consistent with Resolution 688. And because the overall objectives of these operations were humanitarian assistance to the Iraqi civilians, which conformed to the UN's interest in this region, no member State of the Security Council which had voted for Resolution 688 stated that the coalition had violated the provisions of this resolution.<sup>340</sup> This justification has nevertheless been contested by many scholars and commentators, since no use of force was explicitly mentioned in the provisions of this resolution. And the humanitarian motivations of

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<sup>333</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 87.

<sup>334</sup> Wheeler, *Saving Strangers*, 148–151.

<sup>335</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 87.

<sup>336</sup> *Ibid.*, 87–88; Also see Wheeler, *Saving Strangers*, 50.

<sup>337</sup> Chesterman, *Just War Or Just Peace?*, 199.

<sup>338</sup> *Ibid.*

<sup>339</sup> Chesterman, *Just War Or Just Peace?*, 200.

<sup>340</sup> Rodley, *To Loose the Bands of Wickedness*, 33.

the major powers were rather suspicious, especially after the coalition's air strike towards the Iraqi missile launchers in January 1993.<sup>341</sup>

The US defended this air strike as a response to Iraq's violation of the rules regarding the no-fly zones; while the UK argued that it was an act of self-defense. The UN Secondary-General Boutros-Ghali also delivered a statement on this conflict. He considered that the raid by the coalition force accorded with the mandate of the Security Council under Resolution 678 and the raid was caused by Iraq's violation of the ceasefire rule under Resolution 687.<sup>342</sup> This argument was unusual comparing with the justifications given by the acting States. Regardless of the rationale behind this argument, it exceeded the discussion of the no-fly zones, and rather referred to issues related to the Iraq-Kuwait conflict.

### **1999 Kosovo**

Kosovo was an autonomous region of Serbia—one of the six republics of the former Socialist Federal Republic of Yugoslavia (SFRY), which was granted limited autonomy by the new Yugoslav constitution in 1974. The decade-long unrest on the Balkan Peninsula was ignited by Serbian President Slobodan Milošević's decision to remove Kosovo's autonomy in 1989 and replaced it with complete domination by Belgrade. And a strict discrimination policy was imposed by the Serbs on the ethnic Albanians. In the context of the breakup of the SFRY,<sup>343</sup> some Albanians—and the Albanians constituted more than 70% of the population of Kosovo<sup>344</sup>—proclaimed to establish full independence of Kosovo from Serbia and to create State institutions parallel to the Serbian government. This wish for independence was denied by the Serbs. Then the separatist group *Kosovo Liberation Army* (KLA) started to revolt against the Serbian authorities, which responded by launching attacks and attempting to smash the pro-independence movement in Kosovo.

The situation escalated in February and March 1998 after the Serbian security forces killed dozens of Albanians who were suspected of supporting the KLA. On 31 March, the Security Council passed Resolution 1160<sup>345</sup> under Chapter VII, which condemned both the excessive use of force by the Serbian police against civilians and the terrorist actions

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<sup>341</sup> International Commission on Intervention and State, *The Responsibility to Protect*, 88.

<sup>342</sup> Chesterman, *Just War Or Just Peace?*, 201–202.

<sup>343</sup> Slovenia, Croatia, and Macedonia declared independence in 1991. And in the next year, Bosnia and Herzegovina announced independence. Serbia and Montenegro were the only two republics remaining in the SFRY, which changed the name of State to Federal Republic of Yugoslavia (FRY).

<sup>344</sup> Janzokovic, *The Use of Force in Humanitarian Intervention*, 176.

<sup>345</sup> UNSC, Resolution 1160. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/090/23/PDF/N9809023.pdf?OpenElement>

undertaken by the KLA. It also demanded a non-violent solution for the Kosovar-Serbian conflicts and imposed an arms embargo on all of the territory of the Federal Republic of Yugoslavia (FRY). Most member States in the Security Council voted for this resolution, by advocating that the human rights violations in Kosovo threatened the international peace and security in the Balkans. Russia and China abstained, considering the conflicts in Kosovo to be subjected to the domestic jurisdiction of the FRY.<sup>346</sup>

Despite the pressure from the Security Council, the fights between Belgrade government and the separatists continued and the humanitarian situation inside Kosovo deteriorated rapidly. On 23 September, the Security Council adopted Resolution 1199 which demanded an immediate cease-fire by all parties.<sup>347</sup> In October, the Organization for Security and Cooperation in Europe (OSCE) authorized a one-year long Kosovo Verification Mission (KVM) to verify compliance by all parties in Kosovo with Resolution 1199, to supervise elections in Kosovo, and to report and make recommendations to the OSCE Permanent Council, the UNSC and other related organizations.<sup>348</sup> In the meanwhile, NATO also established an Air Verification Mission over Kosovo.<sup>349</sup> These two missions were endorsed by the UNSC in Resolution 1203.<sup>350</sup>

In addition, Resolution 1203 affirmed that “in the event of an emergency, action may be needed to ensure [the verification mission’s] safety and freedom of movement”. It is arguable that whether this paragraph implied an UNSC’s authorization of the use of force to the acting organizations of these missions. After the passing of this resolution, the delegate of the US emphasized that “a credible threat of force was key to achieving the OSCE and NATO agreements and remains key to ensuring their full implementation...The NATO allies, in agreeing on 13 October to the use of force, made it clear that they had the authority, the will and the means to resolve this issue. *We retain that authority.*”<sup>351</sup> However, before the voting, the delegate of Russia had directly indicated that “[e]nforcement elements [had] been excluded from the draft resolution, and there [were] no provisions in it that would directly or

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<sup>346</sup> Wheeler, *Saving Strangers*, 259.

<sup>347</sup> UNSC, Resolution 1199. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf?OpenElement>

<sup>348</sup> OSCE, Kosovo Verification Mission. Available at: <http://www.osce.org/node/44552>

<sup>349</sup> Janzekovic, *The Use of Force in Humanitarian Intervention*, 178.

<sup>350</sup> UNSC, Resolution 1203. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/321/21/PDF/N9832121.pdf?OpenElement>

<sup>351</sup> S.C.O.R., 53 year: 3937th Meeting, 24 October 1998. 15. Available at: <http://repository.un.org/handle/11176/47300>

indirectly sanction the automatic use of force...<sup>352</sup> The Chinese delegate also declared, after abstaining, that the adopted Resolution should not entail any authorization of the use of force and objected to any kind of interpretation like that.<sup>353</sup> On the one hand, considering the veto powers of Russia and China, it may be proper to hold that the adopted Resolution should exclude the use of force; on the other hand, such an authorization would nevertheless only have authorized use of force for the defense of the verification mission, not for the protection of civilians etc.

While the OSCE and NATO were proceeding with their ground and air verification missions, which were often impeded by the Yugoslavia authorities, the Contact Group, constituted by the governments of France, Germany, Russia, the UK, and the US, intensified its effort to seek a political settlement to the separatist struggle.<sup>354</sup> By early 1999, the OSCE mission observed that the cease-fire was repeatedly broken by open fights between the KLA and Serbian forces.<sup>355</sup> NATO warned about an impending air strike. In February and March, the Contact Group organized a series of negotiations between the leaders of the Serbs and Albanians in Rambouillet and Paris.<sup>356</sup> However, these negotiations concluded without a deal, since the Serbs refused to sign an agreement which would have guaranteed substantial autonomy to the Kosovar Albanians within Serbia.<sup>357</sup> Following the failure of the peace negotiations, the Serbian government initiated a systematic ethnic cleaning campaign against the Albanians in Kosovo, resulting in a large number of populations fleeing to other countries.<sup>358</sup> On 24 March, NATO commenced its air campaign against the FRY, namely *Operation Allied Force*, which lasted for 72 days.

Just hours after NATO's air attack, the Security Council held an emergency session. The acting States of NATO censured the FRY for non-observance of the obligations in the UNSC Resolutions 1160, 1199 and 1203, and commitments in its agreements with NATO and the OSCE. They argued that it was necessary to take military actions in the emergency of an impending humanitarian catastrophe, when all other peaceful options were exhausted. These justifications of the supporting States were primarily political and moral, but not legal ones. On the contrary, Russia and China, who strongly condemned NATO's acts, challenged it on

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<sup>352</sup> *Ibid.*, 12.

<sup>353</sup> *Ibid.*, 14-15.

<sup>354</sup> Leppard, *Rethinking Humanitarian Intervention*, 20.

<sup>355</sup> Janzekovic, *The Use of Force in Humanitarian Intervention*, 179.

<sup>356</sup> Walling, *All Necessary Measures*, 163.

<sup>357</sup> *Ibid.*, 164.

<sup>358</sup> *Ibid.*, 165.

legal grounds. They claimed that NATO's use of force was a blatant violation of the UN Charter and other norms of international law. They refused to recognize that the humanitarian consideration might serve as a justification for the use of force. And they called for an immediate cessation of the military attacks by NATO against the FRY.<sup>359</sup> Russia, Belarus and India submitted a draft resolution<sup>360</sup> at this meeting condemning NATO's use of force, which was naturally vetoed by the other three permanent member States which had actually participated in the bombing. Indeed, only China, Russia and Namibia voted for, and all the other twelve States against, with no abstentions. In May, the Security Council finally reached limited consensus by passing a resolution<sup>361</sup> to urge international humanitarian assistance to the Kosovar refugees and displaced persons.

On 3 June 1999, the FRY government accepted NATO's peace plan and on 10 June, the Security Council passed Resolution 1244.<sup>362</sup> It demanded the FRY to cease any violence in Kosovo and begin an immediate withdrawal from Kosovo. It authorized, under auspices of the UN, the member States and relevant international organizations to establish the international security presence in Kosovo, which were allowed to use *all necessary means* to fulfill its responsibilities. And, it authorized the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration. This resolution also requested the promotion of substantial autonomy to the Kosovars. Under Resolution 1244, multinational military forces were deployed in Kosovo, which consisted of troops from NATO member States and Russia.

It is discussed whether this resolution constitutes a retrospective legal endorsement for NATO's military operations. It is nevertheless more convincing to hold a negative answer to this question. In the Security Council meetings, though the supporting States defended the legitimacy of the military action, Russia and China clearly pointed out the perceived unlawfulness of NATO campaign, which they alleged violated the Charter and other international law, and also undermined the authority of the Security Council. Though China did not veto the resolution but abstained, due to the FRY's acceptance of the peace plan and

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<sup>359</sup> S.C.O.R, 54th year: 3988th meeting, 24 March 1999. Available at:

<http://repository.un.org/handle/11176/35665>

<sup>360</sup> Draft resolution [demanding an immediate cessation of the use of force against Yugoslavia and urgent resumption of negotiations], S/1999/328. Available at: <http://repository.un.org/handle/11176/35684>

<sup>361</sup> UNSC, Resolution 1239. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1239\(1999\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1239(1999))

<sup>362</sup> UNSC, Resolution 1244. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1244\(1999\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244(1999))

NATO's suspension of its bombing, its stand on non-intervention was still very firm. As the Chinese delegate said, "[t]he draft resolution before us has failed to fully reflect China's principled stand and justified concerns."<sup>363</sup> In addition, Christine Gray claims that it is common for the Security Council to accept a peace settlement to a conflict after it ends and deploy the UN or other States' forces to the post-conflict area. She also suggests that the Resolution might not have been passed if it contained any implication of endorsing legality to NATO's action.<sup>364</sup>

The disputes on the legality of NATO's use of force were also referred to the ICJ by the end of April 1999, where the FRY brought actions against ten NATO member States. The FRY claimed that NATO's acts, on the one hand, violated the obligation not to use force against another State and not to intervene in the internal affairs of another State (by financing, arming, training and equipping the KLA); and on the other hand, these military operations did also breach the provisions of international humanitarian law by killing civilians and targeting civilian objects.<sup>365</sup> However, the ICJ decided that it did not have jurisdiction over this case.<sup>366</sup> It is for the purpose of this thesis remarkable that Belgium set out a justification on grounds of humanitarian intervention in its pleading. Belgium's humanitarian argument relied on a narrow interpretation of Article 2(4): NATO's acts were not against the territorial integrity or political independence of the FRY. They were envisaged to save human lives and to prevent a humanitarian catastrophe, and they were thus consistent with the UN's purpose of protecting human rights.<sup>367</sup>

### 6.2.2.2 Collective Humanitarian Intervention

After the end of the Cold War, the Security Council now plays a more activate role in the domain of international peace and security. Specially, while relying on a broad interpretation of the notion of "a threat to international peace and security",<sup>368</sup> the Security Council authorized the military interventions in Somalia (1992-93), Rwanda (1994), and Bosnia-Herzegovina (1995). These cases have been seen as good examples of a new form of humanitarian intervention where the use of armed force for the protection of strangers is

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<sup>363</sup> S.C.O.R, 54th year: 4011th meeting, 10 June 1999, 9. Available at:

[http://repository.un.org/bitstream/handle/11176/36121/S\\_PV.4011-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/36121/S_PV.4011-EN.pdf?sequence=3&isAllowed=y)

<sup>364</sup> Gray, "The Use of Force for Humanitarian Purposes," 235.

<sup>365</sup> *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Memorial of the Federal Republic of Yugoslavia, 6.

<sup>366</sup> *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 279, para. 128.

<sup>367</sup> Gray, "The Use of Force for Humanitarian Purposes," 236.

<sup>368</sup> Corten and Jouannet, *The Law Against War*, 537–538.



undertaken with the authorization of the Security Council, namely collective humanitarian intervention.<sup>369</sup>

The former President's fleeing in January 1991 resulting in a power vacuum in Somalia. The country was soon split into twelve zones controlled by different warring factions. In July, Omer Arteh Qhalib was selected by the warring factions as interim Prime Minister, however, without any real power. In November, full-scale civil war broke out in Somalia. Considering the rapidly deterioration of security, Qhalib referred the situation of Somalia to the Security Council at the beginning of 1992.<sup>370</sup> In the other months of this year, the Security Council passed several resolutions<sup>371</sup> on Somalia and in Resolution 733, the Security Council pointed out that the situation in Somalia did constitute a threat to international peace and security. A complete arms embargo towards Somalia was ordered in this resolution. However, the situation continued to deteriorate. The concern of the Security Council gradually transferred to the human sufferings in Somalia. In April, the *United Nations Operations in Somalia* (UNOSOM) was established under Resolution 751<sup>372</sup> to monitor the cease-fire, and to deliver, protect and secure humanitarian relief in Somalia. Due to the lack of a central government authority and noncooperation from the warring factions, the UNOSOM was unable to fulfill its mandate and the situation in Somalia, as the Secretary-General stated, became intolerable.<sup>373</sup> In December 1992, the Security Council, by passing Resolution 794,<sup>374</sup> authorized the member States to use all necessary measures to establish a secure environment for humanitarian relief operations in Somalia. The Secretary-General concluded that it was the first time that the Security Council authorized a military intervention for strictly humanitarian purposes, something which established a precedent for the UN's future activities.<sup>375</sup>

The brutality of the genocide unfolding in Rwanda in April 1994 struck the conscience of the international community. Activists urged the Security Council to take effective actions

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<sup>369</sup> Teson, "Collective Humanitarian Intervention," 323–372; Spencer Zifcak, "The Responsibility to Protect", in Evans, edit, *International Law*, 2014, 512–513.

<sup>370</sup> Teson, "Collective Humanitarian Intervention," 348–349.

<sup>371</sup> Resolution 733, 746, 751, 767, 775, and 794.

<sup>372</sup> UNSC, Resolution 751. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/751\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/751(1992))

<sup>373</sup> Chesterman, *Just War Or Just Peace?*, 141.

<sup>374</sup> UNSC, Resolution 794. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/794\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/794(1992))

<sup>375</sup> *Report of the Secretary-General on the work of the Organization*, 1993, 51. Available at:

[http://cdn.un.org/unyearbook/yun/chapter\\_pdf/1993YUN/1993\\_SG\\_REPORT.pdf](http://cdn.un.org/unyearbook/yun/chapter_pdf/1993YUN/1993_SG_REPORT.pdf)

to save lives and to prevent further humanitarian catastrophes in Rwanda. In June, the Security Council approved France's proposal to intervene in Resolution 929<sup>376</sup> under Chapter VII. It determined that the humanitarian crisis in Rwanda constituted a threat to international peace and security. France was authorized to use *all necessary means* to secure and protect displaced persons, refugees and civilians at risk in Rwanda, and to assist in the humanitarian relief operations. France claimed that its initiative was exclusively humanitarian and its objective was not to replace the UNAMIR,<sup>377</sup> but to "fill a gap which is having disastrous consequences."<sup>378</sup> However, the French motivation of intervention was still doubted by some, due to its evident partiality to the Hutu government and people before June.<sup>379</sup> In any event, these suspicions do not impair the legality of France's military operations under the UNSC's authorization, and the positive humanitarian consequences of this intervention are admired by most governments and many scholars.

The Security Council also passed several coercive Resolutions in order to resolve complicated conflicts and serious humanitarian crisis, ignited by the fall of the Communist government, in the former Yugoslavia. In the summer of 1992, recognizing that the situation in Bosnia and Herzegovina constituted a threat to international peace and security, the Security Council, for the first time in relation to this conflict, called upon States to take all measures necessary to facilitate the delivery of humanitarian assistance to Sarajevo and other parts of Bosnia and Herzegovina in need.<sup>380</sup> In October, the Security Council imposed a no-fly zone over Bosnia and Herzegovina,<sup>381</sup> and member States were endorsed to take all necessary measures to maintain the enforcement of the no-fly zone. The Security Council further authorized *the United Nations Protection Force* (UNPROFOR) to take necessary measures, including the use of force, for the purpose of self-defence.<sup>382</sup> In support of the Security Council's decisions, NATO air forces launched a series of air strikes and other military operations against the Bosnian Serbs. In December 1995, the warring parties signed

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<sup>376</sup> UNSC, Resolution 929. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/260/27/PDF/N9426027.pdf?OpenElement>

<sup>377</sup> The United Nations Assistance Mission for Rwanda (October 1993–March 1996), established Under the Security Council Resolution 872. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/540/63/PDF/N9354063.pdf?OpenElement>

<sup>378</sup> S.C.O.R, 49th year: 3392nd meeting, 22 June 1994, 5-6.

<sup>379</sup> Chesterman, *Just War Or Just Peace?*, 146–147.

<sup>380</sup> UNSC, Resolution 770. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/770\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/770(1992))

<sup>381</sup> UNSC, Resolution 781. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/781\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/781(1992))

<sup>382</sup> UNSC, Resolution 871. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/871\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/871(1993))

the *Dayton Peace Agreement* in Paris to end the conflicts. Strictly speaking, the military operations of NATO could only be justified partly on the authorization of the Security Council. Since the use of “all necessary measures” was limited to the efforts of humanitarian assistance and the enforcement of the no-fly zone, NATO’s use of force in some operations, such as the counterattacks against the Bosnian Serbs for the latter’s shelling in Sarajevo, did obviously exceed the purposes of the UNSC’s authorization.<sup>383</sup>

The humanitarian purpose, to prevent States’ violations of human rights and to protect foreign civilians, is generally recognized by the intervening States as the foremost consideration to act. They are typical State practice of humanitarian intervention. However, the legality of the use of force in these cases rests for now with the authorization of the Security Council under Chapter VII, which is cited by the acting States in their formal justifications, but not on a right of humanitarian intervention. It is still hardly seen *opinio iuris* of humanitarian intervention consistent with these practices of States. Nonetheless, this is still a remarkable development of the doctrine of humanitarian intervention compared with the Cold War period where any outside actions in domestic affairs were generally opposed even by the UN.<sup>384</sup>

### **6.3 From “Humanitarian Intervention” to “the Responsibility to Protect (R2P)”**

In the last one and a half decades, a new concept of the “*Responsibility to Protect*”, as a succession of humanitarian intervention, arose in the international community. And, as a political doctrine, it was soon “widely considered and broadly accepted”.<sup>385</sup> However, in the realm of international law, the legal nature of this new norm and its concrete impact on Security Council action and State practice remain controversial.

The concept of R2P was first proposed in a report titled “*The Responsibility to Protect*” by the *International Commission on Intervention and State Sovereignty* (ICISS) issued in 2001. The ICISS is an independent panel established by the Canadian government, and its views were also supported by the High-Level Panel on *Threat, Challenges and Change* of the UN Secretary-General. *The Responsibility to Protect* re-conceptualized the term which indicates the use of force to save strangers in circumstance of mass violations of human rights: The conception of humanitarian intervention is thus displaced by the new norm of R2P. It puts the primary responsibility to take action on the sovereign government of the nation

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<sup>383</sup> Teson, “Collective Humanitarian Intervention,” 366–369.

<sup>384</sup> Corten and Jouannet, *The Law Against War*, 540.

<sup>385</sup> Spencer Zifcak, “The Responsibility to Protect”, in Evans ed., *International Law*, 2014, 510.

concerned; only if the sovereign government fails to protect its own citizens from humanitarian disaster, will the responsibility be transferred to the international community. When the military intervention is triggered, as the ICISS formulates it, it is limited to the circumstances of genocide, war crimes, crimes against humanity, or ethnic cleansing; and it should be carried out in accordance with the criteria of right authority, just causes, good intention, last resort, proportional means and reasonable prospects. The ICISS proposed three specific responsibilities—prevention, reacting and rebuilding—to this new norm. *The responsibility to prevent* responds to the need of addressing the root causes of the humanitarian catastrophe to avoid its occurrence in the future and it puts the use of peaceful means as the first option to solve the humanitarian crisis, only allowing military intervention in extreme cases. While the crisis is halted or averted, *the responsibility to rebuild* comes to play.

In March 2005, the former Secretary-General Kofi Annan called for an international recognition of R2P in his report *In Larger Freedom*,<sup>386</sup> which served as the base of the agenda of the World Summit held in September. In the following six months preceding the Summit, governments discussed this proposal in a series of informal consultations. Generally, nations of the Western Europe and Others Group (WEOG) welcomed the inclusion of R2P in the World Summit outcome document. While the attitude of the USA was ambiguous, member States of the Non-Aligned Movement (NAM) were opposed to the inclusion of it in the initial text. Some of them requested significant modifications of the original rules of R2P. However, the doctrine of R2P was strongly supported by African nations.<sup>387</sup> And finally a compromised text of R2P, which was much weaker than the original one, was included in the 2005 World Summit Outcome Document.<sup>388</sup> The wordings of R2P in the Outcome Document reflect the essential ideas of drafted by the ICISS. However, concessions are obvious. It imposes stricter qualifications for military interventions, which are limited to genocide, war crimes, ethnic cleansing and crimes against humanity; the intervention must be authorized by the Security Council in accordance with Chapter VII of the Charter; an intervention will only be considered if “peaceful means [are] inadequate and national authorities are *manifestly* failing to protect their populations” from the relevant crimes. In addition, it provides that the Security Council determines the military interventions on a case-by-case basis, which implies that

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<sup>386</sup> *In Larger Freedom: Towards Development, Security and Human Rights for All*. Available at:

[http://www.un.org/en/events/pastevents/pdfs/larger\\_freedom\\_exec\\_summary.pdf](http://www.un.org/en/events/pastevents/pdfs/larger_freedom_exec_summary.pdf)

<sup>387</sup> Evans, *International Law*, 518.

<sup>388</sup> 2005 World Summit Outcome. Available at: <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>

there would be no fixed legal criterion for the implementation of R2P.<sup>389</sup> Furthermore, in the initial report of the ICISS, it proposed that the permanent members of the Security Council should agree not to apply their veto power in cases of the relevant crimes; but this constraint was rejected in the World Summit.

The World Summit Outcome Document was brought to the General Assembly for approval as a resolution at the end of Summit. However, the most significant development of R2P doctrine comes with the recognition of the Security Council, at first elaborated in Resolution 1674 on the protection of civilians in armed conflict. This resolution reaffirmed “the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>390</sup> In dealing with the situation of Darfur, where massive crimes against humanity had taken place since 2003 when the conflict broke out, the Security Council referred to R2P in Resolution 1706.<sup>391</sup> The Security Council decided to ask for the consent of the Sudanese Government of National Unity on expanding the mandate of the United Nations Mission in Sudan (UNMIS) established by Resolution 1590<sup>392</sup> in 2005. It is interesting that there was no reference to the consent of Sudanese government when establishing this Mission. Prior to the 2005 World Summit, the Security Council did pass Resolution 1556 and 1564 in 2004, where the primary responsibility to solve the humanitarian crisis was put on the Sudanese government. It is generally recognized that the doctrine of R2P was also adequately implemented in addressing the issues of Libya. This case will be introduced in the following.

While many government and scholars are hailing for the establishment of the new norm of R2P,<sup>393</sup> a crucial question is here: How much does it change the existing framework for the use of armed force for the protection of strangers—dealt with by the “old” doctrine of humanitarian intervention? Certainly, there are significant differences between R2P and humanitarian intervention. The scope of the former is restricted to situations of genocide, war crimes, ethnic cleansing and crimes against humanity; while the scope of the later is unclear,

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<sup>389</sup> Evans, *International Law*, 520.

<sup>390</sup> UNSC, Resolution 1674. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1674\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1674(2006))

<sup>391</sup> UNSC, Resolution 1706. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1706\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1706(2006))

<sup>392</sup> UNSC, Resolution 1590. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1590\(2005\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1590(2005))

<sup>393</sup> Whether the R2P is a new legal concept or just a political action is still controversial. However, due to the limit of the pages, this question will not be dealt with here.

since no authoritative decisions have been made on the scope of excising a right of humanitarian intervention. Commonly, scholars and a few governments, advocating a right of humanitarian intervention, will use terms like humanitarian catastrophe, disaster, emergency, or crisis to indicate the situation of mass violations of human rights where humanitarian intervention is triggered. The implementation of R2P does primarily rely on the use of peaceful means and the military intervention is the last resort; while humanitarian intervention, distinguished from humanitarian assistance, implies the use of military force. The military intervention under R2P should be authorized by the Security Council; while this condition is not necessary for *unilateral* humanitarian intervention. Furthermore, the primary responsibility to protect is imposed on the sovereign government of the nation where the relevant crimes take place; while the subject of a right of humanitarian intervention is a foreign State or international organization. However, in the past practices of humanitarian intervention or recent practices of R2P, the effectiveness of peaceful means in dealing with genocide, war crimes, ethnic cleansing and crimes against humanity often turn out to be very limited. And the primarily responsible government is often unwilling or unable to resolve the humanitarian crisis. The demands of military intervention are always raised in the international community. Nonetheless, R2P accepted in the World Summit Outcome does not impose strict obligation on the international community to use military force to resolve the relevant crimes under certain conditions, where it just writes ambiguously in paragraph 139 that “we are *prepared* to take collective action”. Furthermore, there is still no restraint on the veto power of the permanent members of the Security Council; thus the deployment of military forces or not is still under the discretion of the member States present on that body of the UN, which is as much the same as the situation under the doctrine of humanitarian intervention. The powerlessness of the new norm of R2P on the situation of Syria has been especially observed and considered.

### **6.3.1 2011 R2P in Libya**

In February 2011, the Tunisia-inspired anti-government protests spread to Libya. The Gaddafi regime immediately responded with military repression and over a thousand protesters were killed. After strengthening the government’s forces and weakening the opposition during fighting, the Gaddafi regime threatened to extinct all population, including innocent citizens, in Benghazi, which was the center of the rebel forces.<sup>394</sup> On 25 February, the Human Rights Council decided to establish a fact-finding commission to investigate the

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<sup>394</sup> Zifcak, “Responsibility to Protect after Libya and Syria, The,” 60.

alleged violations of human rights in Libya. On the next day, the Security Council passed Resolution 1970,<sup>395</sup> which endorsed the commission of the Human Rights Council. The Security Council also emphasized the Libyan authorities' responsibility to protect its population. Acting under Chapter VII of the Charter, the Security Council decided to refer the situation in Libya to the Prosecutor of the ICC, impose the arms embargo, implement the travel ban to the high-level officials of the Gaddafi regime and freeze the asset of the Gaddafi family abroad. However, the Security Council did not refer to the responsibility of the international community to intervene in case of the failure of the Libyans in their duties. It was clear that at that point the Security Council did still attempt to seek a remission of the situation in Libya in a way compatible with the principle of sovereignty.

However, these efforts of the Security Council and States did not hold back the rapid deterioration of the situation in Libya. The violence against civilians had just increased. On 8 March, the Organization of the Islamic Conference (OIC) issued a communiqué on the situation of Libya, condemning the Libyan authorities' excessive use of force against civilians which amounted to a humanitarian tragedy in Libya. The OIC called for an immediate end to violence in Libya and requested the member States to provide urgent humanitarian assistance to the Libyans in need. However, the OIC conveyed a firm position against the use of military intervention to Libya.<sup>396</sup> On 10 March, the African Union Peace and Security Council (AUPSC) held a meeting at the level of Heads of State and Government. On the one hand, the member States of the AUPSC urged an effective resolution to the Libyan crisis— an AU *ad hoc* High Level Committee on Libya was established in this meeting to mediate between all warring parties to seek an early resolution to the crisis;<sup>397</sup> on the other hand, they strongly rejected any foreign military intervention, in contrast to Article 4(h) of the Constitutive Act which guarantees the right the Union to intervene in a Member State in cases of war crimes, genocide and crimes against humanity. On the contrary, the League of Arab States advocated for more coercive measures in a meeting at the Ministerial level on 12 March, which called on

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<sup>395</sup> UNSC, Resolution 1970. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970(2011))

<sup>396</sup> Final Communiqué Issued By The Emergency Meeting Of The Committee Of Permanent Representatives To The Organization Of The Islamic Conference On The Alarming Developments In Libyan Jamahiriya, 8 March 2011. Available at:

[http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya\\_16\\_Final\\_Communique\\_Committee\\_of\\_Permanent\\_Representatives%20.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_16_Final_Communique_Committee_of_Permanent_Representatives%20.pdf)

<sup>397</sup> Communiqué of the 265th Meeting of the Peace and Security Council of the African Union, 10 March 2011. Available at:

[http://www.au.int/en/sites/default/files/COMMUNIQUE\\_EN\\_10\\_MARCH\\_2011\\_PSD\\_THE\\_265TH\\_MEETING\\_OF\\_THE\\_PEACE\\_AND\\_SECURITY\\_COUNCIL\\_ADOPTED\\_FOLLOWING\\_DECISION\\_SITUATION\\_LIBYA.pdf](http://www.au.int/en/sites/default/files/COMMUNIQUE_EN_10_MARCH_2011_PSD_THE_265TH_MEETING_OF_THE_PEACE_AND_SECURITY_COUNCIL_ADOPTED_FOLLOWING_DECISION_SITUATION_LIBYA.pdf)

the Security Council to establish a no-fly zone on Libyan military aviation and to establish safe areas to protect the Libyan people and foreign nationals residing in Libya, supported by the Organization of the Islamic Conference and the Gulf Cooperation Council.<sup>398</sup> It also determined the illegitimacy of the Libyan authorities for committing grave crimes against their own citizens. Different from the OIC and AUPSC, the League of Arab States held that “the failure to take necessary actions to end this crisis [would] lead to foreign intervention in internal Libyan affairs.”<sup>399</sup>

On 17 March, Security Council adopted Resolution 1973,<sup>400</sup> authorizing member States to take *all necessary measures* to protect civilians and civilian populated areas under threat of attack, to enforce compliance with a no-fly zone, and to enforce the arms embargo. The passing of this resolution is often regarded as a great success of implementing the new norm of R2P. However, it is notable that, like Resolution 1970, the Security Council only referred to R2P of the Libyan authorities in the preamble, but without reference to R2P of the international community.<sup>401</sup> The legal basis of subsequent military intervention is not on the duty of the international community to protect, but rather, still, on an authorization of the UNSC under Chapter VII for the purpose of maintaining international peace and security.<sup>402</sup> Besides, the Resolution excluded a foreign *occupation* force on the Libyan territory, which, however, opened a door for the deployment of foreign forces without an intension of occupation in Libya.

Furthermore, Resolution 1973 was passed with a significant number of abstentions: Brazil, China, Germany, India and Russian did abstain in the voting. In the Security Council meeting leading to the adoption of this resolution, Germany gave full support to the economy and financial sanctions to the Gaddafi regime. However, considering the great risk of large-scale loss of life brought by the use of military forces and the likelihood of ineffectiveness of the intervention, Germany refused to support the military option. The delegate of Brazil did

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<sup>398</sup> Morris, “Libya and Syria,” 1272.

<sup>399</sup> The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level, 12 March 2011. Available at:

[http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya\\_19\\_Outcome\\_League\\_of\\_Arab\\_States\\_Meeting.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_19_Outcome_League_of_Arab_States_Meeting.pdf)

<sup>400</sup> UNSC, Resolution 1973. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011))

<sup>401</sup> Justin Morris provides two reasons for the absence of R2P in Resolution 1973. Firstly, the norm of R2P remains controversial and contestable among States. Thus citing this norm in a Security Council Resolution might be inexpedient for States holding a suspicious or antagonistic position. Secondly, it might just because R2P did not figure significantly in the thinks of States. See Morris, “Libya and Syria,” 1273-1274.

<sup>402</sup> Gray, “The Use of Force for Humanitarian Purposes,” 247.



also express a similar worry about the negative results of the use of force though they strongly condemned the Libyan authorities' massive violations of human rights. Russia pointed out several unanswered questions in the meeting, namely how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be, which could potentially open the door to large-scale military intervention. In addition, Russia attributed the responsibility for the negative humanitarian consequences caused by the excessive use of outside force to States or organizations responding to an authorization. China also cited the failure of clarifying and answering specific questions in the meeting as its reason to abstain in the voting. India delivered a hard-line opposition against the military intervention, by deploring "the use of force, which [was] totally unacceptable and must not be resorted to."<sup>403</sup>

The military intervention led by the US, the UK and France started on 19 March and was named *Operation Odyssey Dawn*. The military coalition launched a series of air strikes to deprive Libya's air defence system of capacity. On 31 March, NATO forces took over the command, intensified the military operations against the Gaddafi regime and expanded the range of military targets to all identified command and control centers of the Libyan authorities. Convinced by the faith that the objectives written into Resolution 1970 and 1973 could only be achieved by the removal of Gaddafi from power, in the latter stage of the military intervention, NATO forces gradually transformed its mission from the protection of civilians to seeking a regime change.<sup>404</sup> In the end of October, with support from NATO military forces, the rebels took control of the city of Sirte, where Gaddafi himself was reported to be killed. On 27 October, the Security Council voted to end NATO's mandate on 31 October.<sup>405</sup>

NATO's excessive use of force outside of the UNSC's mandate has been criticized in the international community. In May, the AU Assembly pointed out that "the continuation of the NATO-led military operation defeats the very purpose for which it was authorized in the first place."<sup>406</sup> On 27 June, the Security Council held a meeting to discuss the situation in

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<sup>403</sup> S.C.O.R, 66th year: 6498th meeting, March 2011, 4-5 (Germany), 5-6 (India), 6(Brazil), 8 (Russia), and 10 (China). Available at: <http://repository.un.org/handle/11176/15114>

<sup>404</sup> Zifcak, "Responsibility to Protect after Libya and Syria, The," 65-66.

<sup>405</sup> UNSC, Resolution 2016. Available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2016\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2016(2011))

<sup>406</sup> African Union Decision on the Peaceful Resolution of the Libyan Crisis, 25 May 2011. Available at:

[http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya\\_58\\_AU\\_Decision\\_Peaceful\\_Resolution.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_58_AU_Decision_Peaceful_Resolution.pdf)

Libya. The Under-Secretary-General for Political Affairs Mr. Lynn Pascoe indicated the close connection between the Libyan opposition forces and NATO air power. South Africa, in this meeting, concerned about the civilian casualties resulting from the actions of NATO, emphasized that the mandate of Resolution 1973 could not be stretched to cover regime change and the targeting of individuals.<sup>407</sup> On 21 September, the AUPSC called on the Security Council to “lift the measures imposed with respect to no-fly zone and ban on flights and to terminate the authorization given to member States in this respect, bearing in mind the very purpose for which resolution 1973 (2011) was adopted.”<sup>408</sup> States, abstaining at the passing of Resolution 1973, especially Russia and China, had also strongly condemned NATO’s excessive military actions and willful interpretations of the resolutions on several formal occasions.<sup>409</sup>

### **6.3.2 Syria: Where to Go?**

Partly due to the Libyan experience, Russia and China are extraordinarily cautious about the adoption of any Resolution by the Security Council which would open the door for military intervention in Syria. As mentioned before, until the hand in time for this thesis, Russia and China have vetoed four draft resolutions to condemning the Syrian authorities and taking coercive measures as response to the Syrian crisis. And Russia continually alerts its Western opponents about its doubt regarding the effectiveness of any military intervention, by mentioning the wholesale civil war in Libya after the overthrow of the Gaddafi power structure.

However, the political and military situations in Syria are very different from those in Libya. In the political aspect, the Assad government has not totally lost trust and reputation in its region and its own country. At the regional level, Syria is still an important political, economy and strategy ally to many Middle Eastern States. The governments of these States might not agree with the Syrian government’s policy against its own population; however, many of them still hesitate to condemn the Syrian authorities in the Security Council. Moreover, the stability of Syria is of great concern to the entire Middle East which is itself a

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<sup>407</sup> S.C.O.R, 66th year: 6566th meeting, 27 June 2011. Available at:

[http://repository.un.org/bitstream/handle/11176/15565/S\\_PV.6566-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/15565/S_PV.6566-EN.pdf?sequence=3&isAllowed=y)

<sup>408</sup> Communiqué of the 294th meeting of the Peace and Security Council. Available at: <http://www.ausitroom-psd.org/Documents/PSC2011/294th/Communique/PSCENG.pdf>

<sup>409</sup> See S.C.O.R, 66th year: 6528th meeting, 4 May 2011, 8-9 (Russia), 9-10 (China). Available at: [http://repository.un.org/bitstream/handle/11176/15354/S\\_PV.6528-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/15354/S_PV.6528-EN.pdf?sequence=3&isAllowed=y). Also S.C.O.R, 66th year: 6531st meeting, 10 May 2011, 9 (Russia), 20-22 (China). Available at: <http://repository.un.org/handle/11176/15370>

very volatile region. As an intimate ally of the Assad government, Hezbollah in Lebanon has been observed sending thousands of its own soldiers to fight with the Assad army on Syrian territory. Iran is another significant and powerful supporter for the Syrian government. Iran has undertaken great effort to keep Assad in power, by constantly providing the Assad government essential military supplies and financial sources.<sup>410</sup> If a Western-led military intervention comes to be, it is very likely that Iran will be more directly involved in, which might further intensify the tension between Iran and its principal regional-adversaries, such as Turkey, Israel, Saudi Arabia and Qatar.<sup>411</sup> And at the domestic level, the Assad regime in Syria still retains significant civilian support especially in cities of Damascus and Aleppo, other than the notorious Gaddafi rule in Libya.<sup>412</sup>

Noticeably, the great powers of Russia and the US also have an intense struggle of self-interest in this region. On the one hand, it is not a secret that the Russians have significant political, economic and strategic connections with the Assad authorities. The Russians are holding a hard-line position against any international actions directed at Syria. On the other hand, the fall of the Assad regime would be a heavy strike to Iranian influence in the Middle East, which might be of great importance to advance the strategic interests of the US and its ally State Israel to deprive the nuclear capability of Iran.<sup>413</sup> In this context, it is very hard to maintain a solidarity in the Security Council on the Syrian issues, which is reflected by Russia's repeatedly use of veto in response to the draft resolutions on Syria provided by the Western States and their allies.

As to the military situation in Syria, besides the substantial foreign military supplies from Lebanon, Iran and Russia, the government army keeps a high level of loyalty and coherence. In the meantime, the opposition forces are also strengthening with time. However, the crucial difficulty for the Western States in replicating a Libya-like R2P intervention in Syria remains the non-coherence of the rebel groups and the Islamist extremism upheld by many rebels. On the one hand, it is hard for the Western States to find a reliable rebel ally. On the other hand, once the extreme Islamist rule replaces the dictatorial regime of Assad, the Syrian situation would only become worse, which can be seen from ISIL's bloody rule in parts of Iraq.

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<sup>410</sup> Will Fulton, Joseph Holliday, and Sam Wyer, "Iranian Strategy in Syria," 5. Available at: <http://www.understandingwar.org/sites/default/files/IranianStrategyinSyria-1MAY.pdf>

<sup>411</sup> Evans, *International Law*, 526.

<sup>412</sup> *Ibid.*, 525.

<sup>413</sup> *Ibid.*, 526–527.

Considering the complex and diverse international and domestic situation of Syria, it seems helpless and dangerous to carry out a Western-led R2P military intervention to resolve the Syrian crisis. It turns out that the mechanism of R2P to enhance the Security Council's ability to deal with mass violations of human rights holds little effectiveness in this case. This might not be surprising since Paragraph 139 of the World Summit Outcome Document clearly laid down that the decision on the use of force by the international community is depended on States' political deliberations on a case-by-case basis. Also, it is still possible for the potential Western actors to undertake military operations in Syria in the absence of the authorization of the UNSC; however, even for protecting the Syrian civilian population, in the lights of past cases, these actors might not coherently endorse a legal justification of *unilateral* humanitarian intervention. For instance, responding to the chemical weapon use in the Syrian conflict, in 2013, the UK government publicly referred to a doctrine of humanitarian intervention as the legal basis for its potential military actions against the Syrian authorities.<sup>414</sup> However, this doctrine is seldom formally employed by other States, typically the US, in their justification of the use of force. The vivid discussion of humanitarian intervention rests in the scholarly debate.

#### **6.4 Evaluation of the Legality and the Legitimacy of Humanitarian Intervention**

The post-Cold War State practice unfolds a new trend of humanitarian interventions, typically collective humanitarian interventions, which overwhelmingly exceed the practices of *unilateral* humanitarian intervention in this and former periods. It is nevertheless clear that there still lacks *general* State practice for *unilateral* humanitarian intervention. Though there are many cases of collective humanitarian intervention in the post-Cold War era, they may not be regarded as proper precedents for *unilateral* humanitarian intervention. As mentioned before, the legality of collective humanitarian intervention does not rest on a legal right of *unilateral* humanitarian intervention, but on the Security Council's authorization which endows the otherwise presumably illegal action with legality. Furthermore, few governments, except Belgium and the UK, seems to support a legal right of humanitarian intervention without a Security Council mandate; the Security Council is generally recognized by States as the only authority entitled to take forcible measures to deal with domestic humanitarian atrocities. Thus, State practice after the establishment of the United Nations does not support

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<sup>414</sup> Chemical Weapon Use by Syrian Regime: UK government legal position. Available at: <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>

the existence of a customary international law of humanitarian intervention without Security Council mandate.

The use of armed force for saving strangers under a Security Council authorization might be the only legal form of humanitarian intervention in current international law. However, the decision of the Security Council is subjected to the political deliberations of States, especially the permanent five powers in the Security Council, on a case-by-case base. If the major powers do not reach a consensus, the international community is likely to be reluctant in taking coercive actions to resolve a humanitarian crisis, and this will only worsen the miserable situation of the victims, something which goes against the UN's purpose of protecting human rights. The former UN Secretary-General Kofi Annan pointed out this dilemma of humanitarian intervention at the last stage of the Kosovar conflict, "on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences." As he States, this dilemma constitutes "the core challenge to the Security Council and to the United Nations as a whole in the next century."<sup>415</sup> The deadlock in the Syrian conflict fully manifests the tension between the Charter's rules of lawful use of force and the protection of human right in extreme situations.

Seemingly, it is hard for States to reach consensus on the use of force for humanitarian purposes, due to the shifting political positions of States from case to case. For instance, in the Bosnian-Herzegovinian conflict, as well as the Rwanda conflict and the Somalia conflict, Russia completely supported all necessary measures to provide and facilitate humanitarian assistance; but, as to the Kosovar conflict and the Syrian conflict, Russia repeatedly opposed military intervention. However, the reality may not be that clear. When going through the speeches of the Russian delegates in the Security Council meetings on the relevant conflicts after the end of Cold War, one finds that there is an amazing coherence in Russia's supportive position on the use of force for the protection of strangers.

In the 3106<sup>th</sup> meeting of the Security Council on the Bosnian-Herzegovinian conflict, Russia advocated the *use of all necessary means* to provide and facilitate the delivery of

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<sup>415</sup> UN, "Secretary General Presents His Annual Report to the General Assembly," news release, 20 September 1999, SG/SM/7136, GA/9596. Available at: <http://www.un.org/press/en/1999/19990920.sgsm7136.html>

*humanitarian assistance*.<sup>416</sup> In the 3145<sup>th</sup> meeting where Resolution 794 on the Somalia situation was adopted, Russia stated that, “[t]he Russian delegation is convinced that at the present juncture, resolution of the crisis requires the *use of international armed forces* under the auspices of the Security Council to ensure the delivery and safe keeping of the *humanitarian assistance* and its distribution to the country’s starving population.”<sup>417</sup> As to Rwanda, Russia claimed that the humanitarian tragedy in Rwanda “dictate the need for the adoption of *urgent measures* that can stop further bloodshed in Rwanda.”<sup>418</sup> As to the voting of Resolution 1973 on the Libyan crisis, the Russian delegate claimed that “we [were] consistent and firm advocates of the protection of the civilian population.” Russia also supported the use of force and the establishment of the no-fly zone. However, due to the unclear limits on the use of force in the draft Resolution, Russia abstained.<sup>419</sup>

Regarding the Kosovo conflict, after NATO’s bombing on the territory of FRY, Russian strongly condemned NATO’s military operations against the sovereign State FRY in the 3988<sup>th</sup> meeting. Russia stated that “[t]he members of NATO are not entitled to decide the fate of other sovereign and independent States.” Russia also rejected the justification about preventing a humanitarian catastrophe in Kosovo, which, as they said, could not find any legal basis in international law and would lead to devastating humanitarian consequences.<sup>420</sup> However, Russian did not oppose to the use of force for *pure* humanitarian purpose as such. In the Kosovo case, the military measures employed by NATO did in its view exceed the need to provide and facilitate humanitarian assistance when NATO attacked the authorities in FRY. As to the Syrian conflict, Russia’s antagonistic position against military intervention containing a potential political purpose of regime change is much stiffer.<sup>421</sup>

Taken together, the real divergence between Russia and the Western States supporting military intervention in this regard is seemingly not whether to use armed force for the protection of strangers as such, but rather is the scope of the use of armed force. For Russia, the excessive use of force leading to regime change, even for the protection of strangers, is unacceptable.

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<sup>416</sup> S.C.O.R, 3106<sup>th</sup> meeting, 27-29.

<sup>417</sup> S.C.O.R, 3145<sup>th</sup> meeting, 25-27.

<sup>418</sup> S.C.O.R, 3392<sup>nd</sup> meeting, 2.

<sup>419</sup> S.C.O.R, 6498<sup>th</sup> meeting, 8.

<sup>420</sup> S.C.O.R, 3988<sup>th</sup> meeting, 2-4.

<sup>421</sup> S.C.O.R, 6627<sup>th</sup> meeting, 3-5; 6711<sup>th</sup> meeting, 9; 6810<sup>th</sup> meeting, 8; 7180<sup>th</sup> meeting, 12-13.

In contrast, China generally holds a hard-line non-intervention position. Among the resolutions mentioned above where the Security Council authorized the use of armed force, China abstained in relation to most of them. As to the discussion on the Bosnian-Herzegovinian conflict in the Security Council, the delegate of China Stated, “[w]e endorse the objective of facilitating the humanitarian relief work, as proclaimed in the resolution. But we cannot agree to the resolution's authorization of the use of force by Member States [...]”<sup>422</sup> On the Rwanda conflict, the Chinese also believed that “[r]esort to armed force or mandatory measures would only worsen the situation there” and they abstained again.<sup>423</sup> Regarding to Resolution 794 on the Somalia conflict, China voted for this resolution, but, kept reservations on the authorization of military actions by certain countries.<sup>424</sup>

Nonetheless, when it comes to the new millennium, the Chinese government has hardly blocked the use of force for providing and facilitating *pure* humanitarian assistance. Same as Russia, on the issues of the Kosovar conflict, the Chinese condemned NATO’s military actions on the grounds that the excessive use of force constituted an aggression against a sovereign State.<sup>425</sup> As to the use of force in Libya, the Chinese government held a quite ambiguous position. In the 6498<sup>th</sup> meeting of the Security Council, on the one hand, China reiterated its constant opposition to “the use of force in *international relations*”; and on the other hand, it supported the Security Council taking appropriate and necessary action to resolve the crisis in Libya and it attached “*great importance*” to the establishment of a no-fly zone over Libya. China then abstained from voting for Resolution 1973.<sup>426</sup> In the 6531<sup>st</sup> meeting on the protection of civilians in armed conflicts, the Chinese further held that the protection measures should observe “the principles of *objectivity* and *neutrality* and *avoid* taking sides in local political disputes or even becoming a party to the conflict.” They supported the international community providing *constructive* assistance which “must be done through implementation of Security Council decisions in a *comprehensive* and *strict* manner.”<sup>427</sup> In this sense, like Russia, the Chinese are not principally against the use of force for saving strangers any more, as long as the use of force is limited in scope to *strictly* implementing humanitarian assistance. We can also see that the Chinese opposition in relation

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<sup>422</sup> S.C.O.R, 3106<sup>th</sup> meeting, 50.

<sup>423</sup> S.C.O.R, 3392<sup>nd</sup> meeting, 4.

<sup>424</sup> S.C.O.R, 3145<sup>th</sup> meeting, 16-18.

<sup>425</sup> S.C.O.R, 3988<sup>th</sup> meeting, 12-13; 3937<sup>th</sup> meeting, 14.

<sup>426</sup> S.C.O.R, 6498<sup>th</sup> meeting, 10.

<sup>427</sup> S.C.O.R, 6531<sup>st</sup> meeting, 20-21.

to a relevant Security Council mandate for Syria lies in the worry about a potential regime change resulting from the military intervention, like the Libyan precedent.<sup>428</sup>

Comparing with States' attitude regarding the use of force for saving strangers in the Cold War period and even in the beginning of 1990s, where humanitarian considerations were often treated as an unwarranted excuse for the use of force, at the current stage, we can see that States are generally holding a more positive envisagement in this regard. By the past one and a half decades, the traditionally antagonistic States rather criticize the use of force for exceeding the scope of humanitarian assistance, but they not object to regard the humanitarian reasons as a justification for intervention in a proper way. Thus, in this manner, States, especially the major powers, presumably have a basic consensus, though fragile (States may always pull back such consent of their own will), on the *legitimacy* of the use of force for protection of strangers, even without the authorization of the Security Council. This consensus may also sensibly and logically deduced from States' unanimous endorsement of the World Summit Outcome on "*Responsibility to Protect*", which recognizes the responsibility of the international community to act regarding certain humanitarian tragedies. This responsibility may rather come from States' moral conscience on the humanitarian tragedies as a whole, but not be regarded as a consequence of the simple mandate from the Security Council.

Considering the dilemma of international efforts in relation to the Syrian crisis, or other similar issues, the real crux is not whether to use force or not, but is, how to limit the use of force in a proper humanitarian way—protecting civilians but excluding a significant political change—and to rebuild trust and enable negotiations among the major powers in this regard. However, even if no political compromise on this case has been reached in the Security Council, a single State or group of States choosing nevertheless to use force in order to end the outrageous humanitarian atrocities in Syria, although not legally, this may still be regarded as legitimate, following the States' consent in the "*Responsibility to Protect*" and the uncontested acceptance of using force for *pure* and *restricted* humanitarian purpose in the recent practice of States.

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<sup>428</sup> S.C.O.R, 6627<sup>th</sup> meeting, 5; 6711<sup>th</sup> meeting, 9-10; 6810<sup>th</sup> meeting, 13-14; 7180<sup>th</sup> meeting, 13-14.



## Chapter 7: Conclusion

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Looking back over the at least two-hundred-year history of military interventions for the purpose of ending human suffering, we can see the fundamental status of the principle of sovereignty in international relations. Though political, humanitarian, religious and other considerations affect States' decision to intervene or not, they always emphasize their respect and observance of the principle of sovereignty in advance or in their justifications afterwards. Nonetheless, an absolute concept of sovereignty may not actually have been recognized and executed by States through time. During the pre-Charter period, when resorting to war was legal, the major powers often stepped into the internal affairs of weakened States. On the one hand, they claimed to respect the sovereignty of relevant States; but, on the other hand, they often intervened for their private interests and envisaged some pretexts to justify their actions. And, paradoxically, if a state wanted to intervene it could do this legally by simply declaring war.<sup>429</sup>

After WWII, the principle of sovereignty is enshrined also by the United Nations in its Charter. Chapter VII of the Charter has nevertheless limited the content of State sovereignty, which authorizes the Security Council to also take action as response to a State's internal conflict as long as it constitutes a threat to international peace and security. Since the 1990s, the Security Council has actively intervened in domestic conflicts under Chapter VII. Especially after States signed the World Summit Outcome Document regarding the "*Responsibility to Protect*", which imposes a responsibility on State and the international community under certain circumstances of humanitarian atrocities, the restrictions on sovereignty in international relations are further affirmed. However, the limitations on sovereignty do not impair the general prohibition of the use of force; they rather exist parallel from the establishment of the Charter. Single State or a group of States should only act under the UN rules about the lawful use of force.

As evaluated in the last chapter, *unilateral* humanitarian intervention presumably falls outside of the scope of the lawful use of force under the Charter, and the lawful *collective* humanitarian intervention is determined by the political negotiations in the Security Council on a case-by-case basis. This legal dilemma of humanitarian intervention has been depicted and discussed by many scholars in this research area. A resolution to this dilemma remains

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<sup>429</sup> Dinstein, *War, Aggression and Self-Defence*, 65–79.

unfound. While recognizing the illegality of humanitarian intervention without a Security Council authorization, scholars attempt to find legitimacy for this action. Regarding NATO's intervention in Kosovo, Bruno Simma, on the one hand, affirmed the illegality of NATO's action in international law. On the other hand, he demonstrated that NATO's use of force outside the UN Charter had certain legitimacy at the time, by following the thrust of the existing Security Council resolutions in a state of humanitarian emergency, where "political and moral considerations may appear to leave no choice but to act outside the law."<sup>430</sup>

Going through States' behavior in the Security Council in relation to humanitarian intervention after the end of Cold War, States generally express their concerns on the humanitarian atrocities and even certain consensus is presumably reached among States in this regard. It might nevertheless be too optimistic to think that certain decisive powers, i.e. Russia and China, would approve a *unilateral* humanitarian intervention skipping over an authorizing procedure of the Security Council, which was in their view a red line between legality and illegality under existing international law. However, as Simma stated in his declaration regarding *Kosovo's declaration of independence* in ICJ, the existing international law is rather an "anachronistic, extremely consensualist" vision.<sup>431</sup> *De lege ferenda* should move beyond this vision. Here I recognize the legitimacy of humanitarian intervention without Security Council authorization in an emergency, by following the established States' consensus in this regard and as a moral necessity. However, this is not to endorse a *laissez-faire* policy to *unilateral* humanitarian intervention, as this might be even more destructive to international peace and security. The international community should always hold prudence in its deliberation. Only if the last effort to seek a Security Council authorization is exhausted, the international community may resort to the use of *unilateral* force to end the humanitarian atrocities.

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<sup>430</sup> Simma, "NATO, the UN and the Use of Force," 22.

<sup>431</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. I.C.J.,2010, "Declaration of Judge Simma". Available at: <http://www.icj-cij.org/docket/files/141/15993.pdf>

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