Humanitarian Intervention: In the Process of Legalization?

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ABSTRACT

Humanitarian intervention is one of the most debatable concepts in the field of international relations and international law. Most of the debate surrounding the concept of humanitarian intervention is centered on its legality, and with the absence of any authoritative decision as to whether it is a legal practice or not, one's only recourse is to assess existing literature in the hope of resolving the debate as to the legality of humanitarian intervention in international law. Hence, this thesis not only traces the origins of the practice of humanitarian intervention or questions the definitions which have been provided for the concept, but it also examines how the problem of the legality of humanitarian intervention has been debated in literature and/or doctrine using the vocabulary of Article 38(1) paragraph 4. Moreover, it examines the motives of the intervening agents, and more importantly, this work seeks to determine if the practice of humanitarian intervention is indeed in the process of becoming legalized, or whether the future of humanitarian intervention lies in the theory of fragmentation of international law. By assessing and identifying whether humanitarian intervention is in conformity with international law or not, this thesis hopes that it would provide a better understanding of the concept of humanitarian intervention, and thus help clarify some of the controversies which have surrounded interventions such as Kosovo and Libya.

Keywords: Humanitarian Intervention, Process of Legalization, Process Theory, Theory of Fragmentation, Discourse Analysis.

ÖZ

İnsani müdahale, uluslararası ilişkiler ve uluslararası hukuk alanında en tartışmalı kavramlarından biridir. İnsani müdahale kavramı konusundaki tartışmaların çoğu hukuksallık ile ilgilidir. Tartışmanın ana nedeni konu ile ilgili herhangi bir hukuk kuralı yada mahkeme kararı şeklinde bağlayıcı bir hükmün bulunmamasıdır. Bu çalışmada, uluslararası hukuk alanında insani müdahale kavramının yasallığı konusundaki mevcut literatür değerlendirilmektir. Bu nedenle, bu çalışmada hem insani müdahale kavramına ilişkin sorular tartışılmakta hem de bu kavramın litaratürdeki yeri değerlendirilmektedir. Ayrıca çalışma, müdahale etkenlerinin sebeplerini incelemekte ve insani müdahale uygulamasının yasallaşma süreci içinde yer alıp almadığını tartışmaktadır. Bu tartışma yapılırken uluslararası hukukun parçlanma teorisi ve süreç teorisi ele alınmaktadır. Bu çerçevede, insani müdahalenin uluslararası hukukla uyum içinde olup olmadığını değerlendirilerek, bu kavramın daha iyi anlaşılmasının sağlanması amaçlanmaktadır.

Anahtar Kelimeler: İnsani Müdahale, Hukukilişme Süreci, Süreç Teorisi, Parçalanma Teorisi, Söylem Çözümlemesi

DEDICATION

This thesis is dedicated to Barrister Akwen Achu. You remain in our hearts forever.

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LIST OF ABBREVIATIONS

UN	UNITED NATIONS
UNSC	UNITED NATIONS SECURITY COUNCIL
AU	AFRICAN UNION
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
R2P	RESPONSIBILITY TO PROTECT
NATO	NORTH ATLANTIC TREATY ORGANIZATION
ICRC	INTERNATIONAL COMMITTEE OF THE RED CROSS
ICJ	INTERNATIONAL COURT OF JUSTICE
ICC	INTERNATION CRIMINAL COURT
OPD	OBLIGATION, PRECISION, DELEGATION
WTO	WORLD TRADE ORGANIZATION
UHI	UNILATERAL HUMANITARIAN INTERVENTION

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Chapter 1

INTRODUCTION

Humanitarian intervention is one of the most debatable concepts in the field of international relations and international law. So far, there has been no agreement as to whether it is a legal concept or not. This controversy surrounding the concept of humanitarian intervention was only compounded when on the 20th of March, 1999, '*Operation Allied Force'* was undertaken by NATO without the backing of the United Nations' Security Council as is required under Chapter VII of the Charter of the United Nations which sets out the rules governing the response to matters pertaining to international peace and security. This NATO campaign in Kosovo went on for a period of seventy seven days. Faced with international criticism as to why NATO intervened militarily in Kosovo without the authorization of the Security Council, British Prime Minister, Tony Blair contended that the NATO intervention in Kosovo was consistent with the humanitarian whims of the UN Charter. In fact, he posited that intervention (armed) in a state was allowable if the reason for the intervention was to protect the human rights of the population of that state from its government.[1] NATO claimed that its intervention in Kosovo was based on humanitarian needs and since then a number of interventions have been carried out using the justification of humanitarian necessity. This makes one wonder how such a controversial concept, which is still very hotly debated, can and is used increasingly to justify military actions in some cases,

[1] John, Sloboda, and Chris Abbott. "The "Blair Doctrine" and After: Five Years of Humanitarian Intervention." *Open Democracy: www. opendemocracy. net (accessed 9 August 2013)* (2004). 1.

meanwhile in other cases like Rwanda and Syria where obviously the international community should have called on the right to intervene militarily for humanitarian reasons, nothing was done. The controversy surrounding the legality of humanitarian intervention, especially considering the different responses to cases like Rwanda and Kosovo means that there is a rich and growing literature on humanitarian intervention.

The literature on humanitarian intervention so far has provided no definitive answer as to what humanitarian intervention is. One can hardly identify any definition which has been accepted universally as the definition for the concept of humanitarian intervention. The absence of an authoritative decision on the legality of humanitarian intervention has made the concept a controversial one at best. Hence, existing literature debates the definitions and conditions which, allegedly, justify intervention for humanitarian purposes. Most of the debate surrounding humanitarian intervention is centered on the legality of the practice. Is humanitarian intervention legal, or is it illegal? Consequently, the primary focus of the analysis in this thesis would be on assessing the legality of humanitarian intervention based on existing literature. This is important because the practice of humanitarian intervention shows no sign of ending anytime, and with the absence of any authoritative decision as to whether it is a legal practice or not, one's only recourse is to assess existing literature in the hope of resolving the debate as to the legality of humanitarian intervention in international law. It is imperative that one determines the position of humanitarian intervention in order to bring to an end the controversies surrounding the practice. In cases of gross violations of human rights, do states individually have the right to intervene in order to stop these violations? In an age where the respect of human rights is of utmost importance, what recourse do states have

if one state decides to violate the rights of its citizens? Does international law give states such a right to intervene in order to restore these abused rights? Considering that till date there has been no authoritative decision as to whether states have such a right or not, how does one identify if this practice of humanitarian intervention is in conformity with international law? Here, lies the importance of this thesis. This work taking into consideration that the practice of humanitarian intervention is not regulated by the UN Charter, nor is there any authoritative decision by the International Court of Justice as to the legal standing of the practice, analyzes the legality of humanitarian intervention by focusing on existing literature and doctrine. By doing so, this thesis aims to find answers within the literature as to whether the practice is legal or not, and hence, contribute to the discourse on humanitarian intervention and if possible help to make the concept a less controversial one. Thus, emphasis would be placed not only on the debates surrounding the definitions and alleged conditions under which humanitarian intervention takes place, but also on examining how the problem of the legality of humanitarian intervention has been debated in literature and/or doctrine using the vocabulary of Article 38(1) paragraph 4. This thesis also examines the motives of the intervening agents, and more importantly, this work seeks to determine if the practice of humanitarian intervention is indeed in the process of becoming legalized. By assessing and identifying whether humanitarian intervention is in conformity with international law or not, this thesis hopes that it would provide a better understanding of the concept of humanitarian intervention, and thus help clarify the controversies which have surrounded interventions such as Kosovo and Libya.

The definitions which would be analyzed have been provided by different authors and focus on a number of issues ranging from the purpose of the intervention, who gives the authority to intervene, the means of intervention (threat of use of force or use of force), as well as the outcome of the interventions. The contentious nature of humanitarian intervention is not made any easier by the fact that there is no normative regulation and practically no jurisprudence on the subject. In fact, the UN Charter makes no mention of the term humanitarian intervention. This is and should be the starting point of any discussions on the concept of humanitarian intervention. It is the opinion of this thesis that a universally accepted definition for humanitarian intervention would go a long way in helping resolve the contentious nature of the concept.

It is important to note that although the NATO intervention in Kosovo is the starting point of the discussions in this thesis, the Kosovo intervention was certainly not the first case of humanitarian intervention. In fact, this thesis would provide a lay out of a number of humanitarian interventions which date back to times as early as the 15th century right up to the 20th century. It will also highlight and explain that even before the proliferation on discussions surrounding humanitarian intervention after Kosovo, the legality of humanitarian intervention had as well been a contested issue as early as the times of Hugo Grotius, the father of international law. Hence, this debate on the legality of humanitarian intervention is not a novel one.

Emphasis is laid on the wordings of Article 38(1) d of the Statute of the ICJ[2] because when the court was ceased upon by former Yugoslavia after the Kosovo intervention, the court did not provide a ruling on whether humanitarian intervention was legal or not.[3] Therefore, without an authoritative ruling by the Court on this subject, one can only focus on doctrine as a possible means of resolving the contested nature of the concept. This is in line with the vocabulary of Article 38 which authorizes the Court to refer to the teachings of the most highly qualified publicists as subsidiary means for the determination and interpretation of rules of law.[4] Hence, this work will seek to determine if humanitarian intervention is understood in the doctrine to be or not to be in conformity with international law.

The motives and conditions under which humanitarian interventions are carried out will also be questioned in this work, and the argument will be made that humanitarian intervention is not carried out because of some altruistic reason or reasons, but it is based on the geo-political and economic calculations of the intervening powers. In order to determine this, the cases of Kosovo, Rwanda, Libya and Syria will be used. However, it should be noted that the above stated cases will not be used as case studies, but rather as illustrative of the various arguments explained in the work.

This thesis will also seek to determine the position of humanitarian intervention in the process theory and legalization debates. In an effort to ascertain this, Abbot et al. test of

[2] Aldo Zammit, Borda. "A Formal Approach to Article 38 (1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals." *European Journal of International Law* 24, no. 2 (2013): 655.

[3] Ademola, Abass. (2012). *Complete International Law*. Oxford University Press, 423.

[4] Borda. "A Formal Approach to Article 38 (1)(d)" 655.

obligation, precision and delegation will be used.[5] In the end, a determination would be made if humanitarian intervention is in the process of legalization or not. On another note, one also wonders if it is possible that the concept of humanitarian intervention has its future in the theory of fragmentation of international law.[6] Given that there has been a recent proliferation in specialists law ranging from 'human rights law' to 'law of the sea' to 'refugee law', is it possible that the lack of any convincing answer as to whether humanitarian intervention is illegal or not has made it inevitable that the problem eventually is dealt with in the domain of the fragmentation of public international law. One is also left to wonder if the legalization of humanitarian intervention may contribute to further fragmentation of international law. This is especially important because as would be seen in this thesis, the concept of humanitarian intervention suffers from a very low degree of legalization.

Focus in this work is on the debates surrounding the contested notion of humanitarian intervention. The concept of the Responsibility to Protect (R2P) is only mentioned sparsely as an emerging norm in international law, and not as a focal point of discussions and analysis. This is because the writer believes that contrary to R2P which in comparison is much less contentious and to an extend does function in the world of ideas, the concept of humanitarian intervention is still very controversial, hence warrants more attention. However, one notes that although R2P is not an important component of

[5] Kenneth W. Abbott,. Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." *International Organization* 54, no. 03 (2000):405-406.

[6] Matti Koskenniemi. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the study group of the International Law Commission." (2014).

the discussions in this thesis, there is a growing interest in R2P in the doctrine on humanitarian intervention. Nevertheless, focus in this work has assiduously been laid on the discussions surrounding the concept of humanitarian intervention with very little mentioned on the notion of the responsibility to protect. This however does not mean that humanitarian intervention is too dissimilar to R2P. As will be explained later on in this work, both concepts do have a lot in common.

This thesis aims to contribute to the discussions and already rich field of academic discourse on the concept of humanitarian intervention. In a bid to accomplish this, a number of questions will be raised and tentative answers provided, not only as to the legality of humanitarian intervention as debated in the doctrine, but also to the degree of legalization of humanitarian intervention. In this vein, this thesis will in the end provide two opinions; one on the legality of humanitarian intervention, and the other as to whether the practice of humanitarian intervention is indeed in the process of becoming legalized in public international law. This thesis will contribute as much as it can to the discourse on the legality of humanitarian intervention.

1.1 Research Questions

The main purpose of this thesis is to contribute to the already rich discourse on humanitarian intervention, the ongoing debate concerning its nature and whether humanitarian intervention is becoming legalized under public international law. This question is addressed through the critical examination of 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law' (Art.38 (1) para 4).

In order to do this, this thesis asks a number of more specific questions: How accurate are the current definitions which have been provided for the concept of humanitarian intervention? How is the legality of humanitarian intervention debated in the doctrine? Under what conditions or circumstances can a state or group of states intervene militarily in another state for humanitarian reasons? How can the concept of humanitarian intervention and its evolution be explained using the '*process theory*'?[7] Finally, is it possible that the future of humanitarian intervention lies in the theory of fragmentation?

1.2 Research Methodology

In a bid to answer the above mentioned questions, this research work will principally make use of discourse analysis. The researcher will use discourse analysis in explaining and discussing the various arguments and positions of different writers on the nature and legality of humanitarian intervention. It will focus on secondary sources: books and journal articles.

For the purposes of this thesis, one would also employ Rosalyn Higgins' process theory as well as Abbot et al theory of legalization in order to determine if humanitarian intervention is in the process of becoming law, and if so, in which position does it find itself in this process of legalization. Abbot's OPD test would be employed for this purpose. The theory of fragmentation of international law is also discussed in this thesis. The question is asked if the future of international law lies more in the theory of fragmentation rather than in the theory of legalization.

[7] Rosalyn Higgins. *Problems and Process: International Law and How We Use it.* Oxford University Press, 1995. Chapter 1: "The Nature and Function of International Law".

Although the focus of this thesis is a discourse analysis, normative analysis would be utilized when discussing the position of humanitarian intervention under customary international law, albeit limitedly. This would be done when explaining primary sources of information such as the United Nations Charter, especially Articles 2(4), 42 and 51, as well as; General Assembly Resolution 2625 (XXV) (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations);[8] General Assembly Resolution 2131 (XX) (Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty);[9] General Assembly Resolution 2793 (XXVI) (Question Considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 December 1961),[10] amongst many others.

Historical analysis will be used to discuss and compare the origins of the doctrine of humanitarian intervention, as well as the debates which are recorded to have taken place between some of the great minds like Grotius (The father of International Law) as well as others like Vitoria[11] and De Martens.[12]

[8] UN General Assembly Resolution 2625 (XXV*),'." Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations 24 (1970).*

[9] General Assembly "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UN resolution 2131 (XX), 21 December 1965. 17." *UN Resolution*1 (1965).

[10] UN General Assembly Resolution 2793 (XXVI). Question Considered by the Security Council at Its 1606th, 1607th and 1608th meetings Held on 4, 5 and 6 December 1971." *UN Doc. A/RES/2793 (XXVI), December* 7 (1971).

[11] Scott, James Brown, and Francisco de Vitoria. *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations*. The Lawbook Exchange, Ltd., 2000. Quoted by Abiew, Francis Kofi,

In a nutshell, in order to be able to determine if humanitarian intervention is in the process of legalization, this research work will examine existing literature on the legality of humanitarian intervention, the process theory, the theory of legalization as well as the theory of fragmentation.

The above questions will be discussed and analyzed with illustration to specific references like Kosovo, Rwanda, Libya, and Syria. It should be noted however that these are not case studies, but rather these cases will be mentioned only as illustrative of the various arguments and positions expounded in this thesis.

1.3 The Structure of the Thesis

Chapter one of this thesis explains the importance of the topic. It also enunciates what the researcher intends to use as research questions for this thesis, as well as the research methods which would be employed to carry out this research.

The second chapter of the thesis is the literature review. It is divided into a number of sections. The first section deals with the origins of the practice of humanitarian intervention. The second section focuses on the confusions surrounding the definition of the concept of humanitarian intervention. The third and last section of this Chapter, questions the motives and conditions under which humanitarian intervention is and can be conducted.

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ed. *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. Martinus Nijhoff Publishers, 1999.

[12] F. De Martens. *Traité de droit international*. Vol. 1. Chevalier-Marescq et cie., 1883. Chevalier-Marescq et cie.. 398. Cited in Jean-Pierre L. Fonteyne. "Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter, The."*Cal. W. Int'l LJ* 4 (1973): 182.

Chapter three of this thesis is a focus on the discussions and analysis of my research questions. Chapter three is principally a discourse analysis and centers on how the legality of humanitarian intervention has been discussed in literature by other authors. This section also brings up the question of altruism in humanitarian intervention.

Chapter four of the thesis is centered on the theoretical underpinnings which are used in this work. The first part of the chapter explains the process theory as expounded by Higgins, while the second explains the theory of legalization, and third the concept of fragmentation. The last part of this chapter is focused on reconciling the process theory to the theory of legal and the notion of fragmentation in international law.

Chapter five is the concluding chapter. In the first section, the question as to the position of humanitarian intervention in the process theory would be explained using Abbot's OPD test. This work will also in this chapter, provide two concluding opinions; one on the issue of legality, and the second on the issue of legalization.

Chapter 2

DEFINITIONS AND PERSPECTIVES ON THE CONCEPT OF HUMANITARIAN INTERVENTION

The concept of humanitarian intervention is a hugely controversial one amongst the academia and international lawyers. There is even no consensus as to how the term should be defined. Humanitarian intervention remains till date contentious. In fact, Anthony Lang notes that the disagreements over the definition of the term points not only to the importance and primacy of definitions, but also the difficulties associated with defining the term, as well as the controversies surrounding the concept of humanitarian intervention itself.[13] On the one hand, there are those like Lilich, Wolf, Reisman, Teson, Falk, and McDougal[14] who argue that interventions for humanitarian reasons do not violate international law, and are therefore legal, while on the other hand Simma, Henkin, Hilpold, Brownlie, Hurd, and Abass[15] argue that by all accounts,

[13] Anthony F. Lang Jr. *Just intervention*. Georgetown University Press, 2003.P 2.

[14] Richard B. Lillich. *Humanitarian Intervention and the United Nations*. Vol. 1972. Univ of Virginia Pr, 1973.Univ of Virginia Pr., Daniel Wolf. "Humanitarian Intervention." *Mich. YBI Legal Stud.* 9 (1988): 333., Michael W. Reisman. "Sovereignty and Human Rights in Contemporary International Law." *The American Journal of International Law* 84, no. 4 (1990): 870-871., Fernando R. Teson. "Collective Humanitarian Intervention." *Mich. J. Int'l l.* 17 (1995):, 323-370., Richard Falk. "Complexities of Humanitarian Intervention: A New World Order Challenge, The." *Mich. J. Int'l L.* 17 (1995):491-514., Michael Reisman and Myres Smith McDougal. *Memorandum Upon Humanitarian Intervention to Protect the Ibos*. 1968.

[15] Bruno Simma. "The Charter of the United Nations: A Commentary (1995)."*See also id* (1993): 114-5. Louis Henkin. "Kosovo and the Law of" Humanitarian Intervention"." *The American Journal of International Law* 93, no. 4 (1999): 824-828., Peter Hilpold. "Humanitarian Intervention: Is there a need for a Legal Reappraisal?." *European Journal of International Law* 12, no. 3 (2001): 437-468.., Ian Brownlie. "International Law and the Use of Force by States Revisited."*Chinese J. Int'l L.* 1 (2002): 1., Ian Hurd. "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World." *Ethics & International Affairs* 25, no. 03 (2011): 293-313.

humanitarian intervention is an illegal practice and is in violation of the UN Charter system. Others like Rosalyn Higgins[16] opine that although illegal, the practice of humanitarian intervention might be legitimate. The purpose of this chapter is to critically analyze the literature concerning the concept of humanitarian intervention; in particular its origins, definition and conditions under which a state or group of states can intervene militarily into another for humanitarian reasons, based on existing literature. This chapter is a critical analysis of the literature on humanitarian intervention, and because humanitarian intervention is not regulated by international law, literature review is particularly important.

2.1 Tracing the Origins of Humanitarian Intervention

Contrary to what one might think the concept and practice of humanitarian intervention dates back several centuries ago. This concept dates as far back as Thucydides who had clamored for general laws of humanity which would give hope and salvation to those who were in distress.[17]

In fact, as early as the 15th century, Spanish Scholar De Vitoria was quoted as saying that the Spaniards were justified to intervene in order to protect the rights of Christians who had been forcefully converted to other faiths.[18]

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[16] Higgins, *Problems and Process,* 252.

[17] Betty Radice. "Thucydides: History of the Peloponnesian War trans. Rex Warner." (1972), p 245.

[18] *Francis Kofi* Abiew. *ed. The Evolution of the Doctrine and Practice of Humanitarian Intervention. Martinus Nijhoff Publishers, 1999,* 33.

In *De Jure Belli ac Pacis*, Hugo Grotius had also argued that if the injustice against a people or group were visible such that good living people could not approve of it, then there existed a right on the society to stop the tyranny.[19] Bass asserts that Grotius had made reference to Constantine's war against Maxentins and Licinus as well as Roman threats against the Persians who had been prosecuting Christians. Hence, Bass opines that humanitarian intervention had always been familiar practice in Europe, and was understood as such by the countries intervening and in some instances, even the country whose sovereignty was going to be violated. Bass also states that much of the objections to this concept voiced today including the right of sovereignty, objections to the use of force, as well as the intentions and motivations of the intervener had also been echoed in the 19th century and even beyond.[20]

Albiew also purports that interventions for humanitarian reasons has for a long time been a feature in the international system. He cites interventions by the Roman Empire as well as the religious wars during the 16th and 17th centuries as examples of such interventions for humanitarian concerns.[21]

As early as 1904, US President Theodore Roosevelt had said: "In a few cases, depending on the degree of atrocity and upon our power to remedy it…we could interfere by force

[19] Hugo Grotius. "De jure belli ac pacis, 1625." *On the Law of War and Peace*(1950). cited by Bass, Gary Jonathan. *Freedom's battle: The Origins of Humanitarian Intervention*. New York: Alfred A. Knopf, 2008, 4.

[20] Ibid., 5.

[21] Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 30.

of arms… to put a stop to intolerable conditions".[22] This was a message not only for the Americans, but a warning to the Spanish who were at the time committing atrocities in Cuba. Roosevelt had just given a stunning message on what is called humanitarian intervention today.

A number of humanitarian interventions were noted before the First World War; Franco-British intervention in Greece in 1827 to stop the Turks from further shedding blood, Franco-British intervention in the Kingdom of Sicily in 1856, the 1860 intervention by Austria, France, Russia, Prussia and Britain in Syria after the massacre of 6000 Christian Maronites, the European powers intervention in Crete in 1866, Bosnia in 1875, Bulgaria in 1877, Macedonia in 1887, as well as the US intervention against Spain in Cuba in 1898.[23] Fonteyne also notes that the crusades could be classified as interventions for humanitarian reasons. However, he insists that the institution of humanitarian intervention really became prominent in the 19th century.[24] Meanwhile Ganji posits that pre-Charter humanitarian intervention were largely restricted to ignominious cases in the East of Europe.[25]

Due to its contested nature, the practice of humanitarian intervention was widely debated in the pre-Charter times. Some scholars rejected the notion of humanitarian intervention.

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[22] Bass, *Freedom's Battle,* 2.

[23] Ben Kioko, "The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention." *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 85, no. 852 (2003): 807.

[24] Jean-Pierre L. Fonteyne, "Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter, The."*Cal. W. Int'l LJ* 4 (1973): 205-206.

[25] Manouchehr Ganji, *International Protection of Human Rights*. Librairie E. Droz, 1962. 22-24.

Latin American scholars like Pereira objected to the legality of humanitarian intervention by arguing that outside forces had no direct or indirect right to intervene in the internal affairs/businesses of other states even if these so-called internal businesses violated norms of international law.[26] This position was also supported by Anglo-Saxon writers like Halleck who questioned the principle of humanitarian intervention by noting that humanitarian intervention violated the vital principles of sovereignty and non-intervention, and as such could not be legally right.[27]

On the other hand, there were writers such as Harcourt who in support of humanitarian intervention said, "Intervention is a question rather of policy than law", referring to the justification why it should be practiced. His argument hinged on the fact that law and policy were two separate notions, and although international law did not espouse the right to intervene for humanitarian reasons, policy considerations and respect for human rights also had to be considered.[28] De Martens on his part posited that 'civilized nations' had the right to intervene in the internal affairs of 'uncivilized nations' for religious and humanitarian considerations.[29]

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[26] Rodrigues Pereira Lafayette, *Princípios de Direito Internacional*. Vol. 1. Jacintho Ribeiro dos Santos, 1902. 97-98, Cited in Hildebrando, Accioly. "Traité de Droit International Public, tome I." (1940), 283.

[27] Henry Wager Halleck, *International Law: or, Rules Regulating the Intercourse of States in Peace and War*. HH Bancroft, 1861. HH Bancroft, 340. Cited by Fonteyne, Customary International Law Doctrine of Humanitarian Intervention, 207.

[28] William Vernon Harcourt, *Letters by Historicus on Some Questions of International Law: Reprinted from'The Times' with Consideralble Additions...* London: Macmillan, 1863. 14. Cited Fonteyne, Customary International Law Doctrine of Humanitarian Intervention, 208.

[29] Fonteyne, *Customary International Law Doctrine of Humanitarian Intervention*,222-224.

Worthy of note is the fact that in the period immediately before World War One the majority of writers and states conceded principally that there existed a right to humanitarian intervention.[30] This however changed with the coming into force of the UN Charter in 1945 which prohibited the use of force in the conduct of international relations, with the only exceptions being in individual/collective self defense and collective enforcement actions. All the same, this has not stopped states from indulging in the practice of intervening in the internal affairs of other states under the banner of humanitarian intervention. Assuming that states do have ulterior motives for being party to humanitarian intervention, but rarely use the defense of humanitarianism,[31] the following are a number of interventions which can be classified as humanitarian interventions; the intervention by India in East Pakistan (1971), intervention by Vietnam in Cambodia (1978), the Uganda-Tanzania war (1979), UN intervention in Somalia (1992-1993), the NATO intervention in Kosovo (1999), East Timor (1999), the joint intervention in Libya (2011), and the intervention in the Ivory Coast (2011).

All things considered, the practice of humanitarian intervention is not a novel one. From the times of Thucydides till today, there has always been a debate as to the legality of humanitarian intervention. As earlier mentioned, during the period just before World War 1, the majority of writers and states agreed that there existed a right to intervene for humanitarian reasons. Notwithstanding, and as stated by Brownlie, humanitarian

[30] Ibid., 223.

[31] Daniel H. Joyner "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm." *European Journal of International Law* 13, no. 3 (2002): 603.

intervention might have been legal before 1945, but was certainly banished by the UN Charter.[32]

In a nutshell, taking a look at the historical underpinnings of the concept of humanitarian intervention, I think it would be fair to assert as does Bass that the practice of humanitarian intervention originated as an intrinsically liberal enterprise engrossed by the progress of liberal institutions and ideas.[33]

2.2 Defining Humanitarian Intervention

There is no universally accepted definition of the concept of humanitarian intervention and therein lies one of the many controversial aspects about the concept. This is a very important question because in as much as there is no consensus as to the legal status of the practice of humanitarian intervention, there is an even bigger debate as to what the term 'humanitarian intervention' actually means. This would be the first task of this chapter, analyzing and comparing the definitions which have been provided for the concept of humanitarian intervention. Many authors have provided differing definitions for this concept, all which cannot be analyzed in this work.[34] Hence, only some of these definitions would be discussed in this thesis.

The first is that of the Danish Institute of Foreign Affairs which explains that humanitarian intervention is any act of coercion undertaken by states which involves the

[32] Brownlie, *International Law and the Use of Force*, 23-24.

[33] Bass, *Freedom's battle*, 7.

[34] For other definitions of the concept of humanitarian intervention, see Brownlie (1974; 217), Teson (1988; 1), Roberts (2002; 5), Brown (2006; 135), Welsh (2006; 3).

use of force on the territory of another state without prior approval from that 'given state's' government. The Institute goes further to explain that the purpose of the use of armed force should be to put an end to gross violations of human rights. It is worth noting that this use of force can either be with or without the approval of the United Nation's Security Council.[35] The persons who coined this definition clearly considered that such use of force might or might not be with the consent of the United Nations Security Council (UNSC). One therefore asks the question as to whether authorization by the Security Council should or should not be an element of the definition of humanitarian intervention. One also ponders if consent by the UNSC legalizes the application of force on the basis of humanitarian concerns, or if non-consent illegalizes the application of such force. Again, if the authorization is given by the UNSC, does it make the use of such force legal? Simons[36] opines that there is no explicit provision in the UN Charter for the protection of human rights. Hence, she argues that there is no agreement amongst legal scholars as to whether the UNSC has the legal standing to authorize the use of armed force to stop widespread violations of recognized international human rights and norms.[37] This is just one opinion; others have differing

[35] Danish Institute of International Affairs 1999, *Humanitarian Intervention: Legal and Political Aspects*, submitted to the Minister of Foreign Affairs, Denmark, 7 December 1999 (called the "Danish Institute Report").

[36] Penelope C. Simons, Humanitarian Intervention: A Review of Literature, Ploughshares working paper 01-2, also available at www.ploughshares.ca/CONTENT/WORKING%PAPERS/wp012Ibid , pp. 3-4

[37] Kioko,The Right of Intervention under the African Union's Constitutive Act, 809-810.

opinions on whether legalization by the Security Council validates an intervention for humanitarian purposes.[38]

Kofi says that humanitarian intervention is a theory of intervention based on humanity grounds which recognizes the right of a given state to exercise international control over the actions of another state with regards to its internal sovereignty if contrary to the laws on humanity.[39]

Holzgrefe and Keohane, posit that it is "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied".[40] Although similar in many respects, the definitions of humanitarian intervention provided by the Danish Institute and Holzgrefe and Keohane have a number of differences.

The definitions are similar in that they both agree that there must be a grave violation of human rights and also that the consent of the host nation is not needed by the intervener or interveners. However, there lie some significant differences. First, Holzgrefe's definition indicates clearly that humanitarian intervention involves not only the use of

[38] Sean D. Murphy, "*Humanitarian Intervention: The United Nations in an Evolving World Order*." Vol. 21. University of Pennsylvania Press, 1996, 287-288., Fernando, R. "Teson, Humanitarian Intervention: An Inquiry into Law and Morality." (1997): 33., Henkin, *Kosovo and the Law of Humanitarian Intervention*, 826.

[39] Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. 31.

[40] Holzgrefe, & Keohane, *Humanitarian intervention*, 18.

force, but the 'threat' of use of force. The definition by the Danish Institute on its part mentions only the use of armed force, and not the threat of use of force. Second, Holzgrefe's definition is pretty much direct in emphasizing that this intervention should be to protect human rights of the citizens other than the intervener's citizens. The 'Danish" definition is ambiguous with regards to this, thus opening questions as to whether the use of armed force is to protect the rights of the intervener's citizens or that of the host state. Third, the definition by the Danish Institute indicates that humanitarian intervention either operates with or without the consent of the UNSC. One therefore is left to ask if the consent of the UNSC legalizes humanitarian intervention, and on the other hand, if non-approval by the UNSC illegalizes the intervention. Besides, the definition by Holzgrefe makes no allusion as to the approval of the UNSC. At this stage, one needs to start thinking about Articles 2(4) and 51 of the UN Charter which prohibit the use of force except in self-defense.

Bhikhu Parekh views humanitarian intervention as those acts of intervention by a foreign state in the internal affairs of another for the purposes of putting to an end the sufferings caused by the misuse of authority by that state. It also should entail creating conditions under which a sound and suitable civil authority can emerge after the said intervention.[41] What is very significant about Parekh's definition of humanitarian intervention is that he takes into consideration the aftermaths of the intervener's actions. In other words, how the state will fare after the intervention. He attaches importance to the creation of conditions under which viable structures of civil authority can emerge.

[41] Bhikhu Parekh, "Rethinking Humanitarian Intervention." *International Political Science Review* 18, no. 1 (1997): 147.

Hence, if so-called intervention based on humanitarian reasons fails to create a civil structure capable of sustaining itself after the intervention, then does this make such an intervention illegal? This definition is complex because the presumption is such that one can determine that an intervention is humanitarian or not only after the intervention has ended and one is able to assess if this has created a stable environment suitable for civil authority. The complication with this definition is that one needs to identify an intervention as humanitarian or not before it takes place, not after the intervention has taken place. Nevertheless, this definition serves as a good gauge for analyzing the effects of so-called humanitarian interventions. Also, it creates awareness in the minds of the interveners that they have a duty to create conditions suitable for civilian authority after they must have left the country.

According to Verwey, intervention for humanitarian reasons refers to coercive actions undertaken by states on the territory of another state involving the use of armed force in order to put to an end wide scale and serious violations of fundamental human rights such as the 'right to life'. This coercive intervention must be taken at the initiative of the intervening state or states.[42] There are some points to note with regards to this definition. First, Verwey categorically states that humanitarian intervention refers only to coercive action taken by states, at their own initiative which involves the use of force. Thus, one can infer that he means the decision to intervene must be the decision of the interveners, and not some other authority nor invitation by the host country. So, if the authority to intervene is given by an authority, for instance, the United Nation's Security Council,

[42]Wil D. Verwey, "Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective." In *World Orders in the Making*, Palgrave Macmillan UK, 1998, 180.

does this mean that it ceases to be a question of humanitarian intervention? Also, this intervention has to involve the use of force. Second, he asserts that the violations should be that of fundamental human rights (for example, the right to life). Hence, if the rights violated are not of fundamental importance, then the intervention is not warranted. This then brings the question as to what are fundamental human rights. Do we stick to those inalienable rights mentioned in the Universal Declaration of Human Rights (UDHR), or do we conform to the modern understandings of fundamental rights which are ever so widening?

Francioni and Bakker view an intervention for humanitarian reasons as one which involves forcible violation of the sovereignty and territorial integrity of a given state by one or more states, by means of military force in a bid to stop gross violations of human rights in that given state which is either unable or unwilling to stop these violations.[43] It is important to note that in this case, the state whose territorial integrity and/or sovereignty is being violated should either be unwilling or unable to stop these violations of human rights and crimes against humanity from being committed. Also, the intervention should be a forcible one. However, the most important aspect here is that unlike the definitions provided for by Holzgrefe, the Danish Institute, and Verwey, no mention is made of the authorization or non-authorization by the United Nation's Security Council. More importantly, the authors have not made it clear if this forcible intervention has the blessings of the state whose sovereignty has been violated or whether the intervention was upon the initiative of the intervener state or states. This

[43] Francesco Francioni, and Christine Bakker. "Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali." (2013), 3.

raises confusions as to the kind of intervention. This therefore goes that if such forcible intervention was at the behest of the state who suffers the intervention because it was unable to stop the gross violations of human rights within its territory, then it ceases to be a humanitarian intervention. Rather it becomes an issue of 'intervention by invitation'.[44] However, if such an intervention occurs without the consent of the state, then it is an intervention for humanitarian reasons.

Kolb gives probably the most elaborate and explicit definition of the concept of humanitarian intervention.[45] He defines it 'as the use of force in order to stop or oppose violations of the most fundamental human rights…in a third state'. He goes a step forward than Holzgrefe and specifies 'especially' in cases of genocide and mass murder. Again, he asserts that the victims should not be nationals or citizens of the state or states intervening (constitutes an act of self-defense).[46] More importantly, the authorization to intervene should not come from a higher authority such as the United Nation's Security Council. It should be a 'unilateral' decision taken by the intervening state or states. If such intervention is carried out by a number of states together without the authorization of the UNSC, although an action of 'collective intervention' it is still a unilateral action of intervention because the decision to intervene was taken by the states and not some higher authority. Kolb also states that if this consent is given by the third state, then it

[44] See Decision of the International Court of Justice in the Case of Nicaragua para 246., Democratic Republic of Congo v Uganda (Armed Activitieson the Territory of the Congo Cases, paras 42-53).

[45] Note should be taken of the fact that the researcher in no way asserts that the definition provided by Kolb is exhaustive. Nevertheless, it is one of those decisions which come closest to representing almost all the differing ideas which constitute what a humanitarian intervention is.

[46] See case of Entebbe as explained by Rosalyn Higgins. Higgins, *Problems and process*, 246.

ceases to be humanitarian intervention and becomes an act of 'intervention by invitation'.[47]

There are a few points which one notes about Kolb's definition. The first is that Kolb unlike other authors categorizes what he understands as 'fundamental human rights' (genocide and mass murder). This helps to solve the ambiguity surrounding the meaning of 'fundamental' rights. Although others might disagree, at least by this, he gives us a sense of understanding that the violations of human rights must be of such a core and essential manner that it requires intervention (right to life for example). Another point of note is the fact that the cause for intervention should not be to rescue one's own nationals abroad. The most important point however about Kolb's definition, is his insistence on the fact that it should be a 'unilateral' intervention. That is, the decision to intervene should be that of the intervening state, and not some other legal authority such as the UNSC. He goes as far as to elaborate that 'unilateral' does not mean one single state acting alone, but that even a group of states acting 'collectively' without any legal authorization, are effectively undertaking a 'unilateral intervention'.

At this point, a comparison of Kolb's definition of humanitarian intervention with some of the other definitions which have been provided by the other authors above is needed. Both Kolb and the Danish Institute agree that the intervention should involve the use of force. The main difference between the two definitions is that Kolb specifies what he means by gross violations of human rights (mass murder and genocide). Also, unlike

[47] Robert Kolb, "Note on Humanitarian Intervention." *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 85, no. 849 (2003): 119.

the definition given by the Danish Institute, Kolb rejects the notion that that the UNSC can approve a humanitarian intervention. To him, authorization from the Security Council makes it inappropriate for one to bring up the debate of humanitarian intervention because such authorization gives the states involved, 'a legal title for their action'.

Holzgrefe and Kolb agree on pretty much everything apart from the fact that Holzgrefe opines that such an intervention must not only entail the use of force, but the threat of use of such force in itself is an act of humanitarian intervention. Parekh on his part emphasizes on creating suitable conditions for a viable civil authority administration after such an intervention, something which Kolb does not mention.

The definition by Verwey comes closest to that provided by Kolb. Same as Kolb, Verwey insists that the decision to intervene should be that of the intervening state or states. Although he does not go into as much details as Kolb does in explaining what he understands as unilateral intervention. Also, Verwey qualifies what he understands as 'fundamental' rights by giving an example of the right to life, same as Kolb does.

It is imperative that one comprehends the complexities inherent in defining this concept. Former UN Secretary General Kofi Anan is quoted as saying that the term '*humanitarian*' should not be used to describe military operations.[48] Resultantly, he rejects Malone's definition of '*humanitarian action'* which ranges from humanitarian

[48] Kofi Annan 2000, UN Press Release SG/SM/7632. "Military Operations Should not be Described as Humanitarian Action, Secretary-General tells symposium"

responses to crisis and conflict situations, to military intervention. To Anan, the term 'humanitarian' should not be used to describe military operations. He concedes that in rare cases and/or where there is no other option, military action can and should be used for humanitarian purposes, but this should be the exception and not the general principle. He argues that humanitarian action should in no way be confused with military action. He advocates humanitarianism which is not politicized by insisting that governments should not refuse humanitarian aid because of the fear that it might be the first step toward military intervention.[49] As noble as this position is, one must concede that there is no clear cut distinction in today's practice between humanitarian aid and humanitarian intervention. Humanitarian missions today are almost always followed by military action in order to secure peace and prevent further misery. Moreover, attaching the term '*humanitarian'* to intervention gives it an almost altruistic character. However, as noted by Vogel, '*apolitical*' is not a quality which can be associated with humanitarian intervention.[50] Howard Zinn also expounds that "*most wars, after all, present themselves as humanitarian endeavors to help people.*"[51]

Generally speaking, although there are numerous and disparate definitions of the concept of humanitarian intervention, most authors agree on a number of issues. The first is that, humanitarian intervention involves not only the 'use of force', but also the

[49] See definition provided by Kofi Anan of the term Humanitarian *'Kofi Annan 2000, UN Press Release SG/SM/7632'.* "A Person Who Seeks to Promote Human Welfare or a Person Who Advocates Humane Action".

[50] Tobias Vogel, "The Politics of Humanitarian Intervention." *Journal of Humanitarian Assistance* 3 (1996).*3*.

[51]Howard Zinn, (n.d.). BrainyQuote.com. Retrieved July 9, 2016, from BrainyQuote.com Web site: http://www.brainyquote.com/quotes/quotes/h/howardzinn385157.html

'threat of use of force' in the territory of another state.[52] The second is that this use of force and/or intervention can only be possible when there are massive and gross violations of the fundamental human rights of a people. Kolb and Verwey go as far as explaining what they see as fundamental human rights. While Kolb cites genocide and mass murder[53], Verwey cites the right to life.[54] This is very important because it saves one the trouble of determining what fundamental rights are. Without these guidelines provided by Kolb and Verwey, one would be wondering if fundamental rights should relate to those inalienable rights mentioned in the UDHR, or whether we should conform to the modern understandings of fundamental rights which are ever so widening. Also, the intervention should be to protect the rights of citizens other than the intervening state's or states' citizens. It is generally understood and the position of the International Court of Justice that intervention to rescue one's own citizens falls under 'self-defense' and not humanitarian intervention.[55] Third, and probably the most important is the issue of authorization. The bulk of writers agree that the consent of the United Nations' Security Council is not needed for humanitarian intervention. The argument here is that if such consent is given, then the intervention ceases to be a humanitarian intervention, and falls under the category of collective enforcement. It is imperative, as Kolb notes, that for an intervention to be classified as humanitarian intervention, the decision to intervene must come from the state or states intervening, and not from some higher

[52] Holzgrefe, & Keohane, *Humanitarian Intervention, 18.*

[53] Kolb, *Note on humanitarian Intervention*, 18.

[54] Verwey, *Humanitarian Intervention*, 180.

[55] Francioni, *Responsibility to Protect, 3.*

authority or a third state.[56] If this intervention comes from the UNSC, then the debate on legality ceases to exist because then the intervention is covered by Chapter VII of the UN Charter, specifically Article 42 under collective enforcement actions. If the authority to intervene comes from the third state, it falls under 'intervention by invitation' and not under humanitarian intervention.

One cannot also ignore Parekh's view who postulates that for an action to be considered as humanitarian intervention then it should create a suitable environment under which civil authority can emerge by the end of the intervention.[57] The difficulty here is that one needs to identify an intervention as humanitarian before, not after the intervention if not we would be encouraging a 'the end justifies the means' sort of position.

Before concluding this section on the definitions which have been provided for humanitarian intervention, it is imperative that one differentiates between 'unilateral humanitarian intervention' and 'collective humanitarian intervention'. As stated above, unilateral humanitarian intervention refers to the use of force by a state or group of states in the territory of another state without its consent, or authorization from a higher legal authority such as the UNSC in a bid to put to end massive violations of human rights. This is the meaning of humanitarian intervention *sensu stricto, and* is supported by Kolb who argues that no authorization is needed from the Security Council. In fact, Kolb opines that if such an authorization is given by the Security Council, then it ends the legal debate on the concept of humanitarian intervention because it ceases to be an

[56] Kolb, *Note on Humanitarian Intervention*, 18-19.

[57] Parekh, *Rethinking Humanitarian Intervention*, 147

action for humanitarian reasons, and becomes one of collective enforcement under the United Nations Chapter VII of its Charter.[58] Teson makes the case for collective humanitarian intervention.[59] Collective humanitarian intervention in this *sensu largo* refers to the use of force authorized by the UNSC in order to prevent or stop gross violations of human rights in a third state. Teson opines that such an authorization changes the legal status of intervention. That is, the process of voting in the Security Council creates legality. However, for the purposes of this research work, unilateral humanitarian intervention would subsequently be referred to as humanitarian intervention. Not much attention would be paid to the concept of 'collective humanitarian intervention' except when necessary. Hence, since the purpose of this thesis is to assess the legality of the concept of humanitarian intervention, it is fair enough that the focus should be on unilateral humanitarian intervention. Note should be taken of the fact that 'unilateral' as used here does not only mean a single state acting alone. Rather, a group of states acting outside of UN authority also falls under the umbrella of 'unilateral humanitarian intervention'.

This thesis agrees the most with the definition provided by Kolb:

> …the use of force in order to stop or oppose massive violations of the most fundamental human rights (especially mass murder and genocide) in a third State, provided that the victims are not nationals of the intervening State and there is no legal authorization given by a competent international organization...

[58] Kolb, *Note on Humanitarian Intervention*, 19.

[59] Teson, *Collective Humanitarian Intervention*, 42.

Reason being that this definition, covers most if not all of the general points which writers identify as covering the spectrum of humanitarian intervention.

2.3 The Motives and Conditions under which a State or Group of States may Intervene Militarily into Another for Humanitarian Reasons

International law does not regulate or provide specific conditions under which states can intervene militarily into others for humanitarian reasons. One reason for this is due to the fact that there is no agreement as to whether humanitarian intervention is legal or not. Despite these arguments for and against the conformity of humanitarian intervention with international law, there at least is a general acknowledgement that it is widely practiced in today's international relations, and shows no signs of stopping anytime soon. This position was further buttressed by Former UN Secretary General Kofi Anan, who asked how the world would respond to 'a Srebrenica or Rwanda' or other gross violations of human rights if states continued to view interventions for humanitarian reasons as 'an unacceptable assault on sovereignty'.[60] This suggests that rather than vehemently opposing a practice which has showed no signs of stopping despite several criticisms, it would be more pragmatic if the conditions, under which justifiable humanitarian intervention should occur, be defined by an international legal authority. An example of such was the "code of citizenship' proposed by the report of the

[60] UN Secretary General Kofi Anan 2000 Millennium Report to the General Assembly, Restated in International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect (Ottawa: International Development Research Center, 2001), p. 2, para. 1.6.

Independent International Commission on Kosovo, which suggested conditions under which justifiable humanitarian intervention should occur.[61]

Goodman contends that one of the main reasons why states are so fearful of legalizing unilateral humanitarian intervention is the fact that stronger states would use it for ulterior motives.[62] This view is also supported by Abass who posits that the argument that humanitarian intervention can be used and is used as pretexts by states which have ulterior motives to promote their own agendas cannot be taken lightly.[63]

Roberts notes as well that decisions on whether to intervene for humanitarian reasons are based on the interests of the parties involved.[64] However, when the term 'humanitarian' is attached before the word 'intervention', it gives the concept of humanitarian intervention an altruistic undertone and a charitable nuance. It gives the impression that these interventions are void of any national interests by the states involved. Nevertheless, if the theory of realism teaches us anything, it is that states do act based on their national interests.[65] However, Krieg explains that national interests should not be

[61] Independent International Commission on Kosovo. *The Kosovo Report: Conflict, International Response, Lessons Learned*. Oxford University Press on Demand, 2000, 291-294.

[62] Goodman Ryan, "Humanitarian Intervention and Pretexts for War." *American Journal of International Law* (2006): 107.

[63] Abass. *Complete International Law*, 419.

[64] Roberts, Anthea. "Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?." *HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, P. Alston, E. Macdonald, eds., Oxford University Press* (2008). 212.

[65] Richardson (1997). (p. 1) as cited in Andreas Krieg, "National Interests and Altruism in Humanitarian Intervention." In *Motivations for Humanitarian intervention*, pp. 37-58. Springer Netherlands, 2013.

understood purely negatively from an 'economist' standpoint of self-interest or egoism.[66]

Finnemore argues differently. She says that due to changing norms, national interest is no longer the basis for interventions for humanitarian reasons. Military interventions for humanitarian concerns have occurred in many countries today for reasons other than self-interests, and Somalia is an example.[67] Nonetheless, Hilpold notes that the case of Somalia was different because it was a failed state as well.[68]

Notwithstanding the debate surrounding the motives behind the unilateral use of force for humanitarian reasons, several catalogues have provided for conditions under which these interventions should occur. One such catalogue and probably the most authoritative is the 1974 Subcommittee Interim Report on the International Protection of Human Rights. This report posited that the human rights violations must be ongoing, all other non-intervention remedies must have been exhausted, potential intervenor must have first reported to the Security Council, intent of intervenor should not be to affect the Civil structure of the intervene state, it must be for a very short time, as well as a very limited use of force.[69]

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[66] Ibid.,38.

[67] Katzenstein, Peter J. *The culture of National Security: Norms and Identity in World Politics*. Columbia University Press, 1996. citing Finnemore, Constructing Norms of Humanitarian Intervention, 309.

[68] Hilpold, Humanitarian Intervention, 446.

[69] See 'Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law', ILA Report of the Fifty-Sixth Conference (1974) 217

Charney provides an excellent means for gauging the conditions under which justifiable humanitarian intervention should be carried out. He contends that before any intervention, the intervenor should submit to suit both in the ICJ and ICC for violations that injure the intervenee state during the course of the humanitarian intervention, and also for crimes committed by the intervenor's nationals during this same period.[70]

Parekh on his part proposes that potential intervening powers should bear in mind that they have a responsibility by the end of the intervention to create conditions under which a viable civil authority can emerge.[71]

The 2000 Kosovo Report sets out the conditions for humanitarian intervention by dividing it into two; threshold principles and contextual principles. The requirements to fulfill the threshold principles include: there should be severe and gross violations of internationally recognized human rights on a continuous basis; the main objective should be the protection of the oppressed populations; and the method and form of intervention must end the catastrophe as soon as reasonably possible while avoiding collateral damage to the civilian population. Meanwhile, the contextual principles provided that: there should have been a serious attempt to find a peaceful solution; recourse should have also been made to the UNSC or General Assembly (See 'Coalition of the Willing'); military action should be the last resort; use of force or the threat of use of force should enjoy multilateral support; no principal organ of the UN (ICJ or UNSC) should have

[70] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo."*Vand. J. Transnat'l L.* 32 (1999): 1244.

[71] Parekh, Rethinking Humanitarian Intervention, 147.

condemned the act; there should be stricter adherence to humanitarian law and the laws on the conduct of war than in ordinary military operations before, during and after the intervention; territorial and/or economic considerations are illegitimate causes for interventions; and after the intervention there should be a commitment to implement a humanitarian mission in order to reconstruct that given society.[72] It is worthy of noting as well that the report points out that these principles do not in any way legitimate humanitarian intervention, but rather are intended to prevent the use of ulterior motives for interventionary purposes.[73]

2.4 Conclusions

Despite the numerous claims and counter claims made by those who argue in favor of and those who argue against the legality of humanitarian intervention, as Hurd observes, the unilateral recourse to use of force for humanitarian purposes is both legal and illegal at the same time, and no amount of arguments today will change that.[74] The contested nature of this concept is even compounded by the fact that there is no universally accepted definition of the concept. The lack of an authoritative definition of the concept is in itself a huge problem which needs to be resolved before one can even start debating as to the legality of the concept. In this section, the principal focus was on humanitarian intervention '*sensu stricto'* and not *'sensu largo'*. That is, on unilateral humanitarian intervention (which lacks authorization). The argument is that collective humanitarian intervention falls under the auspices of collective enforcement. The rationale and

[72] Independent International Commission on Kosovo. (2000). *The Kosovo Report: Conflict, International Response, Lessons Learned*. Oxford University Press, USA. P 291-294.

[73] Ibid., 294.

[74] Hurd, Hs humanitarian Intervention legal?, 293.

conditions under which justifiable humanitarian intervention should occur have also been discussed. However, the writer rejects the notion of 'illegal but legitimate'. My rejection is based on the premises that such a notion is an irresolute means of having to deal with the task of determining the legality of humanitarian intervention. While I agree with Simma and Henkin who posit that unilateral humanitarian intervention is illegal,[75] I am pragmatic enough to understand that illegal or not, humanitarian intervention is widely practiced in today's world. Hence, I agree with Hurd who contends that that there might be a sustained pattern of legalization taking place.[76] In this same vein, as Higgins purports, I argue that because international law is a process, and is subject to changes circumstances as well as social and political demands, the concept of humanitarian intervention might just be on its way to becoming hard law.[77] Hence, rules and guidelines on how to make humanitarian intervention justifiable have been proposed by a number of reports and authors.[78]

[75] Simma, The Charter of the United Nations, 114., Henkin, Kosovo and the Law of" Humanitarian Intervention, 824-828.

[76] Hurd, Is humanitarian intervention legal?, 301-306.

[77] Higgins, Problems and Process, 252.

[78] See 'Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law', ILA Report of the Fifty-Sixth Conference (1974) 217., Charney, Anticipatory Humanitarian Intervention in Kosovo, 1244.

Chapter 3

DEBATING THE LEGALITY OF HUMANITARIAN INTERVENTION

The prohibition of the use of force in the conduct of international relations is enshrined in Article 2(4) of the United Nations Charter, with Article 42 (self-defense) and Article 51 (collective enforcement) being the only exceptions to this general rule. This prohibition on the use of force however, did not stop ten NATO member states from intervening in Kosovo-'*Operation Allied Force'* in 1999 in order to put an end to the gross violations of the fundamental human rights of the Kosovar Albanians by the Yugoslav army. Cassese posits that the NATO intervention in Kosovo has set precedence in international law whereby, the use of force in international relations is permissible in cases where the moral considerations (in this instance, violations of fundamental human rights) trump the prohibition on the threat of or use of force.[79] Simma on the other hand, argues that although it may be possible for moral considerations to trump the prohibitions on the use of force in extreme cases, as was the case with Kosovo, this can only serve as a onetime exception and has in no way laid the foundations of a new principle of public international law.[80] One might argue that the

[79] Antonio I Cassese, "Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of Internatinal Law* 10, no. 1 (1999): 27.

[80]Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects."*European Journal of international law* 10, no. 1 (1999): 22.

real legacy of the NATO intervention in Kosovo was neither that it settled the conflicts between the warring parties, nor that it stopped the massive expulsions and violations of the rights of the Kosovar Albanians, but rather its contributions in reopening the debate as to the legality of humanitarian intervention under international law. Hence, do states have the legal right to intervene in other states unilaterally in a bid to put an end to massive violations of fundamental human rights?

One should not be misguided in thinking that the NATO intervention in Kosovo was the first instance of humanitarian intervention as a practice. To stand on such a premise would be a great mistake. Before Kosovo, there had been countless interventions on the basis of humanitarian necessity (Sicily 1856, Cuba 1898, Tanzania 1979, Somalia 1993, etc.) and after Kosovo there as well have been numerous interventions justified on the basis of providing humanitarian relief to the oppressed (Darfur 2003, Libya 2011, Ivory Coast 2011, etc.). Despite these numerous so-called humanitarian interventions, there is still no consensus either amongst states or in the academia that there exists a right of humanitarian intervention in international law.

The purpose of this chapter is to determine if such legal right exists, as has been debated in the literature. Consequently, which of these two is of a higher normative value, upholding the principles of human rights; or the respect for the principles of non-intervention and sovereignty? What is the status of humanitarian intervention under international law? What are the arguments which have been made for and against the legality of humanitarian intervention? The motives for intervention would also be discussed in this section (it is claimed that humanitarian intervention is an excuse for

modern day imperialism)[81] and the conditions under which justifiable humanitarian intervention can be carried out, especially as the practice shows no signs of ending.

There are principally two schools of thought; those who argue that humanitarian intervention is legal; Lilich, Wolf, Reisman, Teson, Falk, McDougal, etc.,[82] and those who argue that it is illegal; Simma, Henkin, Hilpold, Brownlie, Hurd, Abass, etc.,[83] and base their arguments on the provisions of Articles 2(4) and (51). The argument here is that the Charter has made a clear choice that the use of force unilaterally by states is prohibited with the only exception being in self-defense and collective enforcement. However, there also is a growing school of thought led by Higgins who argue that although illegal, humanitarian intervention is moral and legitimate in the most extreme of cases.[84] Despite the arguments for and against the legality of humanitarian intervention, the fact remains that humanitarian intervention is a reality. The purpose of this chapter therefore, is to examine the arguments which have been made for and against the legality of humanitarian intervention.

[81] Goodman, Humanitarian Intervention and Pretexts for War, 107.

[82] Lillich, *Humanitarian Intervention and the United Nations*., Wolf, Humanitarian Intervention., Reisman, Sovereignty and Human Rights in Contemporary International Law., Teson, Collective Humanitarian Intervention., Falk, Complexities of Humanitarian Intervention., Reisman and McDougal, *Memorandum upon Humanitarian Intervention to Protect the Ibos*.

[83]Simma, The Charter of the United Nations., Henkin, Kosovo and the Law of Humanitarian Intervention., Hilpold, Humanitarian Intervention., Brownlie, International Law and the use of Force by States Revisited., Hurd, Is humanitarian Intervention legal, 293-313.

[84] Higgins, *Problems and Process, 252.*

3.1 In Defense of Legality

Those who purport that intervention for humanitarian reasons is legal base their arguments on a number of factors. The first is of a technical nature. It is argued that since humanitarian intervention is directed neither at the political independence or territorial integrity of a state, therefore it is in no way inconsistent with the provisions of articles 2(4) and 51[85]. Higgins argues that humanitarian intervention violates the sovereignty of a state, but it does not violate its political independence nor its territorial integrity because the action is being directed not with the intent of attacking the state, but with the intention of producing humanitarian relief to those in need. She differentiates between a violation of state sovereignty and a violation of territorial integrity. Thus, to her, humanitarian intervention is legal in this respect. This was the argument brought by the British government in the Corfu Channel Case. The British government argued that its actions were not directed against the political independence or territorial integrity of Albania. However, the ICJ held that while the passage of the British warships through Albanian territorial waters was justified and in conformity with the law of the sea, its acts of sweeping for mines violated Albania's territorial integrity and, as such, was illegal.[86]

Simma in his commentaries disagrees with Higgins' position. He argues that neither of the terms 'political independence' nor 'territorial integrity' were intended as restrictions on the use of force. Instead, integrity should be understood as meaning inviolability. In

[85] Ibid., 245.

[86] Cited in Quincy Wright, "The Corfu Channel Case." *The American Journal of International Law* 43, no. 3 (1949): 491-494.

fact, he advances that the terms 'territorial integrity and political independence' were specifically included in the Charter upon insistence by a number of smaller states, and was meant to reinforce the prohibition on the use of force, and not relax the prohibition.[87] It follows that the use of force is prohibited and should be used only in those cases explicitly specified as exceptions to 2(4). This position is also supported by Goodrich and Brownlie.[88]

The second argument put forward by supporters of the legality of humanitarian intervention is of a teleological nature. They postulate that the UN Charter protects not only sovereignty of states and respect for international peace and security; it also values equally the respect for human rights. [89] Thus, there is always the need to strike a fair balance between the protection of human rights and the use of force. Reisman is one of the foremost authorities on this teleological interpretation to law. He argues that the purpose of the law is of as much importance as the law itself. Laws are enacted for specific reasons and social circumstances, so rather than a point to point conformity to the law, the purpose of the law should be closely looked at. Based on this sort of interpretation, he argues that humanitarian intervention is not illegal because it conforms

[87] Simma, *The Charter of the United Nations*, 123.

[88] Goodrich, Leland Matthew, and Edvard Isak Hambro, *Charter of the United Nations: Commentary and Documents*. World Peace Foundation, 1946, 104., Brownlie, International Law and the Use of Force by States, 9.

[89] Kolb, Note on Humanitarian Intervention, 126.

to the rationale behind the UN Charter that is promotion and protection of respect for human rights.[90]

Falk opines that severe human rights abuses and deprivations justify interventions for humanitarian purposes.[91] He even goes as far as to contend that the preamble of the Charter supports or legitimizes humanitarian intervention. This is so because it states that armed force should not be used except in the common interests of the international society. One can assume by this that the respect for and protection of fundamental rights is in the common interests of the international society. Hence, if a state engages in gross and massive violations of the human rights of its own citizens, especially in cases of genocide, then it would be legally justified to intervene to alleviate the conditions of these people. He adds, however, that such an intervention should be neutral and the intervening power should not have specific geographical or strategic interests in that given area.

Teson argues that states have an obligation to respect and protect the rights of their citizens. Hence, if they fail to do so, any forcible intervention by outside forces in a bid to defend and reinstate respect for human rights is neither illegal nor inconsistent with the purposes of the United Nations because the rights of states are meaningful only in so far as these states respect the human rights of their populations.[92] In fact, in cases of gross violations of human rights, the international community or even individual states

[90] Reisman, Criteria for the Lawful Use of Force, 28 as cited in Higgins, Problems and Process, 252.

[91] Falk, Complexities of Humanitarian Intervention, 500.

[92] Teson, Humanitarian Intervention, 173-174.

can and should intervene to stop these violations.[93] However, Hurd postulates that in as much as the UN Charter upholds and promotes the respect for fundamental human rights, these are not attached with any specific legal commitments and therefore cannot create a possibility for armed intervention because they are non-binding and do not create any legal commitments.[94]

It follows by this teleological interpretation of the UN Charter that intervention for humanitarian reasons, although not explicitly stated, is legal because the respect and protection of fundamental human rights and values is part and parcel of the spirit behind the United Nations Charter and is enshrined in the Universal Declaration of Human Rights (UDHR) as well.

Although Hurd opposes the legality of humanitarian intervention, he nonetheless presents what he refers to as 'Three cases for legality'. In it he posits that due to an evolution in state practice since the 1990s, it is important that the relationship between state practice and international law should be examined. He purports that the case for legality is made up of principally three schools of thought: the first which posits that the ban on war stated in Article 2(4) is no longer effective because states have repeatedly violated it; the second being that there has been a normative change in international law, causing a shift of focus from non-intervention and sovereignty to that of human rights protection, and, as a consequence, what used to be unlawful is now lawful and; the third which argues that sovereignty and respect for human rights are complementary in nature,

[93] Fernando R. Teson, "Collective Humanitarian Intervention." *Mich. J. Int'l l.* 17 (1995), 336.
[94] Hurd, Is Humanitarian Intervention Legal, 299.

such that the respect for one is conditional on the respect for the other. These three positions would be examined below.[95]

The first school of thought on the legality of humanitarian intervention is supported by Franck who asserts that the prohibition against the use of force has abraded beyond identification[96] and Glennon who observes that the Charter regime on the use of force has completely and woefully cracked up. Glennon opines that Article 2(4) has lost its legally binding character.[97] This, legally speaking, is referred to as ***desuetude*** and exists when the continuous violation of a law invalidates that law. Based on this logic, the continuous violation of the prohibition on the use of force has made the illegality on the use of force no longer binding, thus, unilateral use of force for humanitarian purposes is not illegal as well. However, the problem with this argument is that no state has used ***desuetude*** of Article 2(4) as a justification for its use of force. This so probably because the states themselves do not think that this argument is valid. One could also refute this by arguing that it is not because one or two states violate international (United States for example, albeit repeatedly), in this case Article 2(4), it is no longer in force. If that is the case, then there would be no international laws because all laws are certainly violated especially when it is not in the immediate best interests of states.

[95] Ibid., 301-306.

[96] Thomas M. Franck, "Who killed Article 2 (4)? or: Changing Norms Governing the Use of Force by States." *The American Journal of International Law* 64, no. 5 (1970): 809-810.

[97] Michael J. Glennon, "Fog of law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, the." *Harv. JL & Pub. Pol'y* 25 (2001): 540.

The second school of thought posits that 'emerging normative ideas' and state practice have changed the way the law is to be interpreted today[98]. Weiss and Thakur even remark that the fact that humanitarian intervention is being used today to justify the use of force is sufficient affirmation of a change in practice, from one which previously did not see humanitarian intervention as a justification for the use of force to one which regards humanitarian intervention as a justification for the use of force.[99] This change-in-norms approach contrary to the ***desuetude*** approach, insists that by violating international law, states are engaging in the formation of a new principle which does not violate international law, but instead constitutes actions of 'constructive non-compliance'. R2P one might argue is an example of proof of this change in norms as a result of state practice. Cassese opines that given recent trends and depending on the gravity of the circumstances, resort to the use of force even absent Security Council authorization might be becoming albeit slowly justified.[100] This is in line with the theory of legalization.[101] Interventions such as Iraq 1990, Kosovo 1999, Darfur 2004, Libya 2011 and Ivory Coast 2011 are examples that there is a normative change in international which supports intervention for humanitarian reasons.

However, Joyner disagrees with this argument and submits that for there to be any development in customary international law, there must be evidence of sufficient state

[98] Michael J. Smith, "Humanitarian Intervention: An Overview of the Ethical Issues." *Ethics & International Affairs* 12 (1998): 66.

[99] Thomas G. Weiss, and Ramesh Thakur. *Global governance and the UN: An Unfinished Journey*. Indiana University Press, 2010. Cited in Hurd, Is humanitarian intervention legal?, 301-306.

[100] Cassese, Ex Iniuria Ius Oritur, 27.

[101] Abbott et al., The Concept of Legalization, 401-419.

practice and *'opinio juris'.* He argues that although there have been numerous interventions on the pretext of humanitarian intervention, the statements of the intervening governments do not use the defense of humanitarian intervention. For example, in the case of Kosovo, only Belgium used the argument of humanitarian intervention. The other nine member states put their interventions in two different contexts: the United Nations Security Council resolutions and general principles of international law which provided for a right of intervention in 'overwhelming' cases of humanitarian necessity.[102] In fact, Beck and Arend posit that states carefully avoid using the term 'humanitarian intervention' to justify their use of force.[103] Thus, Joyner purports that this lack of reliance on a right (legal) of humanitarian international to justify the use of force indicates a damaging lack of *opinio juris'* even by the states involved in the interventions.[104]

Brownlie agrees with Joyner and contends that if one has to argue that humanitarian intervention is legal because it is part of customary international law, then one would need to prove the existence of general state practice and '*opinio juris'*. This however, is lacking and thus brings into dispute the existence of humanitarian intervention. He agrees that the UN Charter system is subject to change and amendment if there is sufficient state practice and *'opinio juris'*, but even today this is still lacking as the

[102] Joyner, The Kosovo Intervention, 603.

[103] Anthony C. Arend, and Robert J. Beck. *International law and the Use of Force: Beyond the UN Charter Paradigm*. Routledge, 2014. 137.

[104] Joyner, The Kosovo Intervention, 601.

majority of states do not even accept the practice of humanitarian intervention.[105] Conclusively, there is little or no evidence suggesting that a novel principle of customary law regarding interventions based on humanitarian concerns is being developed; "With rare exceptions, humanitarian intervention forms part of a political agenda and there is no authenticity".[106] Consequently, humanitarian intervention might have been acceptable before 1945, but became illegal as from 1945 with the coming into force of the UN Charter. Hurd agrees with Brownlie and adds that there has not been sufficient and consistent practice of humanitarian intervention for it to be considered as an 'emerging normative idea'.[107]

The third school of thought argues that sovereignty and respect for human rights are complementary in nature, and that the respect for one is conditional on the respect for the other. It holds that there has been a shift from a doctrine of non-intervention and sovereignty to that of human rights protection. Hence, the failure to respect and protect the rights of local inhabitants amounts to a state losing its right to sovereignty, and once this right to sovereignty is lost, any action taken against that state, ceases to be an act of use of force. This position is supported by Teson, Reisman and Falk.[108] The problem with this line of argument is the difficulty in assessing when a state ceases to have the

[105] Brownlie, *International Law and the Use of Force*, 16.

[106] Ibid.

[107] Hurd, Is Humanitarian Intervention legal?, 305.

[108] Teson, Collective Humanitarian Intervention., Falk, Complexities of Humanitarian Intervention., Reisman and McDougal, *Memorandum upon Humanitarian Intervention to Protect the Ibos*.

right to sovereignty. Is it as a result of minor breaches of human rights or major violations, and what do we consider minor and major violations?[109]

Scheffer advocates that with the disintegration of the former Soviet Union and the end of the Cold War, the UN now places greater emphasis on the respect of human rights, and by this account, collective intervention and enforcement of human rights should now be possible under the Charter.[110]

Wolf notes that the arguments against the legality of humanitarian intervention are based on an absolutist interpretation of Article 2(4). that those who fear that legalizing humanitarian intervention would lead to an abuse of the practice by powerful states for selfish reasons have no basis for their arguments because all laws are invariably abused. He adds that there is a need for a more realistic and contemporary interpretation of the Charter which should recognize a right to use force in order to prevent or put to an end gross violations of human rights.[111] Higgins as well supports this position and postulates that even the right to self-defense has been abused by states for a number of reasons, but this does not mean that it is not a right under international law. Hence, she does not see why the case should be different for the right of humanitarian intervention.[112]

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[109] Hurd, Is Humanitarian Intervention Legal?, 311.

[110] David J. Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention." *U. Tol. L. Rev.* 23 (1991): 253.

[111] Wolf, Humanitarian Intervention., 333.

[112] Higgins, Problems and Process, 247.

Others like Brown have argued that the prohibitions on genocide and crimes against humanity[113] have attained the status of *jus cogens* (peremptory norms from which no derogation is allowed) in international law.[114] As such, any action (military) which is undertaken to prevent the commission of genocide or crimes against humanity is not inconsistent with the purposes of the Genocide Convention, and therefore not illegal. Joyner disagrees with this position and contends that while the laws preventing genocide and crimes against humanity are of very high value, he doubts that they have reached the status of *jus cogens*.[115]

Greenwood contends that while some might view the statement 'humanitarian intervention is unlawful' as just a simple technical breach, it however carries heavy implications because to accuse those who intervene in order to protect human rights and stop genocide as doing something unlawful, is on the one hand accepting a false dichotomy between law and morality, and on the other, undermining not only international law and morality, but the international society as a whole and this, to him, is not to be taken lightly.[116] He proceeds that to say humanitarian intervention is illegal because there is no explicit mention of it in the Charter is too rigid a view (161).[117] To him, the UN Charter protects not only the principles of non-intervention and

[113] In 1948, members of the United Nations General Assembly Voted Unanimously to Create the UN Convention on the Prevention and Punishment of the Crime of Genocide. Hereinafter referred to as "THE GENOCIDE CONVENTION".

[114] Bartram Brown "Humanitarian Intervention at a Crossroads' (2000)." *William and Mary Law Review* 41. 1691.

[115] Joyner, The Kosovo Intervention., 603.

[116] Christopher Greenwood, "Humanitarian Intervention: The Case of Kosovo." (2002): 145.

[117] Ibid., 161.

sovereignty, but also the respect and promotion of human rights. Additionally, he opines that state practice in the last decades is an indication as well that there is a right to humanitarian intervention in international law. This view is well supported by Brown who notes that there has been a development in public international law that there exists an individual right to use of force in customary international law for the purposes of protecting fundamental human rights in cases of massive violations.[118] Greenwood notes that one cannot ignore these developments in international law within the last 50-60 years and also that the preponderance of interventions in the name of humanitarian concerns is an indication that states have accepted a right of humanitarian intervention in contemporary international law.[119] Greenwood supports McDougal and Higgins'[120] view of law not being static.

3.2 In Defense of Illegality

Proponents of the illegality of humanitarian intervention base their arguments on the plain language of Article 2(4) of the UN Charter. They argue that the UN Charter prohibits the use of force, except in cases of self-defense and collective enforcement and in no way suggests that the motives for the use of force for humanitarian reasons be interpreted differently from other forms of the use of force.[121] The only exceptions to this rule are Articles 42 (collective enforcement) and 51 (self-defense). As earlier mentioned, focus will be more on humanitarian intervention *sensu stricto* (unilateral humanitarian intervention without approval of UNSC) rather than collective

[118]Brown, Humanitarian Intervention at a Crossroads', 1691.

[119]Greenwood, Humanitarian Intervention: The Case of Kosovo, 170.

[120]Higgins, Problems and Process, 1.

[121] Hurd, Is Humanitarian Intervention Legal?, 298.

humanitarian intervention (approved by UNSC). This is so because when such authorization is given, it ceases to be an illegal intervention, and therefore falls under the auspices of Article 42 of the UN Charter, and hence, no longer in the spectrum of humanitarian intervention. The real question therefore is; is unilateral intervention for humanitarian purposes legal?

Hilpold argues that without any doubt whatsoever, the UN Charter system prohibits the unilateral use of force for humanitarian reasons and that even despite its shortcomings it still offers a better protection for weaker states.[122] He notes further that despite its good intentions, unilateral humanitarian intervention has no real legal basis in international law.[123] Continuing in this same vein, Hilpold postulates that by acknowledging the unilateral use of force, we would be going back to the concept of 'legitimate war' which the founders of the Charter tried so hard to eliminate. He argues that in as much as the Charter is not perfect, at least we possess more sophisticated instruments today which we could use to evaluate the claims of states and enforce the respect for human rights and international law without necessarily resorting to the use of force. For instance, states could take their claims to the ICJ, ICC and WTO to resolve disputes rather than resorting to the use of force. In this same vein, Brownlie posits that before 1945, unilateral humanitarian intervention might have been legal, but has since become illegal after 1945.[124] The argument here is that the Charter has made a clear choice that the use of force unilaterally by states is prohibited with the only exception being in self-

[122] Hilpold, Humanitarian Intervention, 443-444.

[123]Ibid., 441-449.

[124]Hurd, Is Humanitarian Intervention Legal?, 298.

defense,[125] and collective enforcement. In this light, a state cannot claim the right to use force if this does not entail using it for the aforementioned reasons. Therefore seeing as humanitarian intervention does not fall under the category of self-defense (Art. 51) nor collective enforcement (Art.42) then humanitarian intervention in itself is illegal. Kolb argues that the provisions of Articles 2(4) and 51 of the UN Charter have shut the loophole through which humanitarian intervention could have been passed because it contains a prohibition on the use of force with the only exception being in self-defense.[126]

Henkin contends that if not authorized by the United Nation's Security Council, then humanitarian intervention is illegal and should remain illegal.[127] White questions if the UNSC even has such jurisdiction when it comes to authorizing interventions for humanitarian purposes.[128] Simons postulates that there is no agreement amongst legal scholars if the UNSC has been vested with such rights because there is no mention of the existence of such a right in the UN Charter.[129] However, if the violations of basic human rights are such that they threaten not only the existence of peace in that state, but also of peace in a given region, then the UNSC has the jurisdiction to authorize use of force to readdress such a situation in line with Article 42 of the Charter. This is the argument brought forward by Cassese who posits that the NATO intervention in Kosovo was legal

[125] Glennon, Fog of law, 539.

[126] Kolb, Note on Humanitarian Intervention, 124.

[127] Henkin, Kosovo and the Law of Humanitarian Intervention, 826.

[128] Myjer, Eric PJ, and Nigel D. White. "The Twin Towers Attack: An Unlimited Right to Self-Defence?." *Journal of Conflict and Security Law* 7, no. 1 (2002): 5.

[129] Simons, Humanitarian Intervention: A Review of Literature, 3-4.

because the violations of human rights in Kosovo not only threatened the Kosovans but also threatened the peace and security of Albania, Macedonia and Bosnia and Herzegovina. Thus, it constituted a threat to the peace and stability of that region.[130] However, it is difficult to gauge if this argument validates the unilateral use of force. In another given scenario wherein the violations of the fundamental rights of a people do not affect the geopolitical status of a region, would this 'Cassese argument' hold sway? One would think not.

Simma in his commentaries observes that Article 2(4) of the Charter is a prohibition and is in no way conditioned by the protection of human rights.[131] He, therefore, rejects the arguments of those like Fonteyne who posit that there needs to be a balancing of the 'opposite goals of conflict-minimization and protection of human rights'.[132] Simma argues that the concept of humanitarian intervention cannot continue to exist side by side with the UN Charter because it has been prohibited by Article 2(4).[133]

Schachter postulates that humanitarian intervention is illegal. He goes on to insist that legalizing unilateral humanitarian intervention maybe problematic because it would be creating a significant gap in the Charter system which some states might cease

[130] Cassese, Ex iniuria Ius Oritur, 27.

[131] Simma, *The Charter of the United Nations*, 130.

[132] Fonteyne, Customary International Law Doctrine of Humanitarian Intervention, 255.

[133] Simma, *The Charter of the United Nations*, 130.

advantage of. So, it is preferable to have some states violate the present Charter in particular extra-ordinary circumstances, rather than creating such a gap.[134]

As was earlier discussed, states rarely, if at all, invoke the right of humanitarian intervention to justify the use of force.[135] Hilpold also notes that more often than not, states that carry out unilateral interventions for humanitarian purposes refuse to refer to it as humanitarian intervention. Rather, they justify their actions using different reasons. He questions if it is possible that this omission is a silent admission of the illegality of humanitarian intervention.[136] This position seems to be supported by Brownlie who argues that although all the ten NATO member states involved in the bombings in Yugoslavia claimed it was legal none, with the exception of Belgium, used the claim of humanitarian intervention as justification for their actions.[137] Most referred to UNSC resolutions 1160,[138] 1199,[139] and 1203[140] of 1998 to justify their use of force. The term humanitarian intervention was largely avoided by the parties. The debate as to the legality of humanitarian intervention would have been made easier if the International Court of Justice had ruled on this case. However, the Court refused the plea of Former Yugoslavia.

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[134] Schachter Oscar. *International law in Theory and Practice*. Vol. 13. Martinus Nijhoff Publishers, 1991. 126.

[135] Abass, *Complete International Law*, 419.

[136] Hilpold, Humanitarian Intervention, 444.

[137] Brownlie, International Law and the Use of Force, 14-15.

[138] Security Council Resolution 1160 (1998) on the Letters from the United Kingdom (S/1998/223) and the United States (S/1998/272)

[139] Security Council resolution 1199 (1998) on the Situation in Kosovo (FRY)

[140] Security Council resolution 1203 (1998) on the Situation in Kosovo

Again, some authors like Abass have postulated that legalizing humanitarian intervention would be making the intervening state, a judge and executioner. He also doubts if states who claim to intervene in the name of humanitarian concerns, have better humanitarian conditions on their own territory. Moreover, the examples of Kosovo and Libya have taught us that thousands of innocent people die in the name of humanitarian intervention under the morally disguised terminology of 'collateral damage'. However, the argument can as well be made that thousands more will die if there is no intervention.[141]

The case for illegality of humanitarian intervention also lies on the premises that states never act for purely humanitarian reasons.[142] Goodman contends that since the times of Grotius, proponents of the legality of humanitarian intervention have always faced criticisms that legalizing humanitarian intervention would be providing a leeway for the exploitation by the powerful of the weak and as pretexts for starting wars of aggression. However, if humanitarian intervention is legalized, it would discourage wars that begun with ulterior motives because there would be a clear legal regime which would regulate the use of force for humanitarian reasons and demands.[143] Developing states especially

[141] Abass, *Complete International Law*, 422.

[142] Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention." *Mich. J. Int'l L.* 19 (1997): 1020.

[143] Goodman, Humanitarian iHtervention and Pretexts for War, 107.

fear that legalizing humanitarian intervention might trigger another wave of colonialism by imperialist states, hence, are vehemently opposed to its legalization.[144]

In a nutshell, those who posit that humanitarian intervention is not in conformity with international law argue and condemn it as completely outside of the UN Charter system of security and that it is not only a symbol of all that is inadequate with the respect of international law, but also that it is a threat to global security because any other interpretation will give a leeway to political bias, selectivity and massive abuse by imperialist states to serve their national and strategic interests.

It should be noted that not only the UN Charter prohibits the practice of humanitarian intervention, but subsequent General Assembly resolutions, also proscribe humanitarian intervention. For example, the General Assembly on 24 October 1970 adopted resolution 26/25 (XXV) on the Principles of Friendly relations;[145] the General Assembly Resolution 2131[146] on the Inadmissibility of Intervention; and the General Assembly Resolution 2793[147] all prohibit states from intervening in the internal affairs of other states except authorized by the Security Council. What this demonstrates is that states are unwilling to trade their sovereignty rights and, by all accounts, unilateral

[144] Kegley, Charles W., and Shannon L. Blanton. *World Politics: Trend and Transformation, 2016-2017*. Nelson Education, 2015.

[145] General Assembly Resolution 2625 (XXV) Adopted on 24 October 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

[146]General Assembly Resolution 2131 (XX) Adopted on 21 December 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty

[147]General Assembly Resolution 2793 (XXVI) Adopted on7 December 1961 Question Considered by the Security Council at its 1606th, 1607th and 1608th Meetings on 4, 5 and 6 December 1961.

humanitarian intervention is an illegal practice in international law, despite the many arguments which can be advanced for its legality.

An authoritative answer to this question of legality would have been provided if the International Court of Justice as was ceased upon by Yugoslavia when it brought ten NATO member states before the Court on the grounds of unlawful use of force had provided a ruling as to the legality of the practice of humanitarian intervention under public international law. However, the case failed to get a hearing at the Court because one of the principal parties (United States) had not given its consent for the jurisdiction of the Court. Probably, if this case had made hearing at the ICJ, a ruling would have been provided, and this debate as to the legality or illegality of humanitarian intervention might have been buried. Without this ruling, one is forced to adhere to the wordings of Article 2(4) which prohibits the use of force except in self-defense or collective enforcement, thus, making humanitarian intervention illegal. The fact that the Court could not take a position in this case is yet another reason why the focus of this thesis is on the doctrine of humanitarian intervention as debated by other authors rather than on a normative analysis of state practice. This is in line with Article 38(1) of the Statute of the International Court of Justice which in para 4 refers to doctrine and teachings of highly qualified publicists as supplementary source for the determination of international law.[148]

[148] Borda, A Formal Approach to Article 38 (1)(d), 655.

No matter how one may want to look at it, Hurd concedes that humanitarian intervention is legal and illegal at the same time depending on one's understanding of the construction of international law, and no amount of debating can change this status.[149]

3.3 Is Humanitarian Intervention Illegal but Legitimate?

There are those who posit that even though humanitarian intervention is illegal, it is morally and politically expedient to intervene militarily to protect the human rights of a people.[150] Higgins, one of such proponents, asks whether the shortcomings and limits of the UN Charter on the use of force: Articles 2(4) and 51 should be maintained even if it favors the wrong doer (in this case the state oppressing its citizens), or if these restrictions should be kept aside in order to promote justice and respect for human rights. She even asks: "…whether the failure of the international system coupled with fundamentally changed circumstances since the time when the relevant texts were agreed, makes preferable unilateral action for the common good even if it is at variance with the norms articulated in the Charter and elsewhere"? She does not answer this question in the affirmative, but recommends that if the present norms do no longer serve the best interest of today's community, then it should be subjected to change to reflect our present needs. But we need to ask ourselves if these norms are so 'irredeemable' that change becomes a necessity.[151] This reinforces her process theory in international law. However, she does not think that Articles 2(4) and 51 no longer have a purpose even

[149] Hurd, Is Humanitarian Intervention legal?, 293.

[150] Hilary Charlesworth, "International Law: A discipline of Crisis." *The Modern Law Review* (2002): 380.

[151] Higgins, *Problems and Process:* 252

though their applications have been unsatisfactory. She thus proposes that each action should be judged on its merits and contexts.[152]

Moreover, if one takes into consideration the present proposal for R2P to be adopted as an international norm, then it would justify Higgins' process theory. This is buttressed by Eaton who asserts that the responsibility to protect is an "emerging norm" on the path to becoming customary international law.[153]

Simma explains that in some extra-ordinary cases, it becomes unbearable for the international community to turn a 'blind eye' to massive human rights violations. In such instances, although illegal, moral and political considerations require that states intervene to put an end to such atrocities in the event where the Security Council fails to act. However, he warns that cases like Kosovo serve as *ad hoc* exceptions and not precedence for establishing a new law allowing the use of force unilaterally for humanitarian purposes.[154] Cassese, although he agrees with Simma that moral considerations, as in the case of Kosovo, trump the prohibition on the use of force, disagrees with Simma's assertion that there was only a 'small breach' of the UN

[152] Ibid.

[153] Jonah Eaton, "Emerging Norm-Determining the Meaning and Legal Status of the Responsibility to Protect, An." *Mich. J. Int'l L.* 32 (2010): 766.

[154] Simma, The Charter of the United Nations, 132.

Charter.[155] To Cassese, this represents a major shift away from the UN Charter system and there is no guarantee that this will remain an exception.[156]

The Independent International Commission on Kosovo also observed that NATO's actions, although illegal, were legitimate because of international moral consensus.[157]

Franck contends that although illegal, depending on the mitigating circumstances, unilateral intervention for humanitarian purposes can be morally justified. In fact, he notes that given the circumstances, states may act 'off the Charter'.[158]

However, Roberts contends that while this approach seems a comfortable means of reconciling the doctrines of respect for human rights and sovereignty, it is not a feasible stance in international law. This is so because if unilateral humanitarian intervention is continuously met with submissiveness, then it might become a recognized exception to the law which prohibits the use of force. She notes further that this approach of 'illegal but justified' might also undermine the relevance of the law and increase the risks of interest based exceptionalism.[159] She concludes that' a more dynamic understanding of

[155] Cassese, Ex Iniuria Ius Oritur, 24-25.

[156] Simma, NATO, the UN and the Use of Force, 22.

[157] Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 164.

[158] Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*. Vol. 15. Cambridge University Press, (2002), 190.

[159]Roberts, Legality vs. Legitimacy, 212.

international law needs to be developed…' one which is more responsive to present circumstances.[160]

In this same vein, Hurd postulates that sustained patterns of state behavior in opposition to the rules have creative effects in international law such that 'legalization may be taking place.'[161]

One must say that the 'illegal but legitimate' position on the issue of humanitarian intervention is no more than '*argument paresseux et faible'*, or an 'escape clause' which has no real standing. Indeed, Teson asserts that claiming that an act of intervention is morally justified in extreme cases, but nonetheless illegal, is absurd. To him if there can be agreement on these rare cases, then humanitarian intervention is indeed legal and all that matters is an issue of jurisprudence.[162] However, one is more inclined to assert that the present wording of the UN Charter offers no recourse to humanitarian intervention.

Whatever the case maybe, the recent interventions in Kosovo (1999), Libya (2011) and the Ivory Coast (2011) demonstrate that despite the contested nature of the concept of humanitarian intervention it is a doctrine which is still present in practice. One therefore is left to wonder why some states indulge in the practice of humanitarian intervention. What are the motives behind these interventions? Are these interventions based on altruism or are there other ulterior motives for these humanitarian interventions?

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[160] Ibid., 213.

[161] Hurd, Is Humanitarian Intervention Legal?, 307.

[162] Teson, Collective Humanitarian Intervention, 336.

3.4 The Question of Altruism in International Relations

Supporters for the illegality of humanitarian intervention argue that states never intervene for purely humanitarian reasons.[163] That is, they always have ulterior motives for intervening in the internal affairs of other states, no matter the reasons they give. Abass supports this view that humanitarian intervention is used by states as pretexts for their own ulterior political agendas. Zinn posits that 'most wars present themselves as humanitarian endeavors', meaning that most interventions in the name of humanitarianism are excuses for interventionism and imperialism.[164] Vogel notes that 'apolitical', is not a term which can be associated with humanitarian interventions.[165] What all of these declarations, some subtle, others blunt mean is that there are no altruistic humanitarian interventions.

However, Goodman disagrees and says that if unilateral humanitarian intervention is legalized, then states would no longer be able to abuse it for ulterior motives because there would be a clear regime regulating the practice.[166] This is somewhat contentious because even though there are clear legal regimes on doctrines such as self-defense, states always find ways to exploit these legal regimes. In fact, some states like the United States and Israel even today claim the right to '*preemptive strike'* which is in no

[163]Goodman, Humanitarian Intervention and Pretexts for War, 107.

[164]Howard Zinn, (n.d.). BrainyQuote.com. Retrieved July 9, 2016, from BrainyQuote.com Web site: http://www.brainyquote.com/quotes/quotes/h/howardzinn385157.html

[165] Tobias Vogel, "The Politics of Humanitarian Intervention." *Journal of Humanitarian Assistance* 3 (1996).

[166] Goodman, Humanitarian Intervention and Pretexts for War, 107.

way in conformity with the notion of self-defense. Hence, I would say that there is no guarantee that the same would not happen if humanitarian intervention is legalized.

Again, Krieg notes that the meaning of 'national interests' is often misconstrued it is looked at from a purely *economist* and negative point of view (self-interests or egoism). Rather, if one looks at it from a more objective standpoint, one would understand it differently. Thus, it might be in a state's national interests to put an end to gross violations of human rights on the territory of another state because the intervening state supports democracy and respect for human rights. There is nothing egoistic about such an intervention, although it is undertaken with the national interests at heart.[167] If one were to agree with Krieg's logic, one would wonder why there was no intervention in Rwanda in 1994, but an intervention in Kosovo in 1999; or might be bewildered why there was an intervention in Libya in 2011, but no intervention in Syria. The position of this thesis is that humanitarian intervention is based on self-calculated interests of the intervening powers.

In the case of Rwanda, the French government actively blocked any attempts at intervention because it was against its national interests. France feared that any interventions in Rwanda would mean that its influence and control over Rwanda would be lost. Hence, the French government actively supported President Juvenal Habyarimana.[168] Maritz asserts that the US decided not to intervene in Rwanda because

[167] Andreas Krieg "National Interests and Altruism in Humanitarian Intervention." In *Motivations for Humanitarian Intervention*, pp. 37-58. Springer Netherlands, 2013.

[168] Andrew Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide*. IB Tauris, 2014. 112.

it had no vital national interests at stake.[169] What one observes here is that despite the fact that the French and US Governments were aware of the genocide in Rwanda, they did not intervene in order to put an end to the violations of human rights and crimes against humanity because such intervention would not have been in their best interests, all this despite repeated callings by General Romeo Dallaire who was the Commander of the UN Assistance Mission in Rwanda.[170]

Despite Starr's assertions that the US intervened in Kosovo with no real geographic or economic interest, a closer look at the US role in Kosovo would show that the US and NATO had strategic interest in its intervention in Kosovo. As Starr himself admits, critics have argued that the US-led NATO intervention in Kosovo was based on geographic and racial interests. That is, despite ignoring similar and even worse genocidal practices in Africa and Asia, specifically Rwanda, the fact that the Kosovars are Europeans and geographically close to NATO countries, warranted that an intervention should be undertaken before the conflict spilled into other parts of Europe (national security interests).[171] Bandow, in a testimony before the US House International Relations Committee on March 2010 argued that the US administration was intervening in Kosovo not because of humanitarian reasons but because of a desire to establish a rigged pro-US government in Yugoslavia. He went as far as to question why the US decided to intervene just in Kosovo even though the number of persons killed in three days in Sri Lanka by the Tamil guerillas surpassed the death toll in

[169] Dominique Maritz, "Rwandan Genocide: Failure of the International Community?" (2012) 1.

[170] Romeo Dallaire, "Looking at Darfur, Seeing Rwanda." *New York Times* 4 (2004) 1.

[171] Paul Starr, "The Choice in Kosovo." *The American Prospect, Princeton, Jul/Aug* (1999): 6-9.

Kosovo for four months; he also questioned why the US decided to ignore the conflicts in Liberia, Mexico, Turkey-Kurds, Ethiopia, Pakistan, etc in favor of Kosovo which in comparison was less of a humanitarian disaster. He concluded that the killings in Kosovo no matter how despicable they were, fell short of the requirements of genocide, and therefore did not understand why the US administration chose to intervene only in Kosovo when there were other threats of more significance in other areas.[172]

With the case of Libya and Syria, one wonders why NATO was so eager to intervene in Libya but so reluctant and passive in the case of Syria. It is worth noting that in the case of Libya, despite claims by NATO and the US that the intervention was necessary in order to prevent bloodshed in Benghazi, evidence shows otherwise. Kuperman, argues that while Ghadafi was certainly a tyrant, there was no evidence to show that he had planned to carry out a killing campaign.[173] To make matters worse, the intervention in Libya went far beyond the UNSC Resolution 1973[174] which called only for a 'no-fly zone', an arms embargo and the protection of civilians. Moreover, the intervention in Libya failed Parekh's test (creating suitable conditions for a viable civil authority after the intervention)[175] because the interveners focused more on removing from power Gaddafi than providing the necessary security and suitable environment that could lead to a viable political structure. Several years into the intervention in Libya, the country is

[172] Bandow, Doug. "The US Role in Kosovo." *Testimony Before the US House International Relations Committee (March 10)* (1999).

[173] Alan J. Kuperman, "Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure." *Foreign Aff.* 94 (2015): 66.

[174] Resolution 1973 (2011) Adopted by the Security Council at its 6498th Meeting, adopted on 17 March 2011 permitting a 'no-fly zone' and an arms embargo in Libya.

[175] Parekh, *Rethinking Humanitarian Intervention,* 147.

worst of than it was prior to the intervention.[176] Gillin asserts that the intervention in Libya was not because human rights had to be protected (even though NATO and the US claimed so), but it was directed more at removing Gaddafi from power, an anti-Western dictator. Hence, even when the African Union proposed that a cease fire should be negotiated, NATO vehemently rejected the proposal and rather insisted that Gaddafi could take no part in a future Libya. If one goes by the position that humanitarian intervention is not directed at the political independence of the third state, then this case certainly demonstrates the contrary.

With the case of Syria, despite the millions of displaced persons and refugees and untold sufferings inflicted by the Syrian government on the Syrian people, the world stands idly by.[177] Repeated calls for humanitarian intervention have fallen on deaf ears. In Syria the case is different because Russia backs the Assad regime, and so there can be no humanitarian intervention without its approval.[178] The question one asks is: if humanitarian intervention is such an altruistic practice, then why has there been no humanitarian intervention in Syria despite the untold sufferings of the Syrians yet, the international community was so eager to intervene in Libya; why was there an intervention in Kosovo but none in Rwanda? The answer is simple, the geo-political and strategic interests of Russia has to be taken into consideration before any intervention can be possible in Syria. Whereas with the case of Libya, Russia had no strategic

[176]Joel Gillin, *New Republic* 2015 Web 10 July 2016. https://newrepublic.com/article/121085/libya-no-model-humanitarian-intervention .

[177] Nicole Ostrand, "The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States." *Journal on Migration and Human Security* 3, no. 3 (2015): 255.

[178] Krister Knapp, Ph.D. Senior Lecturer International Relations Round Table Coordinator Washington University in St. Louis no date available for this article).

interests to protect and hence turned a blind-eye to the humanitarian intervention. In the case of Syria, Assad is an ally to the Russians, and therefore needs to be protected. As earlier mentioned, French strategic and economic interests in Rwanda prevented any humanitarian intervention, while a lukewarm US administration made no real efforts to end the genocide.

Hence, this thesis asserts that humanitarian intervention is based on the geo-strategic, economic and political interests of the intervening state or states. Altruism and humanitarian intervention are not two terms one would associate with each other. There must always be an ulterior motive for intervention as is concurred by Abass[179] and Kritsiotis.[180]

3.5 Conclusions

Whatever the case may be, and despite the arguments made in this chapter, the practice of humanitarian intervention still remains very contentious. One can neither assertively say that humanitarian intervention is legal nor that it is illegal, one can only assert that it seems not to be in conformity with international law. Hence, one agrees with Abass, who, in response to the confusion surrounding the legality of unilateral humanitarian intervention and the 'illegal but legitimate' debate, points out that state practice should become more pronounced either in accepting or rejecting the doctrine of unilateral humanitarian intervention pending a pronouncement from the ICJ, if there ever will be one.[181] One also concludes strongly in this chapter that whether illegal or not, the

[179] Abass, *Complete International Law*, 422.

[180] Kritsiotis, Reappraising Policy Objections to Humanitarian Intervention, 1020.

[181] Abass, *Complete International Law*, 423.

practice of humanitarian intervention is not an altruistic one, rather, it is based on the calculated self interests of the intervening powers. This thesis adopts a number of theoretical frameworks which would be discussed in the next chapter.

Chapter 4

HUMANITARIAN INTERVENTION IN THE PROCESS THEORY AND LEGALIZATION DISCOURSE

There is hardly any worldwide consensus as to the status of the practice of humanitarian intervention. There seems to be no reconciling between the two principal schools of thought (legal and illegal) but for Hurd, who concedes that humanitarian intervention is both 'legal and illegal' at the same time.[182] However, taking such a position is of not much help in discerning the real status of unilateral humanitarian intervention in public international law.

The bulk of the academia argues that humanitarian intervention is an unlawful practice. Be that as it may, since the 1999 NATO intervention in Kosovo, as well as the 2011 interventions in Libya and Mali, the number of writers criticizing the practice of humanitarian intervention have dwindled in an astonishing fashion and this requires that this subject be paid more attention to, because it might just be an indication of new trends in public international law and/or approaches.[183] Consequently, is humanitarian intervention in the process of legalization?

[182] Hurd, Is Humanitarian Intervention Legal?, 307.

[183] Hilpold, Is There a Need for a Legal Reappraisal?, 442.

For this purpose and given the nature of this research, the '*process theory'*,[184] supported by Rosalyn Higgins, the *'theory of legalization'*[185] expounded by Abbot & Snidal and the *'theory of fragmentation' as explained by* Jenks[186] and Koskenniemi's[187] will serve as my theoretical underpinnings.

It is worthy of noting beforehand that the theory of international law as a *'process'* proposed by Higgins is intrinsically interwoven with the *'theory of legalization'* advanced by Abbot[188] and further developed by Goldstein.[189] Higgins views international law as a process: '*international law is a continuing process of authoritative decisions'*[190]. In Abbot et al, legalization is characterized as a '*particular form of institutionalization'* which involves obligation, precision and delegation,[191] what, Goldstein put as *'move to law'*.[192] Both theories acknowledge the intimate relationship between power, politics and law. Higgins contends that law does not exist in a vacuum, but rather converges with power, while Goldstein views the relationship between politics and law as reciprocal. This first section of this chapter explains Higgins' law as a

[184] Higgins, *Problems and Process*, 2.

[185] Abbott, et al., The Concept of Legalization, 401-419.

[186] Wilfred Jenks, "Conflict of Law-Making Treaties'(1953)." *BYIL* 30: 403.

[187] Martti Koskenniemi, , and Päivi Leino. "Fragmentation of International Law? Postmodern Anxieties." *Leiden Journal of International Law* 15, no. 03 (2002): 553-579. Koskenniemi, Matti. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission." (2014).

[188] Abbott, et al., The Concept of Legalization, 401-419.

[189] Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter. "Introduction: Legalization and World Politics." *International Organization* 54, no. 03 (2000): 385-399.

[190] Higgins, *Problems and Process*, 2.

[191] Abbott, et al., The Concept of Legalization, 401.

[192] Goldstein et al., Introduction: Legalization and World Politics, 388.

process theory, and Abbot's concept of legalization, and how these theories provide a blueprint for this research work on humanitarian intervention.

4.1 Rosalyn Higgins and the Process Theory

Higgins a student of the New Haven School of thought in her book titled: "*Problems and Processes"* denies the view of international law as a set of rules which are often ignored because of a lack of a central authority. Instead, she regards '*law as a process'.* A social process which involves rules, but not only rules, *'international law is a continuing process of authoritative decisions'.*[193] Higgins contends that law is not only concerned with authority, but actually a harmonization of power, control and authority. In fact, international law to her exists within a social environment and must be applied within that social context. Reason being that one cannot disregard the moral, social and the humanitarian aims of the law.[194] Notwithstanding, she acknowledges that in order for law to remain legal, we need to make sure that decisions are taken by designated and authorized persons with reference to guidelines in past decisions while also taking into consideration the needs of the present community.[195]

Law as a process stimulates choices and interpretations which are more consistent with our values and needs. She argues that if law is a process, then there would be no need for the false dichotomy between *lex lata* and *lex feranda*. Higgins asks if the present limits on the use of force as per Article 2(4) should be respected even though it favors the

[193] Higgins, *Problems and Process*, 2.

[194] W. Michael Reisman, "Criteria for the Lawful Use of Force in International Law."*Yale J. Int'l L.* 10 (1984): 283. Cited in Higgins, Problems and Process, 252.

[195] Ibid., 9.

wrongdoer (in this case, a state oppressing its citizens), or whether this present prohibition should be kept aside because of the shortcomings of the international legal system and our moral responsibility to act to protect the respect for human rights. To this, she asserts that because international law is not just rules, but a continuous process of decision making, if the present norms no longer serve the interests and needs of the community, then they should be subjected to processes of adjustment. Despite her reservations on the efficiency of Article 2(4), she contends that the best way forward is to look at each case of individual use of force contextually with guidance from the law.[196]

Higgins is not alone in this line of thinking; Reisman notes that laws and norms are devised for human beings for specific purposes and social circumstances. Hence, the purpose for the law is of utmost importance, and the law should always pay attention to context.[197] This dynamism is also at the center of the *process theory'.*

Cali contends that the process theory is positioned between nationalism and positivism. That is, emphasis is placed not only on the expression of the will of states but also on other principles that are independent of states' will.[198] In this sense, international law is not simply a 'platform where everything goes'.[199] He insists that students of politics prefer international law as a process because it cuts across not only the divide between

[196] Ibid., 252

[197] Reisman, Criteria for the Lawful Use of Force in International Law, 283.

[198] Basak Cali, *International Law for International Relations*. Oxford University Press, 2010, 79.

[199] Ibid.

jargons of international relations and international law, but also provides room for law in politics.[200]

4.2 The Legalization Theory

Goldstein[201] and Abbot[202] argue in their articles that legalization is a *'move to law'*, a specific mode of institutionalization which involves three principal variables; obligation, precision and delegation. Obligation means that states are bound through law; precision, that the rules are specific and unambiguous and delegation that the authority to settle disputes, to interpret, to implement and if necessary to make rules is delegated to a neutral entity. These three are the definitive characteristics which institutions may or may not enjoy.

This legalization does not only entail a *move to law*, but it is a *move to law* which takes into consideration the realities of power politics (interest and power as opposed to legalism which ignores the realities of power and interests.)[203] Goldstein agrees with Higgins that law and politics are deeply embedded. The relationship between politics and law is a *reciprocal* one, thus, one cannot be understood in isolation from the other.[204]

Abbot notes that legalization ranges from the ideal type in which the properties of obligation, precision and delegation are maximized, to hard legalization wherein at least

[200] Ibid., 80.

[201] Goldstein et al., Introduction: Legalization and World Politics, 387.

[202] Abbott, et al., The Concept of Legalization, 401.

[203] Goldstein et al., Introduction: Legalization and World Politics, 392.

[204] Higgins, Problems and Process, 252.

the criteria of delegation and obligation are high and to several forms of soft or limited legalization involving one or more attributes, to another ideal type which is a complete lack of legalization. In order words, it is a *'multidimensional continuum'*.[205] Note should be taken of the fact that each of these properties is an issue of gradation and degree. All the same, this move to law is not entirely uniform or coherent.[206] It is also important to note that states will either oppose or favor legalization based on whether this legalization is in their best interests.[207]

As earlier mentioned, the degree of legalization varies. Obligation varies from an express non legal norm to *'jus cogens'*, precision varies from a principle which is vague to a highly precise and elaborate rule, while delegation varies from simple diplomacy to institutionalization in domestic and international courts. Abbot provides a *figure* to illustrate this.

[205] Abbott, et al., The Concept of Legalization, 401-402.

[206] Goldstein et al., Introduction: Legalization and World Politics, 386.

[207] Ibid., 397.

TYPOLOGY		
OBLIGATION (NON-LEGAL NORM)	——→	*JUS COGENS* (PEREMPTORY NORM)
PRECISION (VAGUE)	——→	HIGHLY PRECISE
DELEGATION (DIPLOMACY)	——→	INSITUITONALIZATION in international and domestic courts

Figure 1: (W. Abbott et al. 404)

The purpose of this thesis is to determine if in effect, humanitarian intervention is in the process of being legalized. In order to make this determination, one therefore needs a formula which can possibly test the degree of legalization of humanitarian intervention. Abbot's evaluation mechanism which explains the eight possible *mélanges* of obligation, precision and delegation is a perfect example of such a tool. Each property is termed high, moderate or low, depending on its degree of legalization.

Table 1: Typology of Legalization

Form	Obligation	Precision	Delegation	Examples
1	High	High	High	International Criminal Court
2	High	Low	High	World Trade Organization
3	High	High	Low	Montreal Protocol
4	Low	High	High/Moderate	UN Committee on Sustainable Development
5	High	Low	Low	Vienna Ozone Convention
6	Low	Low	High/Moderate	World Bank
7	Low	High	Low	Helsinki Final Act
8	Low	Low	Low	Concept of Balance of power

Form 1 represents the ideal type of legalization, while Form 8 represents the ideal type of anarchy. However, a complete lack of legalization does not mean the inexistence of a '*softer variance of law'.* Neither do the authors adopt the view that even though legalization is on the rise, this increased legalization is inevitable; rather, they recognize soft law as equally important as hard law.[208]

[208] Ibid., 388.

Higgins and Abbot are not the only authors who view international law as *'a continuum'*.[209] Abbot & Snidal also make the case for legalization as a process- *'series of tradeoffs'* and note that the various forms and types of legalization are a reminder that international law and politics are intrinsically intertwined.*[210]*

Ratner & Wippman disagree with the view of law as static. They contend that international law is a process through which actors *'formulate and reformulate policies'* and interests in order to maximize their gains and promote a preferable *'world order'*. They describe it as the *'constitutive process of authoritative decision-making'*.[211]

Dupuy in defense of law as a process purports that *'repetition'* is of utmost importance in the process of law formulation. Consequently, *'conduct and behavior'* which in the past could have been abhorrent and a challenge to the concept of sovereignty are now acceptable standards of behavior.[212] One begins to question if this is the case with the concept of humanitarian intervention, especially as Hurd contends that legalization of the concept of unilateral humanitarian intervention may already be taking place due to

[209]Charlotte Ku, and Paul Diehl. "International Law as Operating and Normative Systems: An Overview." *International Law: Classic and Contemporary Readings, 2nd ed. Boulder, CO: Lynne Rienner Publishers* (2003): 7.

[210]Kenneth W. Abbott, and Duncan Snidal. "Hard and soft law in International Governance." *International Organization* 54, no. 03 (2000): 455.

[211] Steven R. Ratner, and David Wippman. *International law: Norms, Actors, Process: A Problem-Oriented Approach*. Aspen Pub, 2010. 22.

[212]Pierre-Marie Dupuy, "Soft law and the International Law of the environment."*Mich. J. Int'l L.* 12 (1990): 424-425.

the sustained patterns of state behavior in opposition to the prohibitions on the use of force.[213]

Cassese affirms the legalization of humanitarian intervention when he argues that the NATO intervention in Kosovo sets precedence for the development of new international law *'emerging doctrine'*[214], thus reinforcing the legalization theory. McDougal, Higgins' mentor agrees as well that law is an *'authoritative decision making process'*[215]

Legal positivists, contrary to Higgins focus on law as '*rules'* and *'commands'*. Koskenniemi, for instance rejects the social process theory of law by arguing that it takes the lawyer into the social, economic and political domain which blurs his/her legal arguments. He insists that by attaching political processes to law making, international law develops an *'apologist'* character and this makes international law whatever powerful states determine it to be.[216]

Kleimann opines that Higgins and her New Haven School confuse the '*legal with the political sphere'* and this has severe ramifications on the justifications which some authorities give for the use of force.[217] An example was Abraham D. Sofaer former US

[213] Hurd, Is Humanitarian Intervention Legal?, 307.

[214] Cassese, Ex Iniuria Ius Oritur, 27.

[215]Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman. "The World Constitutive Process of Authoritative Decision." *Journal of Legal Education* 19, no. 3 (1967): 256.

[216]Martti Koskenniemi, *From Apology to Utopia: The structure of International Legal Argument*. Cambridge University Press, 2006. 227.

[217]David Kleimann, "Positivism, the New Haven School, and the Use of Force in International Law." *BSIS Journal of International Studies* 3 (2006): 27.

State Department Legal advisor who used the New Haven approach to use of force to justify the intervention in Kosovo.[218]

Kleimann insists as well that the moral justification of decisions having political natures is a question of philosophy rather than legal interpretation, because moral standards can never be truly objective.[219] This position was also supported by Judges Fitzmaurice and Spender in the South West Africa Cases, wherein they opined that social and humanitarian factors when taking decisions are meant for the political arena, not the legal.[220] In fact, the ICJ's position on this is clear "law exists…to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered'.[221]

4.3 The Theory of Fragmentation Of International Law

Difficulties arising from the non-acceptance of humanitarian intervention as undergoing a process of legalization brings one to a third theory; the *'Theory of Fragmentation'* espoused by Koskenniemi and other authors. Jenks, in 1953, enunciated the fragmentation of international law: "*...law-making treaties are tending to develop in a number of...regional groups which are separate from each other...*"[222] Koskenniemi notes that increased globalization and uniformalization of the world has paradoxically

[218] Abraham Sofaer, "International Law and Kosovo'(2000)." *Stanford Journal of International Law* 36: 1-9.

[219] Kleimann, Positivism, the New Haven School, 39.

[220] South West Africa Cases, ICJ Reports (1962) 466 (Joint Dissenting Opinion of Judges Fitzmaurice and Spender)

[221] South West Africa Cases, ICJ Reports (1966) 6 at para 49.

[222] Jenks, Conflict of Law-Making Treaties, 403.

led to increased fragmentation of international law. Fragmentation takes place when international law is broadening. He goes further to explain that this fragmentation has seen the emergence of autonomous rules and/or legal institutions in different regions of the world. What formerly used to be under the jurisdiction of general public international law is now being governed by specialist systems such as 'human rights law', 'refugee law', African law' or 'The law of the Sea', etc. with each of them possessing their separate principles and legal institutions.[223]

The increase in conflicts and interpretations of public international law, has led to the fragmentation of law to regional specialist institutions such as the African Union and the European Union. The theory of the fragmentation of law through the doctrine of *'lex specialis derogat legi generali'* provides an appropriate means of resolving the complexities and conflicts in international law; conflicts between general law and particular law, as well as conflicts between a general law and a specific rule which claims to be an exception to this general law. The principle of *'lex xpecialis'* provides that in cases of conflict between a general law and a specific rule, the specific rule takes precedence over the general rule. In other instances where there is a conflict between two legal understandings of a law which both sides claim are applicable, but provide incongruous guidance on how to proceed with the application of the law, the doctrine of *'lex specialis'* provides that the rule which is specific (exception) should be applied.[224] Consequently, one might argue that unilateral use of force in humanitarian intervention seems to be an exception from the general prohibition of the use of force from Article

[223] Koskenniemi, Fragmentation of International Law, 30-34.

[224] Ibid.

2(4) because it is the more specific rule. However, others disagree and assert that the prohibition of the use of force in Article 2(4) is the more specific rule and should therefore take precedence over the more ambiguous rule of humanitarian intervention.[225] However, this maxim is not as straightforward as it may seem. It is often very difficult to distinguish the difference between what is a general law and what is a particular law. This idea of the 'specific' taking precedence over the 'general' has been a long standing one in international law and was also espoused by Grotius.[226] Notwithstanding, there is sufficient evidence to show that international law is becoming more issue specific (process of fragmentation) as evidenced by the proliferation of specific laws governing certain issues; 'human rights law', 'refugees law', 'law of the sea', environmental law', etc.

Fragmentation refers to the time factor as well and the fact that new norms replace old ones *'lex posterior derogate priori'*. And even more importantly, the problem of hierarchy of norms in international law comes into the picture.[227] Which rule is more hierarchical than the other? Undoubtedly, Article 2(4) has belongs to *jus cogens* which means that no derogations are permitted. So, how can humanitarian intervention become 'legal' and a valid exception from 2(4)? This can only be possibly if the respect for human rights attains *jus cogens.* One therefore wonders if the doctrine of humanitarian intervention or the respect of human rights has attained a peremptory status in

[225] Joyner, The Kosovo Intervention, 604.

[226] Hugo Grotius, De Jure Belli ac Pacis. Libri Tres, Edited by James Brown Scott, The Classics of International Law (Oxford: Clarendon Press, 1925) Book II, Chap. XVI, Sect. XXIX, p. 428.

[227] Koskenniemi, Fragmentation of International Law, 36.

international law. This position is adopted by Brown who asserts that the respect for human rights have become *jus cogens* with the passing into force of the Genocide Convention.[228]

The raison d'être for the inclusion of fragmentation as one of my theoretical frameworks lie in the fact that increased globalization has led to a widening and broadening of public international law. Consequently, with this broadening of public international law it is but normal that conflicts have arisen on the interpretations and application of law. In order to serve their particular needs and interests, regional organizations have increasingly developed laws on specific issues to govern state practice within their given regions. An example is the European Convention on Human Rights which gives individuals the right to bring action against their governments before the European Court of Human Rights as a last resort if their fundamental rights have been violated; the African Union's seemingly admission of a right to humanitarian intervention was the case in the the *Ezulwini Consensus of 2005*[229], as well as the developments taking place in international refugee law especially within the European union. All these actions taken by regional organizations, demonstrate that public international law is becoming increasingly fragmented.

However, the focus of this research is not to determine if international law is becoming increasingly fragmented, rather the researcher's focus is on determining whether the

[228] Brown, Humanitarian Intervention at a Crossroads, 1691.

[229] AU Executive Council: "The Common African Position on the Proposed Reform of the UN (The Ezulwini Consensus), Ext/EX." *CL/2 (VII), Addis Ababa: AU Executive Council* (2005): 7-8. Hereinafter referred to as The Ezulwini Consensus.

theory of fragmentation can better help explain the confusion which surrounds the debate on the legality of humanitarian intervention. To this effect, fragmentation is explained only in relation to the processes of legalization of humanitarian intervention in international law.

4.4 Conclusions

In this chapter of this thesis, the foundational premises of Higgins' *Process theory',* Abbot's *'theory on the concept of legalization'*, and Koskenniemi's *'Theory on fragmentation'* have been briefly explained. However, how do these theories relate to this thesis? The aim of this thesis is to explain and analyze whether humanitarian intervention is in the process of legalization. To this effect, and although one would need to evaluate this premise in the next chapter more explicitly, at this juncture, at least a tentative standpoint as to the correlation between the research questions and the theories would be evaluated.[230]

Higgins describes international law as a process.[231] Despite the reservations on the use of force in international relations, in this case, the practice of humanitarian intervention, Higgins postulates that because international law is an 'authoritative decision making process' which takes into account the present needs and demands of the society, therefore, if the prohibitions on the use of force no longer reflect the goals of the international community (respect and protection of basic human rights), because one cannot sit idly by while fundamental human rights are being violated with impunity,

[230] Note that this is only a tentative view point. A more detailed and explanatory position will be provided in the next chapter.

[231] Higgins, Problems and Process, 2.

then the laws governing the prohibition on the use of force should be subjected to processes of change. This would enable the international community to effectively make sure that such violations of fundamental rights can be avoided and/or stopped when they commence. This process of change one would presume should mean the legalization of humanitarian intervention.

Hence, is humanitarian intervention in the process of legalization, is it moving from an 'abhorrent practice by a few states to a recognizable and acceptable practice? At this stage of this work, it is premature to determine where exactly the concept of humanitarian intervention finds itself in this legalization process. Notwithstanding the arguments of authors such as Charney who rejects the notion of humanitarian intervention as becoming law because of a significant lack of widespread state practice and *'opinio juris'*,[232] it would be a mistake to think that humanitarian intervention has zero legalization. The seemingly endless debates surrounding the ambiguity of the concept of humanitarian intervention has not stopped some states and/or regional organizations (AU, NATO, US) from carrying out interventions based on humanitarian concerns. Now, do we consider these interventions as violations of international law, or exceptions to the general prohibitions on the use of force? Better still, one might view the Ezulwini Consensus document[233] proposed by the AU, not as a violation of public international law, but as an example of the fragmentation of international law from the centre to the particular. Hence, I am left to wonder if the future of international

[232] Jonathan I. Charney "Anticipatory Humanitarian Intervention in Kosovo."*Vand. J. Transnat'l L.* 32 (1999): 1241.

[233] The Ezulwini Consensus

humanitarian law lies not in the process of legalization per se, but in fragmentation. Accordingly, is fragmentation the future of international law and, even more specifically, is fragmentation the solution to the uncertainty and complexities surrounding the concept of unilateral humanitarian intervention?

Chapter 5

CONCLUSION

Rosalyn Higgins posits that international law is not static, but that it is a process of authoritative decision making. She agrees with Reisman that law is meant to serve a social need and achieve some desirable social circumstances and that if the law fails to provide this, then it should be subjected to processes of change.[234] With regards to the debate surrounding the legality of humanitarian intervention, Higgins opines that humanitarian intervention, although illegal at the moment is morally and politically legitimate. She asks whether the shortcomings and limits of the UN Charter on the use of force - Articles 2(4) and 51 – should be maintained even if it favors the wrong doer (in this case, the state oppressing its citizens), or if these restrictions should be kept aside in order to promote justice and respect for human rights. She even asks:

> …whether the failure of the international system coupled with fundamentally changed circumstances since the time when the relevant texts were agreed, makes preferable unilateral action for the common good even if it is at variance with the norms articulated in the Charter and elsewhere?[235]

[234] Higgins, *Problems and process*, 2.

[235] Ibid., 252.

She does not answer this question in the affirmative, but recommends that if the present norms do no longer serve the best interest of today's community, then it should be subjected to processes of change. This reinforces her process theory in international law.

Considering this line of reasoning, one might be fair to assume that the prohibition on the practice of humanitarian intervention needs to be revised so that states can intervene in the territory of those states that refuse to respect the fundamental human rights of their citizens. In this same vein and seeing as the practice of humanitarian intervention shows no sign of dwindling even though public international law views it as illegal, one is left to wonder if this concept of humanitarian intervention is in the process of becoming law. As Slaughter notes, sometimes it is necessary to break the law in order to change it.[236] Hence, are states deliberately breaking international law because they do want to change it? Charney opines that international law can be changed if there is continuous violation of the current law and the development of a new practice by the majority of states as well as the all important ingredient of *opinio juris.* He goes further to purport that a new understanding of public international law coupled with contemporary contextualization and interpretations of the Charter might be permitting pure humanitarian intervention. [237]

Greenwood notes that the preponderance of interventions in the name of humanitarian intervention is an indication that states accept a right to humanitarian intervention in

[236] Anne-Marie Slaughter, "The Use of Force in Iraq: Illegal and Illegitimate." In *Proceedings of the Annual Meeting (American Society of International Law)*, pp. The American Society of International Law, 2004. *260-263.*

[237] Charney, Anticipatory Humanitarian Intervention in Kosovo, 1238.

customary international law.[238] Furthermore, he contends that contemporary customary international law admits a right to intervene military in the affairs of other states on the grounds of protecting the respect for the fundamental human rights of individuals.[239] Weiss and Thakur too, opine that the fact that humanitarian intervention is used today as a justification for the use of force is a proof that there has been a normative change in ideas; therefore legalization might be taking place.[240] Cassese adheres to this logic of the legalization of humanitarian intervention when he argues that the NATO intervention in Kosovo sets precedence for the development of new international law *'emerging doctrine'*, thus reinforcing the legalization theory.[241] Hence, one might be inclined to agree that recent developments in public international law and the fact that states continue to undertake interventions on the pretext of humanitarian necessity, is proof that the concept of humanitarian intervention is on its way to becoming law, and Kosovo is its precedence. As logical as this may sound, one must still ask how true this assertion is.

As has been previously explained, Brownlie asserts that one would need to prove the existence of general state practice and *opinio juris* if one contends that humanitarian intervention is part of customary international law. In his opinion, there is a lack of sufficient state practice or *opinio juris* that interventions for humanitarian reasons should

[238] Greenwood, Humanitarian Intervention, 170.

[239] Ibid.

[240] Weiss and Thakur, *Global Governance and the UN.*

[241] Cassese, Ex Iniuria Ius Oritur, 27.

become legal.[242] This position is also supported by Joyner who notes that the conditions of state practice and *opinio juris* still need to be satisfied if one is to argue that humanitarian intervention is in the processing of becoming customary international law.[243] Charney, although he suggests that there might be a new understanding of public international law vis-à-vis humanitarian intervention, admits that there is still considerable doubt amongst academics and international lawyers that the international community is willing to authorize humanitarian intervention. The lack of widespread state practice and *opinio juris* even today is apparent. Hence, claiming that humanitarian intervention is in the process of legalization might be very premature.[244] He also contends that Article 103 of the UN Charter overrides all other treaties which are not consistent with the UN Charter, even new laws. Thus, the only possible means for humanitarian intervention to become law would be by amending the Charter, and this frankly is farfetched.[245] As has been discussed above, the twin requirements of state practice and *opinio juris* are quintessential for the development of any form of customary international law, and since this is lacking in the case of humanitarian intervention, then is it fair to assert that humanitarian intervention has not attained the status of customary international law?

However, the argument does not end there. One still needs to determine if humanitarian intervention is in the process of becoming legalized. Therefore, is it possible that the

[242] Brownlie, *International Law and the Use of Force*, 16.

[243] Joyner, The Kosovo Intervention, 601.

[244] Charney, Anticipatory Humanitarian Intervention in Kosovo, 1241.

[245] Ibid., 1240.

practice of humanitarian intervention is an increasingly emerging norm under customary international law? In order to determine this, Abbot et al test of obligation, precision and delegation would be applied to the concept of humanitarian intervention.[246] Obligation here refers to the legally binding nature of the rule; precision meaning the specificity and definiteness (clarity) of the rule and; delegation as to the transference of power of interpretation, implementation, dispute settlement and if necessary law making to a higher authority. It should be noted that each of these is a matter of degree from high to moderate to low.[247]

Table 1 explains how Abbot tests the degree of legalization of a rule or norm. Form 1 indicates that the International Court of Justice (ICJ) has a high degree of obligation, precision and delegation.[248] Article 38(1) of the ICJ evidences the high normative value of the Court as this statute gives the Court the jurisdiction to apply, international conventions, international custom, recognized general principles of law, and even interpret judicial decisions and teachings of the best publicists. This is the reason why Abass rues the missed opportunity in 1999 when the ICJ could have ruled on the issue of humanitarian intervention. If that had been the case, then the debate would have been closed once and for all.[249]

[246] Abbot et al, The concept of Legalization, 401-419

[247] Ibid., 405-406.

[248] Ibid.

[249] Abass, *Complete International Law*, 423.

Form 8 demonstrates a low level of OPD for the concept of balance of power since it is neither a legally binding rule, a specific rule nor does it transfer power to any authority for interpretation, implementation or dispute settlement.

How then does the concept of humanitarian intervention fare in this OPD test?

First, with regards to obligation, humanitarian intervention is rated as ***low***. The reason for this is because states are under no obligation or legally binding duty to intervene militarily in the internal affairs of other states in order to enforce the respect for fundamental human rights. In fact, this is even prohibited by Article 2(4) of the UN Charter.

Secondly, the practice of humanitarian intervention also scores ***low*** under precision because the rule regarding if, how, and when states should intervene militarily for humanitarian reasons, is neither clear nor specific. States more often than not set their own criteria for intervention despite criticisms from other states (Kosovo 1999, Libya 2011, etc.). As a matter of fact, different authors propose different conditions under which humanitarian intervention should be undertaken.[250] Thus, there is an apparent lack of either precision or clarity on this rule.

Last, given that there is no central authority or institution which has been given the powers to interpret, implement and settle disputes on issues relating to humanitarian

[250] Parekh, Rethinking Humanitarian Intervention, 147., Charney, Anticipatory Humanitarian Intervention in Kosovo, 1244., The Kosovo Report, 291-294.

intervention, partly because it is not a binding rule nor is it a precise rule of law, the degree of delegation for humanitarian intervention is therefore also ***low.***

What this test shows us is that the concept of humanitarian intervention same as the concept of balance of power is of a very low normative value. By this, it could be asserted that humanitarian intervention is not undergoing any process of legalization. However, as Abbot opines, a complete lack of legalization does not mean the rule or supposed norm is inexistent or inconsequential. Softer variances of law are of high importance as well.[251] Hence, it should be noted in this case that the doctrine of humanitarian intervention suffers from low legalization and this should not be understood as zero legalization.

Seeing as it has been established that humanitarian intervention seems not to be in the process of being legalized, one begins to wonder if the answers regarding the contested nature of humanitarian intervention lie in the theory of fragmentation. This is especially evident with the African Union's seemingly admission in the Ezulwini Consensus of a possible acknowledgement of the right to humanitarian intervention outside of the provisions envisaged by the UN Charter.[252] The proliferation of specific issue law such as 'laws on genocide', 'human rights law' and 'international refugee law' might just be the indication that international law is becoming increasingly fragmented and as a consequence, issues regarding humanitarian intervention would no longer be under the jurisdiction of public international law but rather would be governed by specific rules of

[251]Abbott, et al., The Concept of Legalization, 401-402.

[252]The Ezulwini Consensus

laws in the regions in which these violations of fundamental human rights occur. An example is the African Union's insistence of not only a right but the duty to intervene in the domestic affairs of other African states who fail to respect the fundamental human rights of their citizens (Article 4 of the Constitutive Act of the AU Charter).[253] Does this mean that the African Union defies public international law by giving its member states the right to intervene in the domestic affairs of other African states, even though political independence and territorial integrity is protected by Article 2(4) of the UN Charter? Is the African Union under any obligation to seek authorization from the Security Council before authorizing such interventions for humanitarian reasons? Which takes precedence, the prohibition of the use of force in Article 2(4) of the UN Charter or Article 4 of the African Union's Constitutive Act? Well as has been argued by Kioko, African heads of states have shown that they are willing to push the boundaries of collective security and purposefully decided to ignore 'legal niceties' such as security council authorization.[254] This only buttresses the fact that one aspect of fragmentation is that norms which are highly legalized and norms whose level of legalization is low, both belong to the system of international law.[255] As to whether which norm is of higher importance, the Charter of the UN is inconclusive, and as illustrated with the example of the AU's Constitutive Act, states and/or regional organizations can and in some instances ignore the Charter in favor of specific laws. Koskenniemi also contends that Article 103 does not say that the Charter 'prevails', rather it refers to the obligations

[253]The Constitutive Act of the Union (the Act) Article 4 as quoted by Kioko, B. (2003). The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-Intervention. *Revue Internationale de la Croix-Rouge/International Review of the Red Cross,85*(852), 807.

[254] Kiokio, The Right of Intervention under the African Union's Constitutive Act, 821.

[255] Koskenniemi, *From Apology to Utopia,* 170-171.

under the UN Charter and even so the word 'prevails' does not mean that norms which are lower ranking, are invalid, null or even suspended.[256]

Nonetheless, if one were to take into consideration the maxim of *lex specialis derogat legi generali*, then it would seem as Joyner opines that an interpretation of this norm states that when a more general and a particular international norm are in conflict, then the more specific norm takes precedence. In this case, precedence should be given to Article 2(4) which is more specific than the ambiguous rule which allows for humanitarian intervention.[257] However, interpretations may vary here because one might instead argue that the rule that humanitarian intervention is permissible under extreme cases is rather an exception to the general prohibition on the use of force in Article 2(4), and in this case, the legal right to humanitarian intervention under extreme cases should rather take precedence over the prohibition on the use of force. Perhaps this was the thinking of the heads of States of the AU member states when drawing up the Constitutive Act.

Nonetheless, the legality of humanitarian intervention still remains a heated debate in the field of international law and among international lawyers. Thus, one can only assert that the present provisions of the United Nations Charter make intervention for humanitarian purposes seem not to be in conformity with international law. The position of this thesis as well is that humanitarian intervention is hardly in the process of becoming law as has been illustrated by the OPD test. In any case, one cannot underestimate the fact that

[256] Ibid., 168.

[257] Joyner, The Kosovo Intervention, 604.

despite the prohibition on the use of force in Article 2(4) of the UN Charter, and a lack of widespread state practice and *opinio juris*, interventions for humanitarian reasons show no signs of ending anytime soon. Thus perhaps it would be wise, to asserts as Charney does, that although humanitarian intervention is not new law, it is a new means of interpreting the law.[258]

All the same, it remains to be seen if the future of the concept of humanitarian intervention lies in the theory of legalization or rather in the theory of fragmentation. What is evident now is that different writers are divided concerning the legality of humanitarian intervention and the prospect of its legalization. Nevertheless, if one takes into consideration the present proposal for R2P to be adopted as an international norm, then it would justify Higgins' process theory. This is even buttressed by Eaton who asserts that the responsibility to protect is an "emerging norm" on the path to becoming customary international law.[259] This will however depend if one sees R2P as an extension of the concept of humanitarian intervention or not. This thesis however does not view R2P as an extension of the practice of humanitarian intervention. Although very similar in many respects, R2P is distinct from humanitarian intervention because while the concept of humanitarian intervention espouses that states might have a right to intervene in the internal affairs of other states in order to put an end to violations of the fundamental human rights of individuals, R2P maintains that states do not only have the

[258] Charney, Anticipatory Humanitarian Intervention in Kosovo, 1238.

[259]Eaton, Emerging Norm-Determining the Meaning and Legal Status of the Responsibility to Protect, 766.

right, but they have the duty to intervene in order to enforce and ensure the maintenance, promotion and respect for human rights by all states.

This thesis asserts the following; on the question as to how the legality of humanitarian intervention is debated in literature and/or doctrine, it is the position of this work that the practice of humanitarian intervention seems not to be in conformity with international law. This is so for a number of reasons. First, there is no explicit provision in the UN Charter which provides for humanitarian intervention as an exception to the prohibition on the use of force stated in Article 2(4). This is in contrast with the cases of collective enforcement and self-defense which the Charter in Articles 42 and 51 respectively provides as exceptions to Article 2(4). The absence of such an express provision stating that humanitarian intervention is an exception to the prohibition of the use of force could be interpreted as humanitarian intervention not being in conformity with international law. Moreover, the fact that the ICJ did not rule on the legality or illegality of humanitarian intervention when seized upon by Yugoslavia after the Kosovo intervention, leaves one with more questions than answers. The lack of an authoritative decision on the legality of humanitarian intervention means that one can only look to state practice for a solution to this dilemma. Hence, the fact that the doctrine of humanitarian intervention still lacks consistent and sufficient state practice as well as *opinion juris* can only be understood to mean that humanitarian intervention seems not to be in conformity with international law.

This thesis also sought out to ascertain if indeed humanitarian intervention is in the process of becoming law. Hence, the second position which this thesis opines is that

humanitarian intervention suffers from a low degree of legalization. This was arrived at after testing humanitarian intervention to the triple criteria of obligation, precision and delegation. The result illustrated that humanitarian intervention scored low on all three criteria. This however does not mean that legalization is completely inexistent; rather it should be understood as having a softer variance of legalization. This work cannot determine with any certainty that the status of humanitarian intervention as a softer variance of legalization might one day evolve to that of a harder form of legalization. One simply does not have the tools necessary to make such an assertion. What one can do at present is to adopt a more pragmatic approach, and if one does so, then one would arrive at the conclusion that until an authoritative decision is provided on the legality of humanitarian intervention or illegality of the subject, then it remains in practice, albeit contentiously.

Therefore, rather than vehemently opposing a practice which has showed no signs of stopping despite several criticisms, this work suggests that it would be more pragmatic if the conditions under which justifiable humanitarian intervention should occur, be defined by an international legal authority. In this light, one is tempted to agree with the "code of citizenship' proposed by the report of the Independent International Commission on Kosovo, which suggested conditions under which justifiable humanitarian intervention could be undertaken in order to protect states from undue interference by imperialist states, but also to protect citizens from human rights abuses. Therefore, this work proposes that before any action is taken in the name of humanitarian intervention, the following must have been considered; (a) All local remedies must have been exhausted; (b) The violations of human rights must be

fundamental and serious; (c) International Organizations must be unable or unwilling to act; (d) Military action must stop as soon as the aim has been achieved; (e) The International Community should not be selective on where to intervene and where not to intervene in cases of human rights violations, so as to avoid the interests of imperialist states to dominate decision making as has been the case in Rwanda, Libya and Syria, just to name a few; and (f) As suggested by Parekh, the intervening powers must construct a viable environment suitable for a smooth functioning of civil authority after they must have left.

This analysis on literature which has been done in this work draws one to the conclusion that humanitarian intervention seems not to be in conformity with public international law, and although it suffers from a low degree of legalization, it definitely cannot be said that legalization is completely inexistent. This thesis also argues that humanitarian intervention is based on the self-calculated interests of the parties involved in the intervention. Conclusively, One can only opine that perhaps, the future of humanitarian intervention lies in the process of fragmentation of international law rather than in the theory of legalization; or perchance in the near future the ICJ might give a decision or recommendation on the concept of humanitarian intervention or probably in the next few years or decades, state practice and *opinio juris* might change in favor of interventions for humanitarian reasons. It all remains to be seen.

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