# THE THEORY AND *PRAXIS* OF HUMANITARIAN INTERVENTION

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| | |
|---|---|
| *A.F.D.I.* | Annuaire Français de droit international |
| *African J.I. & Comp. L.* | African Journal of International and Comparative Law |
| *A.J.I.L.* | American Journal of International Law |
| *Australian Y.B.I.L.* | Australian Yearbook of International Law |
| *B.Y.B.I.L.* | British Yearbook of International Law |
| *British For. St. Pap. (B.F.S.P* | British and Foreign State Papers |
| *CL* | H.L.A. Hart, *The Concept of Law*, (Oxford, Clarendon Press, 1961) |
| *CLS* | Critical Legal Studies |
| *Cmd* | United Kingdom Command Papers |
| *Case W.R.J.I.L.* | Case Western Reserve Journal of International Law |
| *Canadian Y.B.I.L.* | Canadian Yearbook of International Law |
| *Cal. W.I.L.J.* | California Western International Law Journal |
| *Col. J. Trans.L.* | Columbia Journal of Transnational Law |
| *Col. L.Rev.* | Columbia Law Review |
| *DdG* | E. de Vattel, *Le Droit des Gens ou Principes de la loi naturelle"*, *The Classics of International Law*, J.B. Scott (ed), (Washington, Carnegie Institution of Washington, 1916) |
| *Denver J.I.L. & Pol.* | Denver Journal of International Law and Policy |
| *E.J.I.L.* | European Journal of International Law |
| *For. Aff.* | Foreign Affairs |
| G.A. | General Assembly |
| GAOR | General Assembly Official Records |
| *Ga. J.I. & Comp. L.* | Georgia Journal of International and Comparative Law |
| *GTLS* | H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg, (Cambridge Mass., Harvard University Press, 1949) |
| *German Y.B.I.L.* | German Yearbook of International Law |
| *HIUN* | R.B. Lillich, *Humanitarian Intervention and the* |

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|---|---|
| | *United Nations,* (Charlottesville, University Press of Virginia, 1973) |
| *Harvard I.L.J.* | Harvard International Law Journal |
| *Hum. R.Q.* | Human Rights Quarterly |
| *Hague Y.B.I.L.* | Hague Yearbook of International Law |
| *Hansard* | Debates of the United Kingdom Parliament |
| *I.C.J.* | International Court of Justice |
| *I.C.L.Q.* | International and Comparative Law Quarterly |
| *ILA* | International Law Association |
| *I.L.C.* | International Law Commission |
| *I.L.M.* | International Legal Material |
| *Indian J.I.L.* | Indian Journal of International Law |
| *Int. Aff.* | International Affairs |
| *Int. Law.* | International Lawyer |
| *Int. Rel.* | International Relations |
| *Israel Y.B.H.R.* | Israel Yearbook on Human Rights |
| *JBP* | Hugo Grotius, *De Jure Belli Ac Pacis libri tres*, (Amsterdam 1646), trans. F.W. Kelsey, A.E.R. Boak, H.A. Sanders, J.S. Reeves and H.F. Wright, *The Classics of International Law,* (Buffalo, N.Y, W.S. Hein & Co. Inc., 1995) |
| *JG* | Ch. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, trans. J.H.Drake, (Oxford, Clarendon Press, 1934), in *Classics of International Law* |
| *JO.AN.CR.* | Journal officiel. Débats parlementaires - Assemblée Nationale - Compte rendus |
| *L.N.O.J.* | League of Nations Official Journal |
| *L.N.T.S.* | League of Nations Treaty Series |
| *Leiden I.L.J.* | Leiden International Law Journal |
| *Modern L.Rev.* | Modern Law Review |
| *M.A.E* | Ministre des affaires étrangères |
| *NLNR* | J. Finnis, *Natural Law and Natural Rights,* (Oxford, Clarendon Press, 1980) |
| *Neth. I.L.R.* | Netherlands International Law Review |
| *N.Y.U.J. Int'l L. & Pol.* | New York University Journal of International Law and |

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|---|---|
| | Politics |
| *Neth. Y.B.I.L.* | Netherlands Yearbook of International Law |
| *PTL (1967)* | H. Kelsen, *The Pure Theory of Law*, Max Knight trans. (Berkeley, Calif., University of California Press, 1967) |
| *PEF* | La Politique étrangère de la France (publication du ministère des affaires étrangères) |
| *Power and Policy* | M.S. McDougal, "International Law, Power and Policy: A Contemporary Conception", 82 *R.C.*, (1953 I), p.133 |
| *Proc. A.S.I.L.* | Proceedings of the American Society of International Law |
| *The Province* | J. Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, (London, Weidenfeld & Nicolson, 1955) |
| *R.C.* | Recueil des Cours de l'Académie de Droit International |
| *R.G.D.I.P.* | Revue générale de droit international public |
| *Summa* | Thomas Aquinas, *Summa Theologia*, (London, Blackfriars, 1964) |
| S.C. | Security Council |
| SCOR | Security Council Official Records |
| *TJ* | J. Rawls, *A Theory of Justice*, (Cambridge Mass., Harvard University Press, 1971) |
| *U.S. For. Rel.* | Foreign Relations of the United States |
| *Vanderbilt J.Tran. L.* | Vanderbilt Journal of Transnational Law |
| *Va. J.I.L.* | Virginia Journal of International Law |
| *Y.B.I.L.C.* | Yearbook of the International Law Commission |
| *Yale J.I.L.* | The Yale Journal of International Law |
| *Yale L.J.* | The Yale Law Journal |
| *ZaöRV* | Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht |

## ABSTRACT

The aim of this thesis is to analyse the conceptual foundations of the doctrine of humanitarian intervention and scrutinise the pertinent practice within the identified lego-philosophical framework.

The present study is organised into three major sections. The first section contains the theory of humanitarian intervention and it has been subdivided into four chapters which represent the main legal theories. The pursued analysis is, thus, manifold. It proceeds with a theoretical appraisement of natural law, positivism, realism, and critical legal studies by presenting and evaluating their main dispositions, inadequacies and interrelations. Additionally, those trends in the practice of humanitarian intervention which coincide with the identified theoretical tenets are also appraised.

The thrust of the pursued analysis is, we hope, to rationalise the contradiction in legal doctrine which stems from the different philosophical stances adopted by legal theorists. These contradictions could be surmised in the antithetical poles of peace/justice; human rights/sovereignty.

The next section could be introduced as the *praxis* of humanitarian intervention and contains two chapters. Having identified the arguments and contradictions, two articles of the United Nations Charter which attempt to control the notion of humanitarian intervention by legal means are analysed. That is, Article 2(4) on the non-use of force and Article 51 on self-defence. The diversified effectuation of humanitarian intervention renders the identified contradictions and opposing theoretical trends more evident.

However, our aim is not merely to deconstruct the legal and philosophical milieu relating to humanitarian intervention but also to present a new framework for analysis. Consequently, the last two chapters contain our *phronesis*. They deal with the assumption of human dignity which transgresses the compartmentalisation of legal doctrine and its unreflective actualisation in the *praxis* of humanitarian intervention.

At this point, the aim of the present research is to substitute a sterile lego-philosophical dogmatism and to submit under scrutiny a vision whereby the critical parameters of any humanitarian action are evaluated and accounted for. This, we hope, consists of the innovative aspect of this research. The existing lego-philosophical approach to humanitarian intervention - negative or positive - suffers from an unreflective automation. The negative approach submits any relevant action to strictly defined criteria compliance with which is *conditio sine qua non* for legality. On the other hand, the positive approach encounters greater difficulties. It weighs any humanitarian action according to certain criteria but disguises its value choices within the legal context. The fear of incommensuration in legal argument invites indecisive and restrained attitudes.

In contradistinction, our approach entails an explicit aim of attaining human dignity which redirects our reflective nature towards distinguishing and de-concretising the manifold aspects which humanitarian actions contain. Instead of monolithic evaluations, one should see in any humanitarian action the values which are at stake and what should be done in order to ameliorate the situation.

# INTRODUCTION

## I. THE ROLE OF INITIAL ASSUMPTIONS IN LEGAL ARGUMENTATION

**I.1** *My initiation with the problem.* Whilst carrying out research into the legal framework for humanitarian intervention and protection of nationals, two controversial concepts in international law, I became aware that there exists, principally, a dichotomy in international legal argument concerning these concepts. The legal argument is bifurcated mainly into two schools. On the one hand, some legal scholars advocate a permissive attitude towards such actions, invoking considerations of humanity, whereas their theoretical opponents reprove of such actions. The latter arrogate their arguments from the prevalent legal framework as it is represented by the United Nations Charter. Between these two extremes, a third, mediatory approach attempts to reconcile a humanitarian interest with the requirements of the legal order.

Each theoretical arrangement presents its legal arguments quite convincingly until one becomes acquainted with the "opponent" school's line of reasoning which may exert some appeal or, at least, discard the certainty of the embraced argument. Consequently, the dilemma of choosing between normatively opposing theses emerges in perplexed issues such as humanitarian actions. Thus, and in order to reach a justifiable result, one should demonstrate his affiliation to one of the above positions. In a nutshell, the law on the use of force which encapsulates an essential and decisive aspect of humanitarian actions, peregrinates between a restrictive, a permissive, or a relatively permissive/restrictive interpretation of the pertinent legal rules, confining thus the argument solely to the legal justifiability of each position.

Although the theoretical logomachy concerning the "correct" interpretation flourishes, it originates from a common point, namely the legal propositions. The invocation of rules has been ensnared with cynicism which is based on the assumption that rules can be manipulated and provide rationalisation and justification to any state action.

**I.2** *The initial assumptions.* The feeling of disappointment which surrounds the supposed interpretative manipulation of legal rules evolves from the scantiness of a demonstrative explication of the initial assumptions which generate different legal arguments. They are implicit in legal reasoning, hidden in the arguments, though dominant in the manipulation of those same arguments. The initial assumptions, existing though not visible, control legal reasoning and predetermine the outcome.

Consequently, the recognition and exposition of their existence palliates the ferocity of legal argumentation by elucidating the conditions and causes of disagreement. The explicit demonstration of these assumptions remedies the sterility and simplicity of legal debate. It does not, however, conclude or close the debate because it refers to those presupposed foundations where agreement cannot be obtained. The dispute becomes interminable by alluding to those fundamental premises, the initial assumptions, which are not reasoned or provable but stand as the ulterior reasons.

The assertion that law has a point of derivation, that is, an initial assumption which accounts for its interpretational definition is not novel. That "essential" source of law has varied in the history of law, from God, nature and natural law to the command of the sovereign or the will of the people. It could hardly be denied that, irrespective of those variations, the foundational assumption is present in providing the ideological context to the legal system. It is external to legal argument and unific though implicit; it is abstract in all legal systems, therefore not readable. It could be compared to a veil through which we construct and interpret the legal world. This comparison refers mainly to the interpreter's point of view who, rather unconsciously, assimilates the premises of a particular assumption. From the legal viewpoint, the initial assumption is the foundation of the law even if mythical or notional in its premises.

The Jews derived their legal rules from God who became the conceptual basis of their system. Justice, as revealed by right reason or conformity with the dictates of nature was for the Greeks the ultimate unifying principle. For the Romans it

was nature, as articulated by Cicero: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; ..... ".[1]

Theistic natural law which prevailed until the Enlightenment gave impetus to the rationalisation of law. The ideological source of law does not wane, although its initial assumption changes and becomes the "will of the people" or the "sovereign command". The reason for its longevity is that it provides the unifying mechanism to the legal system.

> "Secularisation of the law has consisted not in doing away with the 'incomprehensible nature of authority', but in censoring any mention of this. When formerly it was divine in its origins authority 'resounded', and its voice was heard like Biblical thunder, unassailable, irrefutable and unintelligible. Today, in its secularised form, authority still derives its effectiveness from being incomprehensible, with the centralised state installed on the Papal throne".[2]

Resort to this initial assumption cannot produce definite answers. It only transfers the dispute to a higher level of abstraction. Facing the threat of being condemned to indefinite oscillation and the potentiality of being substituted by philosophy and social sciences, legal discourse regressed in the extent of its debate. It maintained the distinction between theory and doctrine, between prescription and description as a means of preserving the distinctive nature of law. Legal professionals should only be concerned with proper law or doctrine because engaging in theory, that is, with the extralegal environment, jeopardises the presumed objectivity of legal norms by injecting subjective assumptions.

Theory is suspected of producing indeterminacy. When lawyers initiate a theoretical debate, they become frustrated with the inability of theory to determine the result definitely. Instead, it extends the area of discord to abstractions which become incomprehensible. Any theoretical position determinative of outcomes is vulnerable to the constructions of opposing theories. In the end, it was deemed necessary to confine legal argument within

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[1] Cicero, *De Re Publica*, Bk.III, XXII.33, trans. C.W. Keyes, *Loeb Classical Library*, (Cambridge, Mass., Harvard University Press, 1928), p.211

[2] A. Glucksmann, *The Master Thinkers*, (Brighton, 1980), p.58

its doctrinal boundaries in order to avoid experiencing the frustration of vague theoretical dispositions.

At the same time, doctrinal argument has failed to provide the anticipated sense of security and clarity. There are instances where doctrinal outcomes seem either irrelevant or controversial. The area on the use of force provides us with an example. The rule on the non-use of force has been meagrely reflected in state practice and at its best it was attributed with antagonistic interpretative courses promoted as correct doctrinal answers. Restrictionists and relativists are vying to prove the accuracy of their position and employ in their arguments conflicting principles such as justice or peace. Their particular arguments yield an aura of *déjà vu*, their principles are familiar and they can only "cheer or jeer, label [the] opponent a moral leper or a disingenuous romantic".[3]

Legal professionals themselves, incapable of solving the disputes among equally valid arguments, resort to theory as the final arbiter. Theory, as it was said above, only brings into the debate incomprehensible abstractions. It was graphically described by A.M. Honoré that: "Decade after decade Positivist and Natural Lawyers face one another in the final of the World Cup .... . Victory goes now to one side, now to the other, but the enthusiasm of players and spectators alike ensures that the losing side will take its revenge".[4]

The argument, then, appears to be circular. Legal theory resorts to abstraction and to avoid this we confine ourselves to doctrine. However, this produces problems of definition which could only be resolved by reliance on theory. In the end, the exercise is self-referential. Legal professionals, therefore, choose the security of the doctrinal world, suppressing the theoretical initial assumptions. Because this device cannot produce clarity, we need to disentangle the debate. This happens by explication of the initial theoretical assumptions inherent in the different doctrinal conclusions as well as by presenting new assumptions to achieve optimum results.

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[3] A.M. Honoré, *Making Law Bind: Essays Legal and Philosophical*, (Oxford, Oxford University Press, 1987), p.33

[4] A.M. Honoré, "Groups, Laws and Obedience", in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence*, Second Series, (Oxford, Clarendon Press, 1973), p.1, at pp.1-2

## II. AN ATTEMPT AT RECONSTRUCTION

**II.1** *Human dignity as a reconstructive device.* In the process of this work a new assumption will be submitted, that of human dignity, which is probably equally unprovable by ulterior reason as all the other concurrent assumptions. We can only present the reasons for adhering to this assumption and how it could mould the present line of legal discourse or attribute to an effective protection of human values. Adherence to this particular assumption is induced by our effective nature and predisposition, it is rather subjective and, therefore, total agreement is not expected. It is merely judged on the evaluative contribution to human or state activity. It cannot provide certainty but even the dominant assumptions are less finite and perceptible than they tend to admit. Although it diminishes certainty, it increases the knowledge and possibilities of how things may be, expands our perceptive field and liberates our thought from uncritical adoption of supposed stable assumptions.

**II.2** *Beyond the closed argument.* Human dignity as the new assumption entreats human appreciation, creativity, edification and multi-instructionism. It induces lawyers to look at problems in a comprehensive manner and appreciate their more complex multi-meaning. Thus, it transgresses the traditional occupation of the lawyerdom which is mainly concerned with the legal argument. In international law, conditions and situations, ideals, politics and rules interweave; they have their own significance and arise when the practitioner is dealing with a certain incident. Humanitarian intervention has, for example, multiple dimensions: legal, political, moral, personal, human or psychological. Overlooking the multidimensional scope forces the practitioner to deal only with the legal argument which in its turn becomes self-restrictive. However, *aséptisation* is not feasible and, consequently, we end up with an interchange of arguments which externalise that which has been described as the oscillation between apology and utopia.[5] The argument which contains interpretative deductions from state practice is apologetic, whereas one which upholds standards is utopian. Consequently, an argument contingent to state

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[5] M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument.* (Helsinki, Finnish Lawyers' Publishing Company, 1989)

practice concerning humanitarian intervention is apologetic, whereas the one based on principle such as the principle of non-intervention is utopian. There is also a third strand which attempts to balance utopia and apology but it results in self contradiction.

The above portrayal of legal discourse directs us towards trailing a missing element: the personal stigma, which is devoured by the practice and the structure. International law is concerned with producing structural arguments and not with the significance of the argument; the responsibility of the discussants; the significance of the incidence and of its consequences. We share the opinion that human dignity as it is elucidated in this work addresses these issues. It encounters the phenomena and bears responsibility for its findings. Furthermore, it is liberating because it is not resistant to revision as the main legal arguments are but it provokes, promotes and substantiates dialogue.

We shall proceed then with a presentation of the international legal argument as a balancing act between naturalism and positivism, along with realism's challenge and the deconstruction performed by the Critical Lawyers. Having also presented the realisation of these arguments in specific cases, we shall leave aside the dogmatic knowledge and embrace the dialogic knowledge of human dignity.

Before proceeding with the main "corps" of this work, some clarifications should be made concerning the different terms used to describe our topic and their aim.

In this work the terms humanitarian action and humanitarian intervention are used denoting different things. Our preferred term is humanitarian action which includes unilateral or multilateral, institutional or not actions which protect the human dignity of threatened individuals. Hence, the term humanitarian action fully defined includes the traditional humanitarian interventions and what is considered as protection of nationals. The use of the word "action" instead of "intervention" describes the multifaceted character of the genre of researched material and also, mentally and psychologically, discharges the connotations which the word intervention gives rise to.

On the procedural field, the description of cases and the legal argumentation which accompanies them follows their traditional explication as humanitarian interventions or protection of nationals. Additionally, there is deliberation of their legal and philosophical assumptions. However, their evaluation and reconstruction refers to their being humanitarian actions.

# CHAPTER ONE

# NATURAL LAW THEORY AND HUMANITARIAN INTERVENTION

*The origins of natural law theory: Greek and Roman - Medieval Christian articulation of the theory: Thomas Aquinas - Hugo Grotius: his natural law theory; the three arguments for humanitarian intervention: (i) importance of the individual; (ii) humanity's reaction; (iii) preservation of international peace - Modern doctrine of humanitarian intervention based on the three Grotian arguments - Contract theories: John Rawls's "Theory of Justice"*

## I. THE ORIGINS OF NATURAL LAW: THE GREEK WORLD

**I.1** *Introduction.* Natural law is coeval with the evolution of human knowledge, and recognises different stages in the advancement of human perceptions of the world. It would not be immoderate, thus, to trace the inception of man's philosophical entanglement in the physical world which always stupefied human beings with its normative order. The Greeks have attributed to that normative order different names such as *moira* (fate), *dike* (justice), *kosmos* (order) or *physis* (nature). The names portray the same concept but differ in their interpretative potential.

It seems appropriate for our understanding that the natural law theory should be presented in its different formulations as ascribed to particular philosophical, political and scientific developments from ancient to modern times.

**I.2** *Nature, morality and law in the tragedies.* The Greek deity has a humanistic persona and that trait differentiated it from the intimidating figures of previous theocracies. They are projections of human beings, though more powerful than the latter. In Homer, human and divine actions intermingle to procure both

teleology and responsibility. The "will of Zeus"[1] is the superseded necessity, a certain order, and it is man's fate (*moira*) to satisfy his "portion" of that order, or else Zeus will. Man does not show a libertarian choice or approval but a subjection to his *moira*.[2] What is more striking in the epics is that the explanation of events is simultaneously external and internal. These two perspectives are interwoven[3] and the superseded order is intermingled with human responsibility for human actions. Zeus, or the interpersonal necessity, is superimposed on individuals; but it appears, because everything pursues its natural course, as complementary to that course.[4] Human responsibility could be regarded as the development of moral understanding. The dual, human and divine, explanation of events is acknowledged by Agamemnon in *The Iliad*. For Agamemnon, the natural occurrence which caused Achilles' anger, setting in motion the events of *The Iliad,* is attributed to divine intervention, though his acts accomplished the schema.[5] The necessary order and human choice are not irreconcilable or inconsistent. On the contrary, they are infused in the notion of *moira* (order) which contains both an "ought" and a "must". This is the normative and real order in a casuistic relation for the ascription of responsibility.[6]

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[1] Homer, *The Iliad,* trans. R. Fitzgerald, (Oxford, Oxford University Press, 1984), I. 5

[2] Hugh Lloyd-Jones, *The Justice of Zeus*, 2nd ed., (Berkeley and Los Angeles, University of California Press, 1971), pp.4-5: "[Zeus] exercises a vague general control over events, and since his thought is identical with future happenings, the future can be known by him or by whoever knows his mind. *Moira*, one's "portion", is in the last resort identical with the will of Zeus".

[3] C.H. Whitman, *Homer and the Heroic Tradition,* (Cambridge Mass., Harvard University Press, 1958), p.248: "There were few places indeed where an ancient Greek could fail to see, not the work of God, but a god, and this is why everything in the Iliad happens twice, once on earth, and once in the timeless world of deity".

[4] W.F. Otto, *The Homeric Gods: The Spiritual Significance of Greek Religion,* trans. Moses Hadas, (N.Y., Pantheon, 1954), p.7: "In their world, the divine is not superimposed as a sovereign power over natural events; it is revealed in the forms of the natural, as their very essence of being".

[5] "But I am not to blame.
Zeus and Fate and a nightmare Fury are,
for putting savage Folly in my mind
in the assembly that day, when I wrested
Achilleus' prize of war from him. In truth,
what could I do? Divine will shapes these things"
Homer, *Iliad*, *supra* note no.1, I, 9.86-90

[6] "[The concept of *moira*] is in fact an early attempt to solve the age-old problem of free - will and determinism. *Moira* fixes some things but not all. *Moira* provides the framework within which man is free to act. But revolt against that framework is conceived. ..... It is here that a moral element enters the concept. The man who accepts his destiny, who, so to speak, elects to work within the framework, who bows to the will of heaven and does not set himself up against

A subsequent development was the replacement of divine necessity with divine justice, its moralisation and its reconciliation with natural order. This was achieved by integrating both natural and divine order in the concept of *cosmos*. The rational unity that the universe displays is the basis of both spirit and matter. That is also the main point of difference between Christian and Greek ethics. For the Christians, the moral law has appeal because it is promulgated by God, an idea taken from the Jewish theocracy, whereas for the Greeks, its appeal is based on its reasonableness.[7] Theirs was a comprehensive idea of *cosmos* or *a cosmos* which signified order and beauty.[8] The universe for the Greeks was a living organism consisting of spirit and matter imbued with the divine. Consequently, it consisted of moral and physical laws. Heraclitus explains the sun's rotation by using the notion of justice: "Sun will not overstep his measures; otherwise the Erinyes, ministers of Justice, will find him out."[9] Human action is integrated in that *cosmos* and respectively those philosophies are more descriptive than evaluative.

Later, in the 5th century BC, the balance of observation moved from the cosmics and universe to that of human beings. In Aeschylus' tragedies, Zeus is still the overmastering will. In Sophocles' *Antigone,* the conflict of human laws and morality is apparent. Antigone defies Creon's dictum and buries her brother Polyneces, animated by her moral beliefs.[10] Antigone's submission to the divine

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it, is enaisimos, and this is a term of definite approbation. Here is a concept of morality closely similar to, though not identical with, that which the Stoics were later to evolve - right action consists in acceptance of that which destiny lays upon you. But it is not a truly fruitful concept, for it is at best of limited (and very difficult) application, and it is incapable of much development, except negatively". J. Ferguson, *Moral Values in the Ancient World,* (London, Methuen & Co., 1958), pp.15-16

[7] E. Hatch, *The Influence of Greek Ideas and Usages upon the Christian Church*, A.M. Fairbairn (ed.), 7th ed., (London, Williams & Nordgate, 1988), p.158

[8] C.H. Kahn, *Anaximander and the Origins of Greek Cosmology,* (N.Y., Columbia University Press, 1960), p.222: "The peculiar richness of the term lies in its capacity to denote a concrete arrangement of beauty or utility, as well as the more abstract idea of moral and social order".

[9] G.S. Kirk, J.E. Raven, M. Schofield, *The Presocratic Philosophers,* 2nd ed., (Cambridge, Cambridge University Press, 1983), p.201

[10]"For me it was not Zeus who made that order.
Nor did that Justice who lives with the gods below
mark out such laws to hold among mankind.
Nor did I think your orders were so strong
that you a mortal man, could over-run
the gods' unwritten and unfailing laws.
Not now, nor yesterday's, they always live,
and no one knows their origin in time.
So not through fear of any man's proud spirit

law whilst Creon's violation thereof is a manifestation of the conflict between positive and natural law in its modern interpretation. Iniquitous laws are non - laws according to naturalist die-hards to whom Antigone belongs or according to its milder Thomistic or Finnisian interpretation they are defective laws, though obligatory. According to the inflexible Creontian or Austinian positivism, those laws would be enforced however unjust because they emanate from the right authority, whilst the milder approach coincides with that of naturalism, as will be presented below. However, the conflict in that tragedy is also the manifestation of an inescapable normative order. As in the previous teleological period, there is a prearranged order which in this play is the doom of the Theban royal house. The actors show choice, liberty, personal responsibility, but eventually they submit to that impersonal force. Their destruction restores the order of the impersonal world which has been waived by human action.[11]

In addition, in *Oedipus Rex*, it is the purposive order that determines the course of action. Sophocles in this play affirms the order of the human condition. He shows the limitations of human vision in conceptualising the moral order of the world "exhibited in certain fundamental human feelings and aspirations for lasting value."[12] Euripides was influenced by the sophistic movement of his time and his work displays inconsistency concerning the existence of moral order, which is attributed to his personal philosophical bewilderment.[13]

**I.3** *The Sophists*. During the same period and under the influence of the sophists, the conflict between *nomos* and *physis* emerged. *Nomos* refers to custom, convention, rule or law, an artificial work, a creation of human effort. *Physis* connotes nature or the real. The antithesis alludes to the sources of evaluative

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would I be likely to neglect these laws,
drawn on myself the gods' sure punishment".
Sophocles, *Antigone*, in D. Grene, R. Lattimore (eds.), *The Complete Greek Tragedies*, vol.II, (Chicago, University of Chicago Press, 1959), p.157, at p.174, 450-460

[11] "Man is a toy in the hands of superhuman forces. It is the gods' rule over man that it is called "fate", and man's reactions against it, which make human life great as well as tragic. Man is born into a world which is the work of the gods, in its good as well as its evil things. ..... His fate is bound up with the divine order of the world and tragedy occurs by the clash between that divine order and human disorder". Victor Ehrenberg, *Sophocles and Pericles*, (Oxford, Blackwell, 1954), p.24

[12] R.F. Goheen, *The Imagery of Sophocles' Antigone*, (Princeton, Princeton University Press, 1951), p.95

[13] W.C. Greene, *Moira: Fate, Good and Evil in Greek Thought*, (Cambridge Mass., Harvard University Press, 1944), p.174

standards,[14] in particular the identification of authoritative sources for *nomos* which, lacking authority "by nature", should nonetheless not be ignored. Protagoras argues that societies promulgate laws in their process towards civilisation and that laws are necessary for social life. Thus, they are acquired and not given by nature; they have human origin.[15] A person can achieve his development only within a community and only laws and customs hold a community together. This statement indicates an acknowledgement of the sociability of human nature which in its different manifestations as social contract or altruism has represented one crucial aspect for legal evolution. The opposite view of individualistic egoism and sanctification of might is presented in *Gorgias*[16] and by Thucydides in the notorious dialogue between Athenians and Melians: "the strong do what they have the power to do and the weak accept what they have to accept. ..... Our opinion of the gods and our knowledge of men lead us to conclude that it is a general and necessary law of nature to rule whenever one can".[17]

As it is presented by Plato and Aristotle, the Sophists and Socrates disagreed on the matter concerning the nature of man. The Sophists, dragging their conclusions from a pure natural law theory or rather from a descriptive natural envision, presented man as an egoistically, selfishly and antisocially motivated creature. Their views are echoed in Plato's *Gorgias* by Callicles: "But I think we only have to look at nature to find evidence that it is right for better to have a greater share than worse, more capable than less capable."[18] Callicles believes that conventional determination of justice is not compatible with true justice because the latter's governance stems only from might. He denies the existence of objective moral standards, an idea repeated also in the *Laws*: "Some people assert ..... that the principles of justice have no existence at all in nature, but that

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[14] G.B. Kerferd, *The Sophistic Movement,* (Cambridge, Cambridge University Press, 1981), pp.112 - 114

[15] W.K.C. Guthrie, *A History of Greek Philosophy,* vol.III, (Cambridge, Cambridge University Press, 1969), pp.63-84

[16] Plato, *Gorgias*, trans. R. Waterfield, *The World's Classics*, (Oxford, Oxford University Press, 1994), pp.65-66,483 c,d,e

[17] Thucydides, *The Peloponnesian War,* trans. R. Warner, (Harmondsworth, Penguine, 1954), Bk.V, pp.360, 363

[18] Plato, *Gorgias*, *supra* note no.16, p.66, 483 c-d

mankind are always disputing about them and altering them".[19] On the other hand, Socrates presented man as a social being who can achieve his fulfilment only in a social context. Plato's writings are concurrent with the decline of the Greek *polis* whose morality and laws were exploited in the hand of particular majorities promoting their self-interests. Those contradictory human motives, altruistic and individualistic, which determine human and institutional evolution have been adhered to as philosophical premises by Critical Lawyers.

An area where the sophists also ventured was to determine whether there exists an objective basis for morality or whether it is pure convention. *Physis* displays permanence and encompasses reality, that is, objectivity. It is also prescriptive, a source of values. Hence it serves as the source for objectivity in ethics because the ontological realm is provable and hence objective. The pattern of thought which permeates the philosophical debate since then has been set. There is, on the one hand, Protagoras who defends law as a human achievement and, on the other, those like Antigone who defend a divine prescription. The "is" - "ought" distinction, a recurrent theme in the positivist - naturalist debate, has been accomplished but not in the realm of the foundational standard. The objective standard for both moral and conventional rules has not been repudiated yet.

**I.4** *Plato and Aristotle.* Plato tries to restore the moral analogy of laws with the ordained world. For him, knowledge and reason can fulfil human nature. They guide human action to achieve justice. For Plato, justice is that trait in human nature which delimits the spheres of human psyche. Reason becomes a guide to legal principles. Laws are reasoned thoughts (*logismos*) embodied in convention.[20] The capacity of man to reason, which distinguishes him from other creatures and helps him to form his will accordingly, inspired the subsequent development of legal and political philosophy. After a period of religious universalism, reason is re-established by Grotius as we shall see later. It should also be emphasised that the duality of natural law, initiated by Plato, Aristotle and the Stoics as rationally found principles or as an expression of a way of life, has been a permanent feature of the latter.

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[19] Plato, *Laws*, 10.889-890, in B. Jowett, *The Dialogues of Plato*, vol.V, 3nd ed., (Oxford, Clarendon Press, 1931), p.274

[20] Plato, *Laws*, *ibid.*, 9.875, pp.259-260

Aristotle in his *Rhetoric* says that "particular law ..... which each community lays down and applies to its own members is partly written and partly unwritten." He refers to universal law, the law of nature, and says that " .....there really is ..... a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other".[21] Plato initially attributed the function of maintaining the moral reason to some enlightened people. He promulgated later a metaphysical idea of *Forms*. The *Forms* were immutable, unchangeable and therefore real. They were particularised, whereas the aggregate whole comprised an organic unity with the *Form* of God as the final expression. This organic system is the source and explanation of the *Forms*, the source of the actual world. Human things are included in the *Forms* and can thus reach God. Justice is that which is appropriate to one's nature. Everyone has a position in the order of things and justice is determined by observing the harmony of the parts to the whole.[22] The harmony of the parts and their direction towards their proper end constitutes justice in the individual as in the state.[23] Plato's contribution to the natural law theory is his articulation of ontological natural law. He derives his ethical principles from a normative natural order giving it human and cosmic significance.[24]

Aristotle's vision of nature is ontological and teleological, but not metaphysical and abstract as in Plato's *Forms*. Our world is the real one and its purposiveness is realised in the Form of things. Each thing has an unchanged element which is the formal element. That element which can be called the essence of the object is teleological, that is, it describes the function of the object by nature. For Aristotle, there is an external, unmoved person who stimulates any change, the

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[21] W.D. Ross (ed.), *The Works of Aristotle*, "Rhetorica", vol.XI, (Oxford, Oxford University Press, 1924), 1373b

[22] Plato, *Republic*, trans. R. Waterfield, (Oxford, Oxford University Press, 1993), ch.5,6, pp.131-156, 427-444

[23] Plato, *Laws*, *supra* note 19, p.290: "The ruler of the universe has ordered all things with a view to the excellence and preservation of the whole and each part, as far as may be, has an action and passion appropriate to it. ..... and you (man) do not seem to be aware that this and every other creation is for the sake of the whole. ..... And you (men) are annoyed because you are ignorant how what is best for you in the universal scheme is also best for you singly, by the law of the common creation".

[24] L.L. Weinreb, *Natural Law and Justice*, (Cambridge Mass., Harvard University Press., 1987), p.32; J.P. Maguire, "Plato's Theory of Natural Law", 10 *Yale Classical Studies*, (1947), p.151ff; John Wild, *Plato's Modern Enemies and the Theory of Natural Law*, (Chicago, The University of Chicago Press, 1953), pp.62, 134-156

inclination of the latter, though, will be towards the direction of its formal essence. That stimulus does not provoke change in a mechanical manner but only by its projection as the "desire" of the particular formal essence. Thus, it is at the top of the teleological universe but also has nothing to do with it.

Aristotle's schema avoids the relativism of ethics by upholding a teleological interpretation of the universe. Human beings have a formal essence which procures changes in the pursuit of that highest essence. Ethical principles emanate from nature and are thus objectively valid. The conflict between nature and convention is solved by the distinction between potential and actual being. Virtue, being potential or natural, is received by human beings and becomes actual only by habit, education and training. Consequently, customs, laws, and conventions are imposed on human beings as the actualisation of the potential-natural virtue.[25] His philosophical achievements will become more evident later with St. Thomas Aquinas and the modern reformulation of natural law by Finnis; particularly with their insistence on the moral aspiration of law in promoting the common good and the self-evident values deducted from their *telos*.

## II. THE HELLENISTIC AND ROMAN CONCEPT OF NATURAL LAW

**II.1** *Stoicism and the Hellenistic Period.* It was the cosmopolitanism of the Hellenistic world that attributed natural law with its definition and purposiveness. The Stoics wrote in a period when Athens and the Greek *polis* were in retreat and philosophical or scientific research was conducted in other parts of the world. It was a period also of intellectual inquiry which emphasised human intelligence. Stoicism's internationalism and its adaptation to the Roman world has contributed to the establishment of the natural law theory and provided the medium for integrating the ancient and the Christian worlds.

Stoics perceive the universe as a unified organic substance which is infused with *logos*. Nature and man partake of *logos*. This active force is described with

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[25] W.K.C. Guthrie, *supra*, note 15, vol.V, p.344

different terms which tend to identify with each other: Fire; Breath; Nature; Reason; Law; God; Providence; Fate.[26]

The identification of the immanent principle with nature or God meant that Nature had both a descriptive and normative connotation, an infusion of "is" and "ought". "Nature embraces both the way things are and the way they should be."[27] Another aspect of Stoic philosophy is a pervasive causality. The universe is a perplexed pattern of causes and effects because that is the *logos* by which God's plan is effected. The advocacy of a mundane casuistic order provides the justification for a teleological system where everything is attributed to divine purpose.[28] Ethics were also central to the Stoics, the highest objective being the conduct of good life. A teleological perception of law for the reformation of society is a recurrent theme in legal theory, culminating in the apparent purposiveness of the policy school.

In that ordained system, the position of human liberty, choisism and human responsibility is questioned. Human action could be a "dictate of nature" in a deterministic sense, that is, the rule of causes and effects. On the other hand, it could also mean what one ought to do in pursuing life according to nature. In the latter sense we have moral responsibility but life is also determined. Probably, this is so because Stoics believed that Nature as *logos* is always bringing about good things.[29] They offered a double evaluation of the same act, one of the determined world, the other of the free qualities of man. In addition to the external causes, it was also the self-will which was evaluated, and, thus, a man could be responsible concerning his attitude towards an act, whereas the physical act itself might be evaluated differently. Stoicism emphasised moral responsibility as a consequence of free will. That conflicted with the other pillar

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[26] W.C. Greene, *supra* note no.13, p.338

[27] A.A. Long, *Hellenistic Philosophy: Stoics, Epicureans, Skeptics,* 2nd ed., (London, Duckworth, 1986), p.169

[28] A.A. Long, "The Freedom and Determinism in the Stoic Theory of Human Action", in A.A. Long (ed.), *Problems in Stoicism,* (London, Athlone Press, 1971), p.173, at p.178; J.M. Rist (ed.), *The Stoics*, (Berkeley, University of California Press, 1978), p.204: "The *cosmos* of the Stoic philosophers was a vast dynamic continuum. It was conceived as a unified whole in which "all things are bound together with one another" through myriad relationships of cause and effect. These causal connections were thought to be pervasive and without exception, permeating Nature at all levels from the lowest inorganic matter to the highest forms of life".

[29] A.A. Long, *supra* note 27, p.165

of their philosophy which is the ordained monist world. The Stoics' concern with ethics and the identification of Nature and Reason conflates the question of "ought" and "is" which is central to natural law theory.

Cicero gave only the name to the essentials of a theory which already existed. He is not an original thinker but his achievement is the infusion of Greek philosophy to Roman and Latin terminology. The statement of the doctrine of Natural Law is contained in the *Republic*: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands. ..... And there will not be different laws at Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations of all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge."[30] It is important therein, the statement that there is a standard of conduct in nature which can be known by reason if properly employed. Therefore, laws and customs can be validated by reference to nature.

**II.2** *The Romans.* The Stoics played a fundamental role in the transfusion of Greek cosmopolitanism to Roman law and in concretising natural law theory. For the Stoics, mankind is a *cosmopolis,* and law as its expression is universal, because it is based upon the common nature of men. All men partake of reason for the identification of that law and therefore they are equal. Equality then becomes a tenet of natural law[31] and the dividing line between ancient and modern political thought with the stigma of the French and American Revolutions.[32] However, the contention of both freedom and equality contains a certain tension which has been accommodated in the hypothetical construction of the social contract. Transmuting the principle of equality into international

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[30] Cicero, *De Re Publica*, Bk.III, XXII.33, trans. C.W. Keyes, *Loeb Classical Library*, (Cambridge Mass., Harvard University Press, 1928), p.211

[31] "For no single thing is so like another, so exactly its counterpart, as all of us are to one another. ..... For those creatures who have received the gift of reason from Nature have also received right reason, and therefore they have also received the gift of law, which is right reason applied to command and prohibition. And if they have received law, they have received justice also. Now all men have received reason, therefore all men have received justice". Cicero, *De Legibus*, *ibid.*, Bk.I, X.29, XII.33, pp.329,333

[32] R.W. Carlyle, A.J. Carlyle, *A History of Medieval Political Theory in the West*, vol.I, (Edinburgh, W. Blackwood & Sons, 1903), p.9

law, it supports a view of non-intervention. If states are equal, either as participants in the original position according to Rawls or by comparison to individuals as articulated by early positivists such as Wolff and Vattel, then intervention is precluded because it will destroy the trait of equality. The full extent of this construction will be presented in subsequent sections of this work but a preliminary observation into the contemporary legal framework as it is formulated by the U.N. Charter supports the view of a background equality and a derivative principle of non-intervention.[33]

Another feature of the natural law doctrine is the reconciliation of the ideal perception of society as a component of natural law and its imperfect actualisation in positive institutions. The equality of all men propagated by nature is confronted with actual inequalities. The problem is not new and derives from the Greek distinction between *nomos* and *physis*. How does the theory then survive the infractory actualisation? The exegesis was twofold: either the human decline from the ideal world, an explanation that furnished the Christian accommodation of natural - ideal world and human actualisation, or a progress towards an ideal future. Seneca, for instance, justified the disharmony of empirical institutions with the law of nature as a degeneration from an original state of innocence.[34]

**II.3** *The emergence of international law.* Natural law has acquired a variety of interpretative perorations during all periods because it conceals abstruse concepts. It is however a standard of derivation for evaluating human conduct. Regarding international law, it is commonly believed that it is the evolution of the Roman *jus gentium* concept. The Romans required a trait of citizenship, for their legal system applied only to Roman citizens which was the *jus civile*. The expansion of Rome and the inclusion within its empire of diverse nations necessitated a law that would apply to Roman and foreigners alike. This law was in essence Roman law imbued with foreign principles and institutions. *Jus gentium* as domestic law came to signify the common practices in the Empire but eventually it transplanted *jus civile* as the core of Roman law. *Jus gentium*

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[33] See Chapters Two and Five
[34] R.W. Carlyle, *supra* note 32, vol.I, pp.23-25

did not have the meaning of law among nations but it was applied as national Roman private law.[35]

There is disagreement concerning the relation of *jus gentium* to *jus naturale*. Thus, Gaius wrote: "Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called the civil law (*jus civile*) as being the special law of the civitas (State), whilst the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *jus gentium* (law of nations or law of the world)."[36] Gaius posits a dual division of law between *jus civile* and *jus gentium* identified with *jus naturale*. The linkage is the universality[37] of *jus naturale* and *jus gentium*, the former referring to its source and the latter to its application. The reduction of natural law and *jus gentium* to a single concept solves also the problem of its practical and theoretical existence, each contributing to those particular aspects.[38]

Ulpian provides a tripartite division of law between *jus civile, jus gentium* and *jus naturale,* incorporated into Justinian's Digest and Institutes of the *Corpus Juris Civilis*. Civil law borrows its precepts from the law of nations, from nature and the law of the city, whereas "Natural law is that which nature has taught all animals. .....The law of nations is that law which mankind observes."[39] *Jus*

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[35] A. Nussbaum, *A Concise History of the Law of Nations*, (N.Y., Macmillan, 1947), p.19

[36] Gaius, *Institutes* I.I, trans. Francis de Zulueta, *The Institutes of Gaius,* (Oxford, Clarendon Press, 1946-1953), pt.I, p.3; "..... it tacitly identifies jus gentium with jus naturale: it is the law common to all mankind as being the product of reason - common human reason or the divine reason ordering the world". *Ibid.*, pt.II, p.12

[37] For Cicero "..... the universality of a principle is a proof of its naturalness and hence of its validity, for the law of Nature is no mere ideal, it is a binding law and no enactment of the people or senatus-consult can prevail against it. ..... [if] all races of mankind acknowledge a practice it must be because it has been taught them by their universal mother, Nature. Cicero thus identifies the law of Nature with the jus gentium, in the sense of law common to all peoples.....". H.F. Jolowicz, B. Nicholas, *Historical Introduction to the Study of Roman Law,* 3nd ed., (Cambridge, Cambridge University Press, 1972), pp.104-105

[38] "The notion (of jus naturale) is of small importance in legal discussion, for though various institutions are referred to it, they are all equally referable, and referred, to jus gentium, and it was as jus gentium that they were law. But while the jus gentium steadily superseded the old *jus civile*, it must not be forgotten that its supposed universality was a great force to this end, and this was its point of contact with jus naturale". W.W. Buckland, *A Textbook of Roman Law From Augustus to Justinian*, 3nd rev. ed. by P.Stein, (Cambridge, Cambridge University Press, 1963), pp.54-55

[39] *Institutes*, I, ii, pr. and 2, *Digest*, I, i, 1,4

*gentium* is distinguished from natural law and the divergence could be attributed to the different periods to which these writers belong. Those scattered reflections make it difficult to construct a coherent doctrine.

## III. CLASSICAL CHRISTIAN NATURAL LAW AND ITS MODERN RESTATEMENT: ST. THOMAS AQUINAS AND JOHN FINNIS

**III.1** *Early Church.* The Christian theory of natural law could be explained as a combination of Greek and Hebrew doctrines: the philosophy of nature as impersonal and orderly and the theology of creation attributed to a divine legislator.[40] Christianity transplanted the Stoic premise that man and nature partake of reason, with the redeeming role of Christ. For the Stoics, moral laws as natural laws are also laws of God, whereas for the Christians, natural law is identified with the *will* of God. St. Paul is responsible for the incorporation of natural law to the Christian world. The early Christian writers, like the Stoics before them, contemplated the divergences between the ideal law of God and actual law. They constructed a dogmatic theology of the Fall which explained the divergence and provided coherence and continuity to the doctrine. The actual imperfections are due to the Fall. That invention was more propitious in acknowledging the *status quo* by harmonising the "absolute natural law", that is, the law of human beings in their initial position of innocence, and "relative natural law", after the Fall.[41] The harmonisation was achieved by subordinating the relative to the absolute natural law; however, they did not claim that state law is invalid if it is against the natural law of God.[42]

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[40] H.Koester, "*NOMOS* PHYSEOS, The Concept of Natural Law in Greek Thought", in Jacob Neusner (ed.), *Religion in Antiquity*, (Leiden, E.J. Brill, 1968), p.520, at p.540

[41] E. Troeltsch, *The Social Teaching of the Christian Churches*, trans. Olive Wyon, vol.I, (London, Allen & Unwin, 1931), pp.153-155

[42] An exception is Origen who admits that the natural law of God invalidates any contrary civil law. It is argued though that Origen's supremacy of natural law refers mainly to the source of the secular ruler's authority at a time when Christianity was criticized as a subversive movement. W.A. Banner, "Origen and the Tradition of Natural Law Concepts", 8 *Dumbarton Oaks Papers*, (1954), pp.71-77

The early Christian fathers adopted a relative or pragmatic attitude towards social institutions, retreating from doctrinal obstinacy and thus "gained the opportunity of controlling Christian society, just because the relative standard which it adopted was capable of application to actual life."[43]

**III.2** *St. Thomas Aquinas.* St. Thomas Aquinas is credited with the integration of the Aristotelian, Stoic and Christian teachings in propounding his doctrine of natural law. Although his immediate influences and in particular St. Augustine's are identified with "theological jurisprudence", his encounter is with the philosophical and realistic branches of natural law. St. Thomas channelled the ancient Greek and Roman philosophical traditions into Christian doctrine, but he believed more in the permeation of Christian teachings in the realms of law and philosophy.[44]

St. Aquinas distinguishes four categories of law: eternal law; natural law; human law; and, divine law. The *lex aeterna* is the sublime, objective *a priori*, the universal rational orderliness similar to the Stoic *logos* in the Christian version: "the very idea of the government of things in God, the Ruler of the Universe."[45] *Lex naturalis moralis* is the participation of man into *lex aeterna*. Positive laws are necessary in order to rectify human deviations from *lex naturalis*. They are just and right only when they derive from *lex naturalis* and consequently from *lex aeterna*.

St. Aquinas attempted the unification in a coherent whole of intellectual and methodological aspects which relate to human essence by arrogating the singularity of the Christian outlook with Aristotelian teachings on Reason. He contested the distinction between faith and reason and tried to reconcile divine and human thought. That was perhaps implied in the *Decretum Gratiani*: "Mankind is ruled by two laws: Natural law and Custom. Natural law is that which is contained in the Scriptures and the Gospel." The inclusion of natural law into the religious sources implied their reconciliation. Nature - Reason and

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[43] L.L. Weinreb, *supra* note 24, p.49

[44] A.H. Chroust, "The Philosophy of Law of St Thomas Aquinas: His Fundamental Ideas and Some of his Historical Precursors", 19 *Am. J. of Jurisprudence,* (1974), p.1, at p.2

[45] Thomas Aquinas, *Summa Theologia*, (London, Blackfriars, 1964), 1a, 2ae, 91.1, hereinafter cited as *Summa*

Revelation are therefore integrated.[46] The rediscovery of Aristotle has shaken the moral pessimism of the Middle Ages which is mirrored in the doctrine of the Fall. Natural law presented a limited unattainable ideal at that time. St. Thomas Aquinas delivered a natural law theory with discrepancies and amplitudes, not deviatory, but integrated into the ideal and providential natural law through reason. Thus, the metaphysical and the actual are reconciled in his thinking.

The definition that Aquinas gives to law is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[47] This definition is reminiscent of modern legal semantics. Enactment and promulgation is the "positive" content of law necessitated by the need for identification. Rationality and good intent are the naturalistic aspects. Law as a prescriptive formulation evaluates human acts through reason. Reason itself induces law towards its natural inclination, which is the common good.

As stated above, St. Thomas reconciled faith and reason, and *lex naturalis* performs that function. *Lex naturalis* is the manifestation of, or, concerning man, the participation in the universal reason, in the providential order of God, the *lex aeterna*. The latter is the yardstick for moral evaluation of all acts. God is the final and infallible arbiter of ethics and morals. Man knows some of the *lex aeterna* through his participation therein, or by virtue of his reflection. Within natural law there is vitalistic order, a natural inclination which must be followed, and human beings should act according to their being and purpose. Hence, eternal law is also a moral law for humans, not sheer necessity. Humans exercising their free will ought to follow their natural inclination, that is, natural law, and should not submit only to natural necessity like other living creatures.[48]

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[46] A.P. D'Entrèves, *Natural Law. An Introduction to Legal Philosophy,* (London, Hutchinson University Library, 1970), p.40; T. Gilby, *The Political Thought of Thomas Aquinas,* (Chicago, University of Chicago Press, 1958), p.104: "Aquinas worked on the assumption that although there might be many forms of truth, because they were truth, all were ultimately reconcilable. It was not for him to accept one form and reject the others as necessarily incompatible: it was taken for granted that all had a certain if unequal degree of validity".

[47] *Summa*, 1a, 2ae, 90.4, p.17

[48] *Summa*, 1a, 2ae, 91.1,2: "It is clear that the whole community of the universe is governed by the divine reason. This rational guidance of created things on the part of God ..... we can call the Eternal Law. Now, since all things which are subject to divine Providence are measured and regulated by the Eternal Law ..... it is clear that all things participate to some degree in the Eternal Law, in so far as they derive from it certain inclinations to those actions and aims at which are proper to them. But, of all others, rational creatures are subject to divine Providence in a very special way; being themselves made participators in Providence itself, in that they

This needs more elaboration in order to understand what was described as "Christian humanism".[49] As in Aristotle, everything had an essence; for St. Thomas Aquinas, the essence of man is reason, and therefore he is the only creature who participates intellectually in eternal law. Reason reveals man's ends and inferentially he can work towards them.[50] Those ends are dual. For the nature he shares with other creatures, he is subjected to the same physical laws as them and is a passive participant in Eternal Law. However, exclusively endowed with reason and will, he can direct himself and participate in Eternal law actively. His natural law, however, is moral and not physical.[51] Endowed with distinct qualities, man is in a communicative position with God. The dignity and intellectual power of man affirmed his moral standing.

Another point where Thomas Aquinas differs from previous writers is that he liberates man from the pessimistic and vindicatory interpretation of human fallibility. Contrary to the belief that defective institutions are the divine remedy for human sin, he argued that sin interferes only with the realisation of natural values, not with acquiring knowledge of them. "It is in this sphere that the foundation of social and political institutions must be assessed."[52]

**III.3** *Lex iniusta non est lex: St. Thomas Aquinas' and John Finnis' repudiation.* From his perception of sin originates his theory of human or positive law which accomplishes both a complementary and corrective function. Positive laws are indubitable and particularised ascertainments of matters proceeding from natural law. Moreover, the coercion of positive law is required in order to force compliance with and implementation of natural law, inhibited due to the Fall.[53]

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control their own actions and the actions of others. So they have a certain share in the divine reason itself, deriving therefore a natural inclination to such actions and ends as are fitting. This participation in the Eternal Law by rational creatures is called the Natural law".

[49] A. P. D'Entrèves, *supra* note 46, p.44

[50] *Summa,* I -II, q.71, a.2c: "And so whatever is contrary to the order of reason is contrary to the nature of human beings as such; and what is reasonable is in accordance with human nature as such. The good of the human being is being in accord with reason; and human evil is being outside the order of reasonableness.....".

[51] W. Farrel, *A Companion to the Summa*, vol.II, (N.Y., Sheed & Ward, 1945), p.372

[52] A.P. D'Entrèves, *supra* note 46, p.45

[53] "Man has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some training. ..... But since some are found to be deprived, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that at least, they might desist from evil doing, and leave others in peace, and that they themselves by being habituated in this way, might be brought to do willingly what hitherto they

Positive law derives its legal appellation from natural law. Positive laws which do not comply with the dictates of natural law are not law at all but a perversion.[54] The consequence of such a statement concerning the obligation to obey has profound ramifications for the theory of natural law, which inadvertently motivated its repudiation. The recurrent argument is the threat a subjective evaluation of morality may represent for the coherence of a legal order. For Aquinas, reasonable calculations would enforce obedience to such laws in order to avoid civil disobedience and scandal.[55] Aquinas was in no doubt that an iniquitous law is law in an Austinian manner, that is, the command of the superior towards his subordinates.[56] The misconception concerning this argument was perpetuated successfully by positivism[57] and is located in the distinction between the morality to obey and the morality to promulgate or enforce the law.[58]

Finnis challenges the verity of this supposedly mainstream argument of natural law, and re-appraising Aquinas, restates natural law to attain the reconciliation of law and morality. The methodological device for circumventing the position that contrariety to natural law renders positive law void is the distinction between the focal and penumbral meaning of law. The focal meaning is the ideal purpose law should serve towards the achievement of the common good. The legal order existing in societies, through manipulation, does not always satisfy that ideal order. The legal criteria of validity attribute the quality of law to rules which are outside the fringes of the focal meaning. The focal meaning has a moral element and aims at facilitating the achievement of the common good. However, unjust laws in the secondary meaning are not equated with invalidity. Finnis rejects the definitional role of natural law and accepts the evaluative one.

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did from fear, and thus become virtuous. Now this kind of training which compels through fear or punishment is the discipline of laws". *Summa*, I -II, q 90, a 3 ad 2; q 95, a 1c

[54] *Summa*, Ia 2ae 92.114

[55] *Summa*, 1a2ae, 96.4; 2a2ae, 104.6

[56] *Summa*, I - II, q 92, a.1 ad 4. see bellow, Chapter Two, p.64

[57] The explication of that proposition by positivists who also concentrate their criticism thereof is the following: "The only concept of validity is validity according to natural law, i.e., moral validity. Natural lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise". J. Raz, "Kelsen's Theory of Basic Norm", 19 *Am. J. Juris.*, (1974), p.94, at p.100

[58] H. McCoubrey, *The Development of Naturalist Legal Theory*, (London, Croom Helm, 1987), p.xii

The rapprochement of the two orders, natural and positive, is hence complete because the debate is reduced to tautology.[59]

Finnis' definition of law concords with that of analytical jurisprudence, as a promulgation of a certain authority coupled with sanctions towards the realisation of the common good.[60] The disparities produced in attaining this aim introduce the distinction between the focal and penumbral meaning, which alludes to the consideration of extra-legal elements. Mainstream positivists, Austin or Kelsen, have propagated a distinct legal quality, logically unresponsive to social features, whereas for Finnis, "[T]he subject-matter of the theorist's description (law) does not come neatly, demarcated from other features of social life and practice."[61] This definitional aspect of law approximates to McDougal's theoretical approach to legal systems. Law for him is an authoritative decision which encompasses a panorama of societal expectations, experiences and formalities, assimilated to Finnis' focal meaning. Also, for both McDougal and Finnis, law is an instrument for societal transformation.[62] The function of law is to promote the realisation of the basic goods which within a communal life are transformed to the common good, whereas for McDougal, law promotes certain pre-moral values.[63]

The positivist jurisprudence, on the other hand, remains to a considerable degree unconcerned with this. Hart admits an "internal point of view" but it could not be assimilated to the focal meaning because of moral inequality. For Finnis:

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[59] N. MacCormick, "Natural Law and the Separation of Law and Morals", in R.P. George (ed.), *Natural Law Theory,* (Oxford, Clarendon Press, 1992), p.105, at p.109: " But the positivist theory I have in view yields just the same conclusion - the law is a valid law, but if the duties it imposes are duties in violation of the demands of justice, it will follow that the moral issue whether or not to comply is prima facie an open one. ..... Finnis has put it beyond denial that the mainstream of the natural law tradition ..... affirms the possible existence of such (unjust) laws, while denying or downgrading their morally compelling quality and insisting on their essential defectiveness as law".

[60] J. Finnis, *Natural Law and Natural Rights,* (Oxford, Clarendon Press, 1980), pp.276-280,359-360, hereinafter cited as *NLNR*

[61] *NLNR.*, p.4

[62] M.S. McDougal, H.D. Lasswell, W.M. Reisman, "The World Constitutive Process of Authoritative Decision", 19 *Journal of Legal Education,* (1966), p.253

[63] *NLNR.*, chs.IV, VI. "..... a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness". *Ibid.*, p.3

"If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation, ..... a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statistically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorists' description."[64]

This description of the focal point addresses the siccative reference made by Hart to the differentiation within the internal point. Peripheral elements such as self-interest or tradition within the internal point of view do not amount to what is valued for law and also they do not address what is counted as important by those "actors in the field".[65] The consequences for humanitarian intervention are considerable. If the law on the non-use of force does not carry the sense of moral obligation, but it adheres to the peripheral cases of the internal point, then it is defective in the focal meaning, whereas humanitarian intervention, when enjoying the viewpoint of moral ideal, should be elevated to law. Additionally, "practical reasonableness" would highlight the reasons for the debasement of the law concerning the non-use of force. If their explanation contains considerations of its rigidity or moral indifference, the reconstruction should be accomplished accordingly, towards ameliorating its content. Consequently, we could reverse the statement made by Franck and Rodley concerning the Bangladesh case. There, they maintain that humanitarian intervention resides in the realm of morality, whereas the law is the non-use of force. As we have proved above, a more rigorous reading of Hart coincides with Finnis's focal point of which humanitarian intervention partakes, that is the central case of the internal point of view.[66]

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[64] *NLNR*, pp.14-15

[65] *NLNR*, p.13, H.L.A. Hart, *The Concept of Law*, (Oxford, Clarendon Press, 1961), pp.198,111,226, hereinafter cited as *CL*

[66] T.M. Franck and N.S. Rodley, "After Bangladesh: The Law Humanitarian Intervention by Military Force", 67 *A.J.I.L.*, (1973), p.275, p.304: "..... belongs in the realm not of law but of moral choice, .... ." *CL*, p.198; *NLNR*, pp.11-18

**III.4** *The distinction between "is" and "ought".* Another defect of natural law is the deduction of norms from their ontological environment. This misconception is founded on the confusion between the ontological and transcendental world, the latter being also existential according to natural law. This further generates the confusion between the deontological and ontological.

For Thomas Aquinas, there is a universal order which permeates the natural, ethical or social structure. That order is unitary. It is integrated from part to part, part to whole, whole to its final end, which is God. Divine providence is the source and the end of that concatenation and this methodology is reminiscent of Kelsen's logical cells of imputation. Moral order springs from the intersection of deontological (divine) and ontological order. It is simultaneously an ascending argument whereunder ontological order terminates in God, and a descending one, because moral order originates from Him. In this dual argument he reconciles reason and faith. Natural order as reason is part of the universal order which is providential. The two are complementary because reason leads to faith, that is, God, whereas faith, descending in the explication of the particular order, recognises reason.[67] The affirmation of human moral freedom and the atonement of human institutions from the providential sublime order are considerable achievements. Hence, Thomistic natural law is the intermediate for the attainment of providential order and shares an Aristotelian teleology, which neutralises the fusion of "is" and "ought".

Although it is a harmonisation of man's reason and faith, the ethical system based on these precepts cannot be characterised as rational or human-centred in a modern context. It does not recognise human personality or human rights, though Aquinas acknowledges the dignity of human reason. The merit of his

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[67] "Human values and truths are not necessarily obliterated by revelation of higher ones; however modest and low, they deserve to be considered as possible tools for the great task of building up Christian civilization. In St. Thomas's assertion, *gratia non tollit naturam, sed perficit*, there is the recognition of the existence and dignity of a purely "natural" sphere of rational and ethical values. This essentially "human" standard of justice is not vitiated by sin nor absorbed in the glare of absolute and divine justice; it is rather the first and necessary step in the long ascent towards the fulfillment of the Christian ideal. This sphere of natural and human values finds its complete expression in the idea of natural law, which thus appears as the proper ground upon which social and political relations can be secured and comprehended". A.P. D'Entrèves, *The Medieval Contribution to Political Thought: Thomas Aquinas, Marsilius of Padua, Richard Hooker*, (London, Oxford University Press, 1939), p.21

exposition is in its function of disentailing ethics from the tight grasp of theology and presenting a natural system of ethics, which later acquired its own development, far from Christian revelational doctrines. This is an important contribution to natural law theory, because the latter had a tradition of deducing moral principles from speculation about the human condition, and that involved an arbitrary transition from "is" to "ought".

Finnis is categorically negative about the suggestion that natural law deducts moral values from facts.[68] His methodology is to work from self-evident principles which, in this case, are the seven pre-moral values of life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion,[69] to subsequent inferences. Therefore, there is no need for factual observation in order to achieve normative conclusions. He avoids empirical reasoning by inward meditation of values as goods, by understanding that natural inclinations are towards desirable objects. Finnis is concerned with the focal meaning of law which is the law deduced from certain postulates through inner speculation, and that position needs more elaboration.

**III.5** *Finnis on the self-evident "basic forms of human good".* Finnis explicitly rejects ontology and articulates a theory of objective and normative precepts which positive law should conform with. Using human reason, we can adumbrate through an inner process of internal meditation the basic goods which are, hence, demonstrable and self-evident. This coincides with Aquinas' articulation of the first principles of natural law as a united conception of certain ends.[70] However, the precepts on which Aquinas based his theory are dissimilar to those of Finnis' and therefore distort his argumentation. The crucial ingredient in Aquinas' philosophy is the Eternal Law of God, which attributed self-evidence to the principles of natural law. The argument is descending from the highest point of Eternal Law to the individual elements of the project. Finnis, on the other hand, formulates an ascending argument whereby one recognises God from the premises of secular ratiocination. This is a salient point in Finnis exposition, because his values are presented as objective,

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[68] L.L Weinreb, *supra* note 24, pp.33,66,86; *NLNR*, p.34
[69] *NLNR*, pp.85-89
[70] *Summa*, I-II, q.94, a.6c; q.99, a.2 ad 2; q.100, aa.5 ad 1, 11c

comprehensive and self-evident; however, the foundation of their being so is not articulated and is in fact based on the subjective intuition of the author. What is missing is the so called "Argument from Queerness".[71] Queerness in this sense is the inductive premises of particular arguments, concerning, for instance, values in Finnis' interpretation. These postulates are so queer that they are unproved; nonetheless, ontology is presupposed in our particular arguments. In the Platonic Forms, knowledge of the Form of Good provides the participant with direction towards instantiating a particular good. That good is objective and pursued because the pursuer is acquainted therewith and not because it is desired. To prove his case, Finnis takes the value of Knowledge and by using a retorted argumentation, proves its self-evidence. Eventually, it develops into what MacCormick said: "Why should ..... anyone ..... care to know that knowledge is not worth having unless, after all, at least that knowledge is worth having?"[72] Whereas his argument on knowledge is convincing, he fails to present the "self-evident" arguments concerning the other values.[73]

Consequently, the burden of subjectivity is commonly shared with Hart's "minimum content of natural law" and McDougal's postulation of human dignity values. They all invoke the assistance of empirical anthropological surveys in order to infer a reductionist list of essential values. The argument between them is circular. Hart and McDougal emphasise an external examination of trends from which they intuitively deduct certain values, whereas Finnis emphasises an internal aspect of intelligent practical reasoning. The fusion of internal and external modes of reasoning is inescapable and practical reasonableness could not demonstrate the basic categories of human goods in a vacuum. Even John Rawls's primary goods are primary "..... since they are in general *necessary for* the framing and the execution of a ratio*nal* plan of life."[74] It requires, therefore, a certain concept of *necessity* and a certain concept of *rationality* whose essence or "hard core" would most probably be

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[71] J.L. Mackie, *Ethics. Inventing Right and Wrong*, (Harmondsworth, Penguin, 1977), pp.38-42

[72] N. MacCormick, "Natural Law Reconsidered", 1 *Oxford J. of Legal Studies*, (1981), p.99, at p.103

[73] L.L. Weinreb, *supra* note 24, p.115: "Even those who agree with him on the merits may suppose that he has confused self evidence with personal conviction".

[74] J. Rawls, *A Theory of Justice*, (Cambridge Mass., Harvard University Press, 1971), p.453, hereinafter cited as *TJ*

subjective. Additionally, the primary goods are "all-purpose means" which assist in selecting the principles of justice.[75]

**III.6** *Finnis' theory of natural law and humanitarian intervention.* His natural law theory is, hence, latently purposive because his ethical pandect has also a practical dimension. Reflection on ethics has the purpose that "..... one's choices, actions and whole way of life will be good, worthwhile."[76] According to Finnis, practicality, however debatable, does not mean the mere investigation into human action, but that the selection and instantiation of particular choices is "..... *the very objective primarily envisaged* as well as the subject matter about which I hope to be able to affirm true propositions."[77] Consequently, his natural law theory is "the set of principles of practical reasonableness in ordering human life and human community."[78] Human reason can show us the "basic values of human existence" or "basic forms of human good" which are objective and self-evident that is, non inferential.[79] He lists seven values, one of which is life. Those values are pre-moral and through the interface of the methodological requirements of practical reasonableness we achieve morality.[80] Accordingly, his method has affinities with the intellectual requirements for the attainment of human dignity in the policy framework elaborated in Chapter Three. As we shall see, the policy school as it is represented in international law by McDougal, projects in a similar manner the basic values of human dignity. These values are also fundamental and self-evident: they are "beyond ethics."[81] Having said this, the conceptual artifice employed is that the participants have also been formed within the value of human dignity.[82]

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[75] J. Rawls, "The Priority of Right and Ideas of the Good", 17 *Phil. and Publ. Aff.*, (1988), p.251, at p.270

[76] J. Finnis, *The Fundamentals of Ethics*, (Oxford, Oxford University Press, 1983), p.4

[77] *Ibid.*, p.3

[78] *NLNR*, p.280

[79] *NLNR*, pp.85-90

[80] *NLNR*, pp.126-127. Also at p.103: "..... the requirements ..... express the "natural law method" of working out the (moral) "natural law" from the first (pre-moral) "principles of natural law".

[81] M.S. McDougal, "The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System", in H.D. Lasswell, H. Cleveland (eds), *The Ethic of Power: The Interplay of Religion, Philosophy, and Politics*, (N.Y., Harper & Bros., 1962), p.221, at p.230

[82] H.D. Lasswell, M.S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest", 52 *Yale L.J.*, (1943), p.203

Returning now to Finnis, moral judgement is the compagination (interrelationship) of methodological requirements with the basic goods. Finnis is confident that this procedure has the capacity of producing moral principles, whereas incorrect moral principles are merely faulty applications of his method.[83] However, because the basic values and the methodological requirements are generally stated, his method does not avoid the arbitrariness of the chosen moral principle.

Human rights emanate from his self-evident basic values. Finnis says that one should not make choices between the basic goods and proceeds in saying that respect for the basic goods generates exceptionless human rights, with the right "not to have one's life taken directly as a means to any further end"[84] as the most obvious. We are going to contemplate this right in conjunction with humanitarian intervention.

Finnis' rights are confluent with his ethical and moral standing. He does not claim that his rights are substantially consensual[85] because the requirements of practical reasonableness may lack consensus. However, rights are absolute because they generate from self-evident basic values in the sense that people ascribe to them as being non-inferential. Those values are experiences of one's nature which manifest instances of basic goods.[86] Rejecting inference from outside observation, the inner, esoteric meditation of basic goods makes them obvious.[87] Though compelling his argumentation as a methodological development, the conclusions one may reach by his perplexed interweaving of moral meanings and applications are not satisfactory. The right not to be deprived of life as a means to an end is such an example. Consider the case of humanitarian disaster caused either by physical events or instigated from the policies of a particular regime. Any action to alleviate that human tragedy and save lives may involve loss of life among the intervenors. Should people act? Presumably not, according to the exceptionless right to life. But the impasse is obvious. Intervention will be life-threatening for the intervenor but the

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[83] *NLNR.*, p.127
[84] *NLNR*, p.225
[85] *NLNR*, p.225
[86] *NLNR*, pp.31-34
[87] *NLNR*, pp.85-86

continuation of the situation is also life threatening for the intended recipients of that intervention. The unhappy conclusion is that in such circumstances morality condemns human beings into passivity by precluding action. A similar contention could be raised also against the Hartian treatment of survival as the "central indisputable element" in human striving.[88] The attribution of absolute character accentuates the individualistic motives within human beings, which may become self-defeating. This position was long ago repudiated by Thomas Aquinas when he said that the captain would be indefinitely moored at the port if the highest aim was the survival of the ship.[89]

This entanglement could be solved by the criterion of reasonableness but the discernment is difficult. From these criteria, the sixth and seventh are of particular interest to our case. Criterion six is that "one brings about good in the world (in one's own life or the lives of others) by actions that are efficient for their (reasonable) purpose(s)" and criterion seven is that "one should not choose to do any act which of itself does nothing but damage or impede a realisation or participation of any one or more of the basic forms of human good."[90] This is a rejection of consequentialism, that one should pursue an act which has beneficial consequences, because consequentialist reasoning is arbitrary. Thus, the sacrifice of life when saving many other lives is not morally correct according to those requirements.

Finnis, in his endeavour to optimise human good, fell victim to an unbearable rigidity, capable of negating the whole structure of his values by logically producing adverse results. The requirement of non-consequentialism prophesies that under no circumstances should someone choose an act that damages directly one of the incommensurable values, notwithstanding that such act in its consequences can indirectly promote either the same value or aspects thereof. He rejects the insertion of personal feelings or sympathy because reason requires that the basic values should be respected *in toto*. Concerning humanitarian actions with human casualties, this is for Finnis an affront to the basic value of

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[88] *CL*, pp.189-195
[89] *Summa*, Pt. I-II, q.2, art.5; L.L. Fuller, *The Morality of Law*, (New Haven, Yale University Press, 1969), pp.184-186
[90] *NLNR*, pp.111,118

life and therefore impermissible. The consequence of saving innumerable lives is irrelevant to the characterisation of the act.

What is intriguing is that he is mainly concerned with the action, although inaction or omission of action is equated to action in its practical and legal signification. In a situation of humanitarian crisis, inaction entails direct human loss in the same manner as action provokes it. As such, it is disrespectful to the incommensurable value of life and impermissible. Finnis focuses his attention on the plain, "naked" act and rejects consequentialism as a distinct, subsequent act.[91] Hence, in the first paradigm, rescuing lives (consequence) is a distinct act separate from the initial act of risking peoples' lives in order to save others, and it is this which becomes the primary act for evaluation. In the second paradigm though, the initial act is that of killing people following our "omission = action", unless someone characterises the latter as accumulative or secondary to the initial action which triggered the killing. Consequently, because action and inaction damage the value of life both are reprovable, irrespective of the beneficial effects the first paradigm may have. This conclusion, if true, is illogical. Condemnation of inaction presumes or directs towards affirmative action but the latter is also condemned. The question "what should be done?" is still unanswered. If Finnis' theory is to avoid irrelevance, he should allow our "feelings, sympathy and generosity" to be implicated in the articulation of the value of life.

There is probably a window of hope in his discussion of ethics. We have characterised his ethics as practical on the assumption that there is no inference from facts to values but that through practical reasoning one can understand the objects of his inclinations. According to Finnis:

> "Reflection on practical reasoning and human action is truly empirical when it seeks to understand human capacities by understanding human acts and to understand those acts by understanding their object(ive)s. Thus the revealing question is the question "Why?", ..... [as] humanly and intelligently as "What for?" Only thus will one be able to describe one's actions as they really are, and oneself as the agent one really is. And only

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[91] *NLNR*, p.119

thus will the relations between desire and understanding in the identification and pursuit of human goods be accurately known. ..... when one pursues the question "What for?" to the point where no further such question is intelligent ..... one arrives at the perception (i.e. the understanding or intelligent discernment) of a basic form of human flourishing in which, not one human being on one occasion, but somehow all human beings in appropriate circumstances can participate".[92]

Following this dialectic, the pertinent question is "What is any humanitarian action for?", why should one pursue such action? Then we arrive at one of the basic values of human flourishing, which is life and its protection. Yet again, the purposiveness of this question prompts the necessary comparisons with McDougal's evaluation of humanitarian actions through the sieve of promoting human dignity.

A concluding remark which would also provide the link with our discussion of Grotius' theory is the place of God in his exposition of natural law. As Grotius before him, Finnis suspends the philosophical presumption of a deity which explicates the nature of things, distancing himself from the object of his reconstruction, St. Aquinas. God, instead of the initiator, is the conclusion of reasonable investigation.

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[92] J. Finnis, *The Fundamental of Ethics*, (Oxford, Clarendon Press, 1983), pp.51-52

# IV. HUGO GROTIUS' THEORY OF INTERNATIONAL LAW AND HUMANITARIAN INTERVENTION

**IV.1** *The identification and secularisation of natural law.* Grotius' contribution to natural law was its secularisation and also the methodological and analytical exposition of international law. He was acquainted with the Scholastic tradition and in particular with Thomas Aquinas who synthesised "nature" and "grace" whereby the *ratio* of *lex aeterna* as the highest law is the divine providence. Grotius deserted the Scholastic tradition and, influenced by natural nominalism, founded his natural law theory on human reason.[93] Thus, law is immutable and unchangeable because it is the product of man's reason and it would be so "even if we should concede that ..... there is no God, or that the affairs of men are of no concern to Him."[94]

The rejection of metaphysical explanations allowed the evolution of natural sciences which installed man as the dominant creature in nature. This, however, has procured an antithesis between nature and man as the bearer of free will. If natural sciences adopt a casuistic model under which rules are formations of observable factuality, it causes the usurpation of human will and freedom. Consequently, it is irreconcilable with human rational personality. Descartes solved the inherent antinomy between nature and reason by using geometric and mathematical methods of evaluation. Human reason, pronounced as the founding principle in Grotius' natural law, was given a mathematical aspect (*res extensa*) which assists in the identification of natural law.

The latter is facilitated by an *a priori* and an *a posteriori* method. The first alludes to a deduction concerning the concordance of a rule with the rational nature of man. The second proceeds from a simple theorem that a universal effect should have a universal cause[95] and infers through empirical investigation

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[93] H. van Eikema Hommes, "Grotius on Natural and International Law", 30 *Neth. I.L.Rev.*, (1983), p.61, at p.65

[94] Hugo Grotius, *De Jure Belli Ac Pacis libri tres*, (Amsterdam 1646), trans. F.W. Kelsey, A.E.R. Boak, H.A. Sanders, J.S. Reeves and H.F. Wright, *The Classics of International Law*, (Buffalo, N.Y, W.S. Hein & Co. Inc., 1995), vol.2, Bk.1, *Prolegomena*, para.11 p.13, hereinafter cited as *JBP*. It is acknowledged that first Bellarmine secularized law. *NLNR*, pp.43-44

[95] *JBP*, Bk.I, ch.I, para.XII(I), p.42

the naturalness of a principle. This differentiation establishes the legal distinction between natural law and the law of nations (*jus gentium)*. Only *a priori* proven principles can be true natural law principles because they are deducted from human reason. The *a posteriori* principles are not immutable because they belong to human will, formed by general agreement. In international law, the *a priori* method refers mainly to the inclusion of natural law principles whereas the *a posteriori* to positive law.[96] The conceptual confusion concerning the source of international law as residing either in natural law or consent or vacillating between the two[97] is perpetuated by Grotius and evidenced in the prior writings of Vittoria and Suarez. It demarcates the inception of the positivistic thinking.

Having said that, we will attempt to present Grotius' natural law theory and then elucidate his position in relation to humanitarian intervention either as a principle directly derived from his writings or inductively, from his philosophical disposition.

First, it is deemed appropriate to illustrate his attitude towards *jus* (law). He proceeds in distinguishing three compartments in the notion of *jus*. First, *jus* means justness, that is, an attribute to facts (*attributum actionis*). Second, *jus* is a subjective attribution to human moral agents (*qualitus moralis personae*). As such it is subdivided into *facultas* or aptitude (*aptitudo*) which denotes to a perfect and imperfect *jus* respectively. Finally, *jus* signifies that which today is called law.[98]

Grotius does not draw any distinctive conclusion from this categorisation but integrates it into a system whereby the objective and subjective aspects of *jus* are founded on justice. The panorama of diverse elements interwoven into the concept of law could be attributed to his project of moderating and humanising the conduct of state affairs. Although unintentional, the significance of such

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[96] T. Tadashi, "Grotius's Concept of Law", in Onuma Yasuaki (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius,* (Oxford, Clarendon Press, 1993), p.32, at pp.41-43

[97] P.E. Corbett, *Law and Society in the Relations of States,* (N.Y., Harcourt, Brace & Co., 1951), pp.21-23

[98] T. Tadashi, *supra* note 96, pp.32-35

differentiation is not modest, because it prompted the enunciation of natural rights, as well as the intellectual and social developments of subsequent years.

**IV.2** *The emergence of "right" as a concept.* Grotius was unable to follow the distinction of law and right so he treats the term "*De Jure Belli*" comprehensively as the justness of war: the right of war and the law of war. Hobbes made the distinction prevalent:

> "Though they that speak of this subject use to confound jus and lex, rights and law: yet they ought to be distinguished; because RIGHT consisteth in liberty to do, or to forbear: whereas LAW determineth, and bindeth to one of them: so that law and right differ as much, as obligation and liberty."[99]

The shift of emphasis to natural rights is of immense importance because it gave the impetus to the American and French Revolutions. Nevertheless, the concepts of right and law are not so compartmentalised. There is a necessary infusion of the two, a complementarity, acknowledged by Wolff: "Whenever we speak of natural law (jus naturae), we never intend the law of nature, but rather the right which belongs to man on the strength of that law, that is naturally."[100] Such combination of natural law and rights is contained in the American Constitution.

Concerning the third interpretation of *jus* as the modern semantic of law, Grotius follows Aristotle and Gaius before him in dichotomising the concept into natural law (*jus naturae/naturalis*) and volitional law (*jus voluntarium*).Volitional law is the law emanating from the will of God or man. It includes municipal law, the law of nations (*jus gentium*) and divine law.

**IV.3** *Human sociability as the basis of natural law.* In order to comprehend the interrelation of *jus gentium* and natural law it is necessary to explain Grotius' idea of "societas humana". The societal nature and interdependence of human beings has been an indispensable assumption for the explication of the legal systems. The *appetitus societatis* is the *ratio* for natural law as it was Aristotle's sociability of man. Acceptance or denial of the engulfing *magna societas*

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[99] Thomas Hobbes, *Leviathan*, R. Tuck (ed.), (Cambridge, Cambridge University Press, 1991), ch.XIV, p.91, para.64

[100] Ch. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, (1741), trans. J.H. Drake, *Carnegie Classics*, (New York, 1964), tom.I, Prol., para.3

defines the process towards positivism as it is evidenced in Wolff's and Vattel's writings. Grotius distinguished between contractual societies and the universal society of mankind. Contractual societies are the product of human will, a moulding of social reality. The state is the highest contractual society and we will subsequently explain Grotius' perception of social contract. The universal natural community of mankind is a bond of kinship between men who have common descent.[101] Grotius combines the Stoic perception of a world-wide community with that of Christian common descent.[102] The universal community of mankind embraces the inter-individual and inter-state relations in a *status naturalis* whereunder individuals and states enjoy equality in their mutual relations.[103] Natural law, being comprehensive, is the foundation of both civil and international law (*jus gentium*). The latter should be directed towards the good of all states, and this good is founded on natural law, which applies both to individuals and states in the *societas humana*.[104]

The *appetitus societatis* is the axiom which generates in a society the natural law principles. The deduction of principles from axioms[105] could be described as the *more geometrico* because it does not involve inquiry but reliance on *ipsedixitims*. The axiomatic premise of sociability becomes the basis of natural law because the latter, as it was presented above, contains self-evident principles having an *a priori* character. Reliance on axioms is a prevalent and recurrent theme in legal theory since Aristotle, who introduced human sociability. Later theorists such as Wolff and Vattel constructed their legal systems on the assumption of human social character. That assumption was considerably altered in later years but its axiomatic character was not made redundant and reappears emphatically in the policy-school as the deliberation of interdependence or the Critical Legal Studies' contradiction between communal and individual human character.

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[101] *JBP*, *Prolegomena*, para.14, p.14
[102] H. van Eikema Hommes, "Grotius on Natural and International Law", 30 *Neth. I.L.Rev.*, (1983), p.61, p.64
[103] *Ibid.*, p.64,
[104] *Ibid.*, p.65
[105] *Ibid.*, p.67; B.P. Vermeulen, "Grotius' Methodology and System of International Law", 30 *Neth. I.L.Rev.*, (1983), p.375,

**IV.4** *The social contract.* Grotius' exposition of social contract theory is rudimentary and different from the contract theories of subsequent years. He has been severely criticised by other writers for offering an empirical justification of the actual state of affairs. Rousseau described his method of arguing as deriving "toujours le droit par le fait."[106] The social contract concept is not accounted as an intellectual device whereby the state function is legitimised on a democratic basis. On the contrary, he vindicates the *status quo*. His social contract, by legitimising the existing power, is an attempt for the philosophical rationalisation of the *status quo*,[107] whereas for the contractual philosophers it is a means for scrutinising legislative and executive power. They employ the contract in order to reform and reconstruct the state whereas Grotius employed it in a historical context for conceptualising an existing fact.

His static method could be compared with positivism, as the conceptual formulation of past experience into legal propositions, but writing in a period where natural law is dominant, he colours his statements with natural law insights.

**IV.5** *The Age of Enlightenment.* Having presented the basic tenets of Grotius' theory of law and law of nature, we will explore the inherent intellectual qualities and philosophical significance which his system embodies. More specifically we will try to appraise his influence on the development of human rights and humanitarian intervention.

The theory of natural rights emanating from natural law has been conspicuous in juridical and political thinking ever since the momentous events of the French Declaration of the Rights of Man (1789) and the American Declaration of Independence (1776), which signalled the advent of modernity. In this context we shall explore three traits in that theory: its rationalism; its individualism and its radicalism, including Grotius' influence.

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[106] J.J. Rousseau, *Du contrat social*, (Paris, F. Rieder et Cie, 1914), 2e éd., livre I, ch.II "Des premières sociétés", p.122

[107] "Mais Grotius, préoccupé seulement d'établir l'obligation de l'obéissance chez les sujets, attribue une valeur absolue au prétentu fait du contrat social qui, comme tel, n'existe pas. L'hypothèse du contrat n'a donc, dans son système, aucune valeur rationnelle. Elle représente uniquement un expédient, ou une fiction destinée à valoriser et ratifier le fait établi". G. Del Vecchio, *Leçons de philosophie du droit*, (Sirey, Paris, 1936), p.64

The French Declaration spoke of "the natural and imprescriptible Rights of Man",[108] whereas the American: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty, the pursuit of Happiness".[109]

Radicalism is the end result of the other two traits which invigorated natural law. It is evidenced in the events of the 18th century and in the revival of natural law and human rights following the horrors of World War II. Be that as it may, we are going to deal more in-depth with the other two elements.

**IV.6** *Rationalism.* Rationalism ascribes to human power and is one of the persistent ramifications of natural law theory. Its initial dormant condition was due to the fact that it had to be established on some other evidence. During the age of Enlightenment, it was sufficient by itself, it was what was said in the American Declaration "self-evident". Grotius' contribution was the emancipation of natural law from the grip of theology, its rationalisation and secularisation. It was the end of a tradition and Grotius appears ambivalent by making references also to God as another source of law. However, Grotius distinguishes between the grounds of the existence of natural law and the grounds of its knowledge. God is the creator of human creatures and therefore of natural law. Knowing or recognising the law of nature can be done independently of believing in God. Here, human *ratio* comes into play as the source of that knowledge. Therefore, natural law has legal validity *per se*. His definition of natural law is that it is a command of good reason (*recta ratio*) "which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity, and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God....."[110] The independence of human reason from God is evident. It delimits God's authority by delineating the forbidden or permitted acts according to their consonance with good reason.

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[108] W.L. Langer (ed.), *The French Revolution,* (London, G.G. Harrap & Co., 1939), p.111
[109] H.S. Commager (ed.), *Documents of American History,* (N.Y., Appleton-Century-Crofts, 1963), "The Declaration of Independence, July 4, 1776", p.100
[110] *JBP*, Bk.I, ch.I, para.X(I), pp.38-39

Having detached natural law from divine ordinance, Grotius' second contribution to its rationalisation is the construction of a coherent system of law. In this field we can trace his reformist outlook by denying historicism and by constructing a system based on principles rather than on facts. As noted above, this was not a persistent characteristic of Grotius, who living in a transitional period, vacillated between justifying the *status quo* and adopting novel philosophical ideas. In order to achieve this, he employs the mathematical method initiated by Descartes:

> "I have made it my concern to refer the proof of things touching the law of nature to certain fundamental conceptions which are beyond question; so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses".[111]

He deduces principles from axioms as the mathematicians deduce propositions from axioms. Consequently, his system of law is deduced from the above mentioned axiom of *appetitus societatis*. Abstraction from the facts enables Grotius to lay a system of universal and eternal value.[112] The emphasis on legal coherence and comprehensiveness initiated by Grotius which refers also to the procurement of general principles unattained by events became a tradition in legal philosophy, in particular with Kelsen's logical system.

**IV.7** *Individualism.* The second aspect of modern human rights doctrine is that of individualism. The origins of this trait perhaps goes back to Protagoras' *dictum* that man is the measure of all things.[113] The significance of the individualistic trait is its transformation into a political theory which has disrupted the ancient social structure and induced social and political changes. The social contract is the configuration of individualism into a political force. By social contract we mean the contract for the initiation of society not the

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[111] *JBP*, *Prolegomena*, para.39, p.23

[112] B.P. Vermeulen, *supra* note 105, p.376, quoting Fruin: "He wished to place his doctrine outside his time".

[113] Plato, *Laws*, *supra* note 19, Vol.IV, 715e,716d; W.K.C. Guthrie, *supra* note 15, vol.III, pp.63-64

terms of governing an existing society. As such, it is connected with natural law and the rationalisation and secularisation of the latter. The social contract provides justification for the institutions which the reason of man evaluates as necessary. If man is rational, born free under nature, the formation of society is explained only through his free will implied in the social contract.

The fact that the social contract had different interpretations and inspired diverse societal structures is explained by the different perceptions of human nature. The egotistical or benevolent nature of man conduces contrasting determinations of societal structure. In general, the social contract presupposes a philosophical rather than a theological attitude towards the state and, as Hegel said, it afforded "..... the overthrow of all existing and given conditions within an actual major state and the revision of its constitution from first principles and purely in terms of thought."[114] That would be impossible if natural law had not detached itself from its theological grasp. In this respect, Grotius' influence is considerable in the drive for the secularisation of natural law, even though his rudimentary contract theory lacks the innovation of the contractual philosophers.

**IV.8** *Individual and humanitarian intervention.* Leaving the philosophical exposition aside, we would like to concretise this theory by exploring the position of the individual in Grotius' work and in particular in *De Jure Belli Ac Pacis libri tres*. In this, Grotius argued that, in his system, the individual is fundamental[115] as the ultimate unit in either national or international law. His legal system is not based on an anthropomorphic notion of the state but on the fact that "states are composed of individual human beings."[116] The analogy between states and individuals is attributed by Sir Hersch Lauterpacht to the patrimonial character of the European States at the time of Grotius and the "realisation of the true nature of rules of international law as addressing

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[114] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, para.258, in A.W. Wood (ed), *Elements of the Philosophy of Right*, trans. H.B. Nisbet, (Cambridge, Cambridge University Press, 1991), p.277

[115] "The law of nature as conceived by Grotius (based on the 'rational and social human nature') can thus serve as the basis of a true universal order embracing all human relations and binding each man in whatever capacity he is acting". P.P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel*, (The Hague, M. Nijhoff, 1960), p.239

[116] H. Lauterpacht, "The Grotian Tradition in International Law", 23 *B.Y.B.I.L.*, (1946), p.1, at p.27

themselves to individual human beings acting on behalf of the state."[117] Again Grotius does not reach the end of the web in his philosophy of individualism which would be the legal emancipation of the individual. Throughout his work, he is both idealistic and realistic, making illuminating insights, yet on the other hand, minimising the political repercussions.

He is reluctant to approve any general right of resistance. The qualification he attaches, though, is of immense importance. According to Grotius, there is a right of resistance when a ruler "shows himself the enemy of the whole people."[118] This is coupled with asserting the permissibility of just war pursued by a foreign sovereign in the circumstance that "a ruler inflict[s] upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded."[119] If we read these statements in conjunction, humanitarian intervention, according to Grotius, appears realistic and coherent. The instances of internal resistance and external interposition involving maltreatment of citizens are identical and Grotius is consistent in permitting both.

One could also deduct a doctrine of humanitarian intervention from the responsibility Grotius attaches to humankind. Grotius used the concept of war as an instrument for punishment, what Van Vollenhoven calls the "Grotius' theorem".[120] If a state commits a crime, it makes itself inferior to any other nation, not only to the recipient of the injury. Any nation which in this sense represents the whole society of mankind is authorised individually or collectively to punish the culprit. The maltreatment of people is such a crime and intervention by one or more states appears to be the punishment.

A third extrapolation from Grotius' work supporting humanitarian intervention is his obsession with peace. He negated any general right to rebellion in the pursuit of his wider plan for order and tranquillity because such actions are disruptive. Consequently, he also sanctions actions by princes against threats to

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[117] *Ibid.*, p.29
[118] *JBP*, Bk.I, ch.IV, para.xi, p.157
[119] *JBP*, Bk.II, ch.XXV, para.viii, p.587
[120] C. Van Vollenhoven, *Grotius and Geneva,* Bibliotheca Visserianum, VI, (Leyden, 1926), p.13, at p.21; P.H. Kooijmans, "How to Handle the Grotian Heritage: Grotius and Van Vollenhoven", 30 *Neth. I.L.Rev.*, (1983), p.81

public order. Grotius defends the *bellum publicum solemne* in order to prevent the extension of war.[121] War for him is "undertaken in order to secure peace".[122] Transmuting those notions into modern-day significance, abuses of human rights are considered threats to international peace and security and therefore could be met with measures under Chapter VII, the collective security system.

To surmise, we can discern three arguments from Grotius' work which support humanitarian actions: (i) the dominant position of the individual in his thesis; (ii) a cosmopolitan argument of *societas humana* whereunder the whole of humanity, abhorred by the maltreatment of subjects within a domestic jurisdiction, interposes with the aim of restoring the forfeited standard of humanity; and (iii) an argument of world order concerning the maintenance of peace.

## V. MODERN JUSTIFICATION OF HUMANITARIAN INTERVENTION ON GROTIAN PREMISES

**V.1** *Intervention from religious solidarity.* Since Grotius, humanitarian intervention has followed the same doctrinal and practical pattern. It would be appropriate now to demonstrate its modern signification. The first and second arguments which show interconnectedness are contemplated concurrently, whereas the third argument, that is of preserving peace, follows because it has acquired momentum only recently.

At the beginning, it should be stated that intervention was initially triggered from religious solidarity, whereby human considerations were assimilated to religious ones. The religious character of humanitarian intervention was prominent in a period when ethnicity was an inconspicuous political force. Faith was both the unitary principle beyond the local jurisdiction and the distinctive feature among nations. The Crusades could be regarded in this sense as the precursors of humanitarian interventions. In *Vindicae Contra Tyrannos*, the

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[121] *JBP*, Bk.III, ch.IV, para.iv, p.644
[122] *JBP*, Bk.I.ch.I, para.I, p.33

author, writing in the 16th century, justifies intervention ".....in behalf of neighbouring peoples who are oppressed on account of adherence to the true religion, or by any obvious tyranny",[123] defending the unity of Christianity and the unity of humanity. During the 19th century, most interventions by the Great Powers in the Ottoman Empire were concerned with the plight of the Christian populations.[124] These interventions, provoked by exigent humanitarian considerations, put an end to the savageries and carnage carried out by the Turkish authorities. They share in common the religious affiliation between the intervening powers and the persecuted populations. Probably the most frequently cited case was the intervention of France, Great Britain and Russia in Greece (1827-1830) which culminated in Greek independence. The three European Powers and the Sublime Porte signed the Treaty of London on July 6, 1927 which aimed primarily at the protection of Greeks but was dishonoured by Turkey thus prompting their intervention.[125] In 1860 France was delegated the task of intervening in Syria to protect the Maronite Christians from being massacred by the Turks.[126] That intervention was effectuated by the Protocol of Paris (1860) which contemplated "l'amélioration du soit des populations

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[123] W.A. Dunning, *A History of Political Theories: From Luther to Montesquieu*, (N.Y., Macmillan, 1931), p.55-56: "And as the doctrine of popular sovereignty is the outcome of the one undertaking, so an enlightened view of international solidarity is strongly presented in the other". The *Vindiciae Contra Tyrannos* was published under the pseudonym of Stephanus Julius Brutus and written probably by either Hubert Languet or Duplessis - Mornay. *Ibid.*, p.47

[124] M. Ganji, *International Protection of Human Rights,* (Geneva, Librairie E. Droz, 1962), ch.1, pp.9-45; J-P.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter", 4 *Cal. W. I.L.J.*, (1974), p.203; T.E. Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey", 79 *Mil. L. Rev.*, (1978), p.157, in part. pp.157-171

[125] *Treaty between Great Britain, France, and Russia, for the Pacification of Greece.* - Signed at London, July 6, 1927. The three powers were urged: ".....no less by sentiments of humanity, than by interests for the tranquillity of Europe". 14 *British and Foreign State Papers,* (1826-27), p.632, at p.633. Under Article V of the same Treaty, they declared that they "..... will not seek, ....., any augmentation of Territory, any exclusive influence, or any commercial advantage for their subjects, .....". *Ibid.*, p.636. Turkey emphasised that: ..... l'affaire Grecque est une affaire interne de la Sublime Porte, et que c'est à elle seule à s'en occuper; que désormais aucune Puissance ne doit plus se mêler de cette affaire, .....". *Manifesto of the Sublime Porte, declining the Pacification with the Greeks, proposed by the Mediating Powers.* -9th June, 1827., 14 *British & For.St.Pap.*, (1826-27), p. 1042, at p.1043. See also the *Proclamation of the Ottoman Porte, declining the Mediation of the Allied Powers, and the Proposed Armistice with the Greeks.* -20th December, 1827., *Ibid.*, p.1052

[126] See conflicting views concerning the nature of the incident between I. Brownlie, *International Law and the Use of Force by States*, (Oxford, Clarendon Press, 1963), p.340 (in favour) and T.M. Franck and N.S. Rodley, "After Bangladesh: The Law Humanitarian Intervention by Military Force", 67 *A.J.I.L.*, (1973), p.275, at pp.281-283 (against). I. Pogany, "Humanitarian Intervention in International Law: The French Intervention in Syria Reexamined", 35 *I.C.L.Q.*, (1986), p.182

chrétiennes de tout rite dans l'Empire Ottoman."[127] The European intervention in Bosnia, Herzegovina and Bulgaria (1876-1878) was provoked by the harsh treatment of Christians. The Porte rejected the establishment of an International Commission whose mandate was to supervise the amelioration of conditions for the Christian population.[128] The Concert of Europe then signed the London Protocol (March 31, 1877) according to which Turkey should have adopted the necessary administrative measures for the protection of Christians, while the Concert retained its right to take any action should Turkey fail to retain the minimum standards.[129] Turkey rejected the provisions of the Protocol "en sa qualité d'Etat indépendant".[130] This situation was terminated with the declaration of war against Turkey by Russia which was sanctioned as aiming "à mettre un terme à la déplorable situation des Chrétiennes sous la domination des

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[127] A. Rougier, "La théorie de l'intervention d' humanité", 17 *R.G.D.I.P.*, (1910), p.468, at p.474 note 2; *Protocol of a Conference held at Paris, August 3, 1860*: "..... les Puissances Contractantes n'entendent poursuivre ni ne poursuivront dans l'exécution de leurs engagements, aucun avantage territorial, aucune influence exclusive, ni aucune concession touchant le commerce de leurs sujets, et qui ne pourrait être accordé aux sujets de toutes les autres nations". 51 *British & For.St.Pap.*, (1860-61), p.279

[128] *General Treaty between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, for the Re-establishment of Peace.* -Signed at Paris, March 30, 1856. In Article VII, it guaranteed the independence and territorial integrity of the Ottoman Empire. 46 *British & For.St.Pap.*, (1855-56), p.8, at p.12. In Article IX, it made provision for certain fundamental civil and political rights for the benefit of the Christians which would be realised by Firman. It also attached the non-intervention principle on the implementation in "good faith" of the firman. See *Firman and Hatti-Sherif by the Sultan, relative to Privileges and Reforms in Turkey.* -February, 1856. 47 *British & For.St.Pap.*, (1856-57), pp.1363-1369. Due to Turkey's disregard of her obligations, the Russian Government communicated to the British that: "We seem therfore to have an undoubted right formally to intimate to the Porte that we shall not hold ourselves bound to abstain from interference till the reforms promised by the Hatt Houmayoun are fully carried out". *Sir H. Elliot to the Earl of Derby - (Recd. Nov. 4, 1876).* He recorded his conversation with the Russian General Ignatiew. 67 *British & For.St.Pap.*, (1875-1876), p.289, at p.290. Pursuant to this, a Conference in Constantinople was held between December 1876 and January 1877 which provided for the establishment of the International Commission. *Protocols of Conferences between Great Britain, Austria-Hungary, France, Germany, Italy, Russia, and Turkey, respecting the Affairs of Turkey. (Servia; Montenegro; Bulgaria; Bosnia; Herzegovina; Reforms, & c.).* -Constantinople, December 1876-January 1877. 68 *British & For.St.Pap.*, (1876-77), pp.1114-1207

[129] "..... d'affirmer de nouveau ensemble l'intérêt commun qu'elles prennent à l'amélioaration du sort des populations Chrétiennes de la Turquie, .....". *Protocol of Conference between the Plenipotentiaries of Great Britain, Austria, France, Germany, Italy and Russia, relative to the Affairs of Turkey. (Christian Population, Reforms in Bosnia, Herzegovina, and Bulgaria. Serbia. Montenegro, & c.)* - Signed at London, March 31, 1877. 68 *British and Foreign State Papers*, (1876-77), p.823

[130] "La Turquie, en sa qualité d'Etat indépendant, ne saurait se reconnaître comme placée sous aucune surveillance, collective ou non". *Turkish Note, in reply to the Protocol relative to the Affairs of Turkey, signed at London, March 31, 1877* - Constantinople, April 9, 1877. 68 *British & For.St.Pap.*, (1876-77), p.826, at p.831

Turcs et aux crises permanentes qu'elle provoque."[131] The Russian government, in a communication to the Turkish before the commencement of war, said: "His Imperial Majesty does not want war ..... but is determined not to hesitate as long as the principles that have been recognised as equitable, human, necessary by the whole of Europe ..... have not received full execution in effective guarantee".[132] Another instance is that of Macedonia (1903-1908, 1912-1913). In this case, Greece, Bulgaria, and Serbia took action to terminate the programme of Turkification of the Christian population. In a "Note Verbale" to the British Government, Greece explained that the three Governments "..... ne pouvant plus tolèrer les souffrances de leurs congérières en Turquie".[133] Consequently, these interventions attach primacy to their humanitarian motives but are also explicit in their religious pre-emption. They presume connotations of civilised and non-civilised standards whereby intervention in the affairs of so called uncivilised nations such as Turkey is justified.[134]

**V.2** *Humanity's reaction and the protection of individuals.* Having dealt with this type of intervention with mixed motives, we should now consider those interventions provoked merely by humanistic considerations for the plight of individuals. To put it in another way, we will now be concerned with humanity's reaction to savage acts. The pertinent actions consolidate Grotius' natural law arguments concerning individuals and the conscience of human society. Contemplating the case of war for the subjects of another ruler Grotius said:

> "This too is a matter of controversy, whether there may be a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands. Now it is certain that, from the time when political associations were formed, each of their rulers has sought to

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[131] A. Rougier, *supra* note 127, p.475, note 6

[132] The Note of the Russian Government was sent on November 13, 1876. 47 *British and Foreign States Papers,* (1856-57), p.321 in Fonteyne, *supra,* note 124, pp.208-212

[133] 106 *British and Foreign State Papers,* (1913), pp.1059-60

[134] "..... l' intervention des *puissances civilisée* est légitime en principe, quand la population chrétienne de ces pays est exposée à des persécutions ou à des massacres. Dans ces circonstances, elle est justifiée par la communauté des intérêts religieux et par des *considérations d'humanité*, c'est-à-dire par les principes du droit naturel d'après lesquels les États civilisés se dirigent généralement dans leurs relations avec les *États barbares*". (italics added). F. De Martens, *Traité de droit international*, t.1, traduit du Russe par A. Léo, (Paris, Librairie Marescq Aine, 1883), p.398

assert some particular right over his own subjects..... . In conformity to this principle Constantine took up arms against Maxentius and Licinius, and other Roman emperors either took up arms against the Persians or threatened to do so unless these should check their persecutions of the Christians on account of religion."[135]

Vattel, the theoretical founder of sovereignty, recognises a right to intervention on the above pattern of Grotius. "If a prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance."[136] The concept of intervention on grounds of humanity was crystallised during the 19th century. At that time, the emerging prevalence of the state in international relations, engendered also the opposite view, which negates any such right. However, those who defend such interventionist actions continue the Grotian tradition. The proponents of humanitarian action have ingrained their reasoning into natural law theory as it was interpreted by Grotius. They follow his tradition by recognising individual rights which the state cannot arbitrarily abuse and also regard the community of states as guardians of this minimum requirement of humanity when the threshold is crossed. They argue against the state which was sovereign, dominant and autonomous. Humanitarian intervention as an assault on sovereignty could only be legitimised if it is integrated in the wider theory of natural law. The arguments of individualism and human solidarity, part and parcel of natural law, can explain humanitarian actions. They proffer the medium for integrating humanitarian intervention into natural law. The friction between sovereignty and humanitarian precepts is conceded by Arntz who shifts the emphasis onto the latter:

"When a government, even acting within the limits of its rights of sovereignty, violates the rights of humanity, either by measures contrary

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[135] *JBP*, Bk.II, ch.XXV, para.viii (2), p.584

[136] E. de Vattel, *Le Droit des Gens ou Principes de la loi naturelle"*, *The Classics of International Law*, J.B. Scott (ed), (Washington, Carnegie Institution of Washington, 1916), livre II, ch.iv, para.56, p.298: "Mais si le Prince, attaquant les lois fondamentales, donne à son peuple un légitime sujet de lui résister; si la Tyrannie devenue insupportable, soulève la Nation; toute Puissance étangère est en droit de secourir un peuple opprimé, qui lui demande son assistance"

to the interests of other states, or by excessive injustice or brutality which seriously injure our morals and civilisation, the right of intervention is legitimate. For, however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect; namely the law of humanity, or of human society that must not be violated. In the same way as within the state freedom of the individual is and must be restricted by the law and the morals of society, the individual freedom of the states must be limited by the law of human society." [137]

In the same spirit, Rougier identifies humanitarian intervention as the control a state exercises "au nom de la Société des nations" over the internal sovereign acts of another which are "contraire aux lois de l'humanité".[138] Other writers such as Oppenheim,[139] Wheaton,[140] and Bluntschli,[141] are identified with the same reasoning.

The American action in Cuba (1898) which assisted in its independence resorted to the same line of argumentation.[142] In response to the atrocities committed there, the American Congress prompted a resolution on 20 April 1898 in which it was stated that "The abhorrent conditions ..... have shocked the moral sense of the people of the United States."[143] President McKinley prior to the intervention stated: "If it shall hereafter appear to be a duty imposed by ourselves, to civilisation and humanity to intervene with force, it shall be without fault on our

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[137] Lettre de M. Arntz à M. Rolin-Jacquemyns, "Note sur la théorie du droit d'intervention", 8 *Rev. Dr.Int'l & Legisl.Comp.*, (1876), p.673, at p.675. The translation in Fonteyne, *supra* note 124, p.220

[138] A. Rougier, *supra* note 127, p.472

[139] "..... when a state renders itself guilty of such cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible". L. Oppenheim, *International Law: A Treatise*, H. Lauterpacht (ed.), vol.I, "Peace", 7th ed., (London, Longmans, Greens & Co., 1948), p.280, para.137

[140] H. Wheaton, *Elements of International Law*, 8th ed., (Boston, Little, Brown & Co., 1866), p.95, para.69: "The interference of the Christian powers of Europe in favour of the Greeks ..... affords a further illustration of the principles of international law authorising such an interference ..... where the general interests of humanity are infringed by the excesses of a barbarous and despotic government".

[141] J.C. Bluntschli, *Le droit international codifié*, trans. M.C. Lardy, 4ème ed., (Paris, Librairie Guillaumin et Cie, 1886), p.281, art.478: "On sera autorisé à intervenir pour faire respecter les droits individuels reconnus nécessaires, ansi que les principes généraux du droit international.. . "

[142] D.S. Bogen, "The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in the Dominican Republic (1965)", 7 *Harv. I.L. Club J.*, (1966), p.296

[143] E.C. Stowell, *Intervention in International Law*, (Washington, Byrne, 1921), p.122

part and only because the necessity of such action will be so clear as to command the support and approval of the civilised world."[144] The American action according to the Resolution authorising it appears to be initiated purely by altruistic motives: "The United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people."[145]

The notion of humanity and the interposition of foreign states in order to restore those principles within a state is supported in the writings of Basdevant[146] and Borchard[147] just before World War II. H. Hodges appears visionary when he says that:

> "As the feeling of general interest in humanity increases, and with it a world - wide desire for something approaching justice and an international solidarity, interventions undertaken in the interests of humanity will also doubtless increase. ..... We may therefore conclude that future public opinion and finally international law will sanction an ever increasing number of causes for intervention for the sake of humanity."[148]

The British Chief Prosecutor in the Nuremberg Trials, Sir Hartley Shawcross, witnessed his sympathy towards humanitarian actions: "The right of humanitarian intervention in the name of the Rights of Man, trampled upon by the state in a manner offensive to the feeling of Humanity, has been recognised long ago as an integral part of the Law of Nations."[149]

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[144] *For. Rel.* U.S (1898), p.759

[145] T. Behuniak, *supra* note 124, p.163

[146] "L'État ..... qui ne remplit par sa fonction de justice même à l'égard de ses nationaux, perd son droit au respect et les autres puissences sont, ..... autorisées à substituer leur action à la sienne". J. Basdevant, "Chronique des faits internationaux", 11 *R.G.D.I.P*, (1904), p.105, at p.110

[147] "..... where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorised by international law to intervene on grounds of humanity". E. Borchard, *The Diplomatic Protection of Citizens Abroad*, (N.Y., The Banks Law Pub. Co., 1915), p.14

[148] H.G.A. Hodges, *The Doctrine of Intervention*, (Princeton, The Banner Press, 1915), p.91

[149] *Speeches of the Chief Prosecutors at the close of the case against the individual defendants*, (Cmd 6964), p.63; L. Le Fur, *Intervention pour cause d'humanité*, (Paris, Pedone, 1935), p.38: "L'intervention, a pour but d'assurer aux individus qui en sont injustement privés, les libertés considerées aujourd'hui comme essentielles chez les peuples civilisés: liberté individuelle, liberté religieuse, droit d'usage de la langue maternelle. C'est à dire que l'oppression dont ils

In a nutshell, this right of intervention is based on the "théorie du droit humain et du pouvoir-fonction" according to Rougier.[150] The people live in a triple social organisation: national; international and in "société humaine" which is more profound and is regulated by the "droit humain". Therefore, a political society should satisfy, beyond the national and international interests of its members, those which are universal and comprise of all the human activities: physical, moral and social. Human solidarity determines the "droit humain" and can be summarised in the "droit à la vie"; "droit à la liberté"; "droit à la légalité". If there exists a certain "détournement de souverainté", governments possess the power "pouvoir-ministère ou pouvoir-fonction" to intervene in order to substitute this sovereignty.[151]

**V.3** *Peace and Human Rights.* The third trait in Grotius' extrapolation of humanitarian intervention is that of preserving peace. He sanctions war against a recalcitrant member of the international community in order to limit its repercussions and preserve peace. In modern terminology it would be interpreted as the prominent objective of maintaining international peace and security envisaged in the U.N. Charter. Thus, according to contemporary construction, violations of human rights in a country could threaten international peace and security. In this instance, collective action to preserve peace is justified as institutionalised reaction under Chapter VII of the U.N. Charter. As a preliminary observation, we should emphasise the fact that the lack of precision in what constitutes a "threat to international peace and security" allows a certain

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souffrent est en général imputable à l'Etat même dont ils sont ressortissants et que l'intervention émanera donc d'Etats tiers..... . Rejeter en principe l'intervention, serait une prime accordée à la violence et toute sécurité assurée à l'injustice". E. Aronéanu, "L'intervention d'humanité et la déclaration universelle des droits de l'homme", 33 *Rev. Dr.Int'l Sc. Dipl. & Pol.,* (1955), p.126

[150] A. Rougier, *supra* note 127, pp.489-497

[151] A. Pillet, "Le droit international public: ses éléments constitutifs, son domaine, son object", 1 *R.G.D.I.P.,* (1894), p.1, at p.13: "Il existe un droit véritable en dehors des sociétés nationales et de leurs institutions jurisdiques, en dehors et au dessus de la société internationale et du droit qui lui correspond, droit inséparable de l'homme et qui mérite bien le nom de droit commun de l'humanité..... . ..... un droit dont l'observation puisse être réclamée de chacun État ou individu, et imposée à chacun, ....." . "Les divers groupes, Etat, communauté internationale ont quelque chose d'artificiel et de voulu: le bien de l'homme est leur dernier objet". *Ibid,* p.19. "Si la volonté et la force lui manquent, d'autres, de simple tiers, les rempliront à sa place dans les limites de leur intérêt". *Ibid,* p.26;

discretion to the Security Council in delivering its function.[152] The Security Council's recent practice indicates that it will not shy away and there are precedents in this demand for international order. This was the first time that humanitarian concerns were invoked along with wider concerns for the stability and security of Europe. The doctrinal substance of this position was elucidated by Fiore in the last century but is still applicable:

> "La violation du droit international peut être aussi la conséquence de faits qui s'accomplissent à l'intérieur d'un Etat, et qui ont pour résultat la violation directe du droit international. ..... Le laisser-faire et l'indifférence des autres Etats constitueraient une politique égoïste, et contraire aux droits des tous, car celui qui viole le droit international au détriment de qui que ce soit, le viole au prejudice non seulement de celui qui est atteint directement, mais à l'encontre de tous les Etats civilisés."[153]

The intervention of the Great Powers in the Greek Revolution was dictated "..... no less by sentiments of humanity than by the interest for tranquillity in Europe."[154] The intervention in Bosnia, Herzegovina (1876-78) also invoked "les intérêts de la paix générale."[155] Making a leap forward, the assimilation of human rights violations and threats to the peace was effectuated with the imposition of sanctions on South Rhodesia in 1968[156] and the imposition of an arms embargo on South Africa in 1977.[157] A more recent demonstration of this

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[152] G. Gaja, "Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial", 97 *R.G.D.I.P.*, (1993), p.297, at pp.302; P-M. Dupuy, "Sécurité collective et organisation de la paix", *ibid*, p.617

[153] "Il est, en effet, une chose indubitable, qu'une société ne pouvant être imaginée en l'absence de lois, l'observation de lois naturelles de la société des Etats est une chose d'un intérêt si capital pour la tranquillité de tous, que s'il était permis à l'un d'eux de les violer impunément, et que les autres fussent obligés de rester indifférents à cette violation, sans avoir le droit d'y mettre obstacle, la société des Etats ne pourrait pas subsister". P. Fiore, *Nouveau Droit International Public*, trad. par Charles Antoine, vol.I, (Paris, A. Durand et Pedone-Lauriel, 1885), paras.596,600, pp.521,522,524

[154] *Treaty between Great Britain, France, and Russia, for the Pacification of Greece,* (6 July 1827), 14 *British and Foreign State Papers*, (1827), p.632, at p.633

[155] See *London Protocol* (31/3/1877), 68 *British & For.St.Pap.*, (1876-77), p.823, at p.824: " Si leur (contracting states) espoir se trouvait encore une fois déçu et si la condition des sujets Chrétiens du Sultan n'était pas améliorée ..... elles se réservent d'aviser en commun aux moyens quelles jugeront le plus propres à assurer le bien-être des populations Chrétiennes et les intérêts de la paix générale".

[156] S.C. Res. 253, 23 U.N. SCOR, Res and Doc., at 5 (1968); M.S. McDougal, W.M. Reisman, "Rhodesia and the United Nations: the Lawfulness of International Concern", 62 *A.J.I.L.*, (1968), p.1

[157] S.C. Res. 418, 32 U.N. SCOR, Res. and Doc., 5 (1977)

attitude is Resolution 688 of 1991 responding to the Iraqi abuses against the Kurds.[158] This resolution is regarded as the first time that the Security Council "stated a clear and explicit linkage between human rights violations materially within a state (although there were indeed international repercussions) and a threat to international security".[159] It is on the basis of this resolution that Western powers have created safe havens in Northern Iraq.

Another such action is Resolution 794 of 1992 concerning Somalia.[160] This resolution is different from the previous one because it confines itself solely to internal human rights violations without international repercussions as a threat to international peace, whereas the former resolution was less explicit on that issue. Resolution 794 said: "the magnitude of the humanitarian tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security". In such circumstances and "in order to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the U.N., aimed at national reconciliation of Somalia.....", it authorised the Secretary-General and co-operating member states to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia". This resolution expresses concern for the internal order in a state,[161] and acknowledges that massive human rights violations, even strictly confined within a state, can cause a threat to the peace.

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[158] S.C. Res. 688, U.N. Doc. S/RES/688 (1991), reprinted in 30 *I.L.M,* (1991), p.858: *"The Security Council, Mindful* of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security, 1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; 2. *Demands* that Iraq, as a contribution to removing the treat to international peace and security in the region, immediately end this repression.....".

[159] K.K. Pearse, D.P. Forsythe, "Human Rights, Humanitarian Intervention, and World Politics", 15 *Hum. Rts Q.*, (1993), p.290, at p.303; J. Delbrück, "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations", 67 *Indiana L.J.*, (1992), p.880; R.B. Lillich, "Humanitarian Intervention through the United Nations: Towards the Development of Criteria", 53 *ZaöRV*, (1993), p.557

[160] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., at 3, U.N. Doc. S/RES/794 (1992)

[161] See U.S. Permanent Representative to the Security Council: "the international community is also taking an important step in developing a strategy for dealing with the potential disorder and conflicts of the post - Cold War world". U.N. Doc. S/PV. 3145, p.36, (Dec.3, 1992)

It should be maintained at this point that a more comprehensive evaluation of the Somali case will be pursued later.[162] However, this incident is included in this section because it is considered as an important indication of the interconnectedness of peace with the internal respect for human rights. Having presented this aspect of the case, its legal character or its trials and tribulations will be evaluated later.

**V.4** *Evaluation of Grotius' contribution and its modern relevance.* Grotius' contribution to international theory is ineluctable and lasting because it is not confined merely to those traits we presented above which formulated the human rights heritage. Of equal importance is his spirit that is, the intellectual concretisation of an emerging world. We often speak of the Grotian moment, the Grotian tradition or the Grotian quest.[163] In our own age of transition the similarities with Grotius' world are large. Grotius explored the shadowland. He perceived with enlightenment the world emerging on the horizon. He systematised it using his legal and intellectual capabilities and offered his contemporaries what they were striving for. This explains why Grotius' work is idealistic and conservative at the same time. He was caught in a transitional period of human history and tried to combine the emerging principles, the shadowland, with the established ones. That exercise is not always successful but it does not lack intellectual quality. The world of Grotius was transforming from a medieval to a modern society with the emergence of the state. The world society was compartmentalised into state units. In our time, things are travelling in the opposite direction. The state is on the defensive, having run its full circle of development and having discarded the fabricated understanding that it is a panacea. On the contrary, statism is viewed with suspicion for the numerous deprivations it has caused. The development of human rights law was of immense importance in facilitating the passage to a world community. The U.N. Charter is caught in the middle of all this by putting emphasis both on state

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[162] See Chapter Five and Eight

[163] H. Lauterpacht, "The Grotian Tradition in International Law", 23 *B.Y.B.I.L.*, (1946), p.1; R.A. Falk, "The Grotian Quest", in R.A. Falk, F. Kratoschwill, S.H. Mendlovitz (eds.), *International Law. A Contemporary Perspective*, (Boulder, Westview Press, 1985), p.36; R.J. Vincent, "Grotius, Human Rights, and Intervention", in H. Bull, B. Kingsbury, A. Roberts (eds.), *Hugo Grotius and International Relations*, (Oxford, Clarendon Press, 1992), p.241

insights and on human rights, though the balance has long rested in favour of the first. If we see human beings *tout court* and not as citizens submerged in a local authority, if we consider state action and evaluate its prominence in the field of protecting human beings from cruelty, then from the shadowland of the contemporary world we could extrapolate the rules which correspond to the future, to the horizon. The denial of humanitarian intervention is due rather to intellectual timidity, for, though we can see the horizon, the cast of tradition is deeply inherent in us. We acknowledge that the burden of the present order is heavy but also we deny the new order which is synthesised in the shadowland to enlighten our present order. Grotius was the man who discerned the new and structured a system based on the continuity of the old and the potency of the new.

## VI. THE CONTRACTUAL JUSTIFICATION OF HUMANITARIAN INTERVENTION: JOHN RAWLS'S "A THEORY OF JUSTICE"

**VI.1** *An outline of Rawls's Theory of Justice - the principles of Justice.* In the preceding sections we have adumbrated the influence that natural law thinking has exerted on the development of humanitarian intervention. The crucial tenet in the different articulations of naturalist thinking is that there exist certain inalienable rights, the "droit humain", which are not conceded when people form societies. The centrifugal dynamics of the societal structure and of these rights is accommodated and stabilised by a hypothetical device, the social contract. In international law, these rights should be satisfied before the contingent interests of the particular political formations. The emergent association of different groups now is auto-regulated. Thus, in the absence of hierarchy, it is states which re-establish the essentials of this association, individually or collectively. Humanitarian intervention has been justified hence, as a restoration of the traits of humanity or of peace and order.[164]

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[164] A more explicit reference to the notion of an existent contract between states to afford the protection of natural law to people within their respective territories is a Report drawn up by the League of Nations in 1926. Accordingly: "Some rights are not rights created by states for the

One of the modern contractual philosophers is Rawls with his seminal book *A Theory of Justice.*[165] He elaborated a theory of justice in the tradition of natural law philosophers who based their theory on the equality of human beings as rational entities. As mentioned above, it was with Grotius that rationalism became the ineluctable trait in natural law. The social contract was used as a rhetorical device which would eventually justify the authority, obligation and expectations of law in an era of secularisation and disapprobation of a purposive, universal law. The correlation between Rawls's theory and natural law resides, consequently, on a general supposition that questions and ideas about justice are prominent within considerations concerning social living, individual and collective claims, social peace and distribution of goods. Justice is for Rawls "the first virtue of social institutions"[166] and thus it is not merely an attribution but an exploration or deduction from good reason. His principles of justice for the structure of society are those that "free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[167] The initial position of equality, in the allusion of contract theories, is that of the original position where participants choose the principles of justice under their veil of ignorance, that is, ignorant of their special circumstances.[168] Rationality is an essential component of the original position which assists together with the veil of ignorance, the circumstances of justice[169] and the formal constraints on the concept of right[170] in formulating the principles of justice. Rationality assists the

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benefit of their nationals or for foreigners, namely the right to life, the right to liberty and the right to own property. The community has simply recognised the existence of these rights. States have mutually undertaken to ensure the possibility of enjoying them. ..... Before these rights nationality sinks into the background, because they belong to the man as a human being and are not, accordingly subordinate to the will of the State". *Report of the Subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law* on "Responsibility of States for Damages Done in their Territories to Person or Property of Foreigners", 20 *A.J.I.L.*, (1926), Sp. Suppl., p.177, at p.182

[165] J. Rawls, *A Theory of Justice*, (Cambridge Mass., Harvard University Press, 1971), hereinafter cited as *TJ*

[166] *TJ*, p.3

[167] *ibid.*, p.11

[168] *TJ*, p.12

[169] *TJ*, pp.126-130

[170] *TJ*, pp.130-136

contractors in agreeing on those principles which would offer the highest prospect of desire satisfaction.[171]

Having set the plan, the parties are ready to choose their principles of justice. These are two:

(i) The Principle of Liberty: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others;[172]

(ii) The Principle of Equality: social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.[173]

The first principle is given precedence and applies to "the basic liberties of citizens" enumerated as "..... political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."[174]

**VI.2** *The international arena.* Concerning international law, Rawls extends the principles of justice elaborated in an initial domestic position of ignorance to the relations between societies. He admits that those principles are more suitable in a closed system and therefore they may not apply entirely to multifarious negotiators. He begins with the initial position of the parties who negotiate the principles unbiased by the knowledge of their position:

> "One may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states ..... these representatives are deprived of various kinds of information. ..... Once again the contracting parties, in this case representatives of states, are allowed only enough knowledge to make a

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[171] *TJ*, pp.142-150
[172] *TJ*, p.60
[173] *TJ*, p.83
[174] *TJ*, p.61

rational choice to protect their interests but not so much that the more fortunate among them can take advantage of the special situation."[175]

The representatives of nations are by analogy in a position of ignorance in order to protect them from the biases of their historical fate. In this original position, they almost deterministically articulate equality as the most important principle. That principle is "analogous to the equal rights of citizens in a constitutional régime".[176] As a consequence of that primordial choice other principles follow. They are (i) self-determination; (ii) self-defence; (iii) the rule that treaties should be honoured; (iv) principles regulating the means that a nation may use to wage war.[177]

Self-determination is "the right of a people to settle its own affairs without the interference of foreign powers".[178] This accounts for sovereignty and, therefore, non-intervention is a related principle emanating from the original position. Nations as moral units having achieved internal equality are not viewed as being fired by a desire to pursue on the international plain their self-interest: but a just state "will aim above all to maintain and preserve its just institutions and the conditions that make them possible."[179] It thus appears that there is nothing in his work that would support a contrary view of intervention.

**VI.3** *Humanitarian intervention.* This negative assertion holds truth in his hypothetical project but involves a rather elliptical construction were we to transmute it in actual situations. Under close examination, we can distinguish an analogy between national and international equal liberty. The ascertainment that the state should maintain its just institutions is an indication that national equal liberty is a mandatory prerequisite for international equal liberty. The parties in their national initial position negotiate the principles of justice among which equal liberty is prominent. Having done so, the representatives of nations now choose in their original position equal liberty as the principle of justice. In other

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[175] *TJ*, p.378
[176] *TJ*, p.378
[177] *TJ*, pp.378-379
[178] *TJ*, p.378
[179] *TJ*, p.379

words, only states which achieve national equality are subject to the international equal liberty, that is non-intervention.[180]

We could attain the same result of humanitarian action even on the assumption that the first principle of justice - equal liberty - is promulgated and enjoyed by both just and unjust participants in the original position. This requires a second level of enquiry. The first which corresponds to the above argument, is the *ab initio* acceptance of equal liberty, whereas the second is the *a posteriori* investigation into the maintenance of equal liberty. We explore the traits of justice within institutions, that is whether the structures of internal institutions satisfy the above principle. If the institutions are defective then non-interference is not, *per se*, justified and war is an option for the amelioration or the termination of the violation because "the contractors are concerned ..... with the well-being of persons and thus, it is perfectly natural that the contractors may approve the destruction of a certain nation, if it severely frustrates the interests of its populace."[181]

Conceding that only parties which have satisfied the rule of equal liberty within their systems enjoy the same principle in the law of nations, a fundamental question emerges concerning the participants or the quality of the representatives who participate in the original position for the formulation of principles of international justice. Only parties which have within themselves equal liberty should participate. Therefore, the derivative principle of equal liberty and non-intervention is not arbitrary or unfair but an expected consequence of the participants' status. If it were for just and unjust nations to participate in the original position, the hypothetical construction of the initial position will be destroyed because the parties do not start from the same footing, they do not share the appropriate initial *status quo*. "Justice as fairness",[182] that is principles of justice agreed to in an initial situation that is fair, does not apply in this case. It is obvious which presumption Rawls made. Equality is not only

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[180] T.M. Franck, S.W. Hawkins, "Justice in the International System", 10 *Mich. J.I.L.*, (1989), p.127, at p.144
[181] D.A.J. Richards, *A Theory of Reasons for Action*, (Oxford, Clarendon Press, 1971), p.138
[182] *TJ*, p.12

the promulgation of, but also the characterisation of, the original position.[183] The acceptance of the principle of non-intervention only among just societies is derived also from his articulation of permissible conscription: "Conscription is permissible only if it is demanded for the defence of liberty itself, including here not only the liberties of the citizens of the society in question, but also for those of persons in other societies as well."[184]

Defending people' rights in other societies is an acknowledgement that some societies are unjust and they deserve external restoration of rights. Here nests a contradiction which could only be resolved by applying the equality principle which is the cornerstone of Rawls' theory. Assenting to the international function of equality and thus to non-intervention, we condone deprivation of equality within some domestic jurisdictions. This contradicts Rawls's banner of equality within societies. It can be resolved only when international equality is applied to just states. His paradigm of conscription is an admittance, firstly, that states could take action to restore a situation of equality in unjust states and, secondly, that equality applies only among just states, as unjust ones do not participate in the promulgation of the principle of international justice.

**VI.4** *Internal civil disobedience - external intervention.* We reasoned from John Rawls's theory of justice that only just states participate in the initial position for the extrapolation of principles of justice. An issue that supports the conclusion of non-intervention as a peremptory norm between just states is the subject of resistance.[185] The parties in the original position most probably would agree to a right of humanitarian intervention had they known that some of the participants were unjust. It corresponds with the right of disobedience for the parties in the original domestic position when there is injustice, merely by infringement of the first principle of justice, that is equal liberty.[186]

This reminds us of Grotius and his right of resistance. Whereas Grotius is concerned with submission unless injustices occur, Rawls' obedience is reserved

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[183] A.A. D'Amato, "International Law and Rawls's Theory of Justice", 5 *Denver J.I.L. & Pol.*, (1975), p.525, at p.531-535
[184] *TJ*, p.380
[185] W.G. Friedmann, "A Theory of Justice: A Lawyer's Critique", 11 *Col. J.Trans. L.*, (1972), p.369, at p.376
[186] *Ibid.*, pp.363, 372

only for just societies; otherwise revolution is the answer.[187] Rawls' discussion of civil disobedience is confined to self-limiting cases of just societies whose particular articulations of law may contravene the principles of justice. Our purpose is to show whether the circumstances which justify resistance in the domestic plain correspond to or could be equated with the circumstances which condone humanitarian intervention on the international level. Firstly, they both start from an equal footing: the degeneration of either the domestic or international principles of justice. The second common trait is that both concern just states or those transformed to nearly just. This feature affirms our previous observation that only just states participate in the initial position for the extrapolation of principles of justice. Hence, for Rawls, the initial position is also a device of representation and the qualities of representatives determine the outcome of the representation.[188]

Permitting both civil disobedience and intervention when justice degenerates into injustice within a formerly just state,[189] one could answer the less disturbing question of whether the parties in the original position would most probably agree to a right of humanitarian intervention had they known that some of the participants are unjust in the affirmative. Civil resistance is a corrective action addressed to the majority and its purpose is to re-establish the shared underlying conception of justice.[190] Civil disobedience as a political act is mainly instigated by the infringement of the first principle of justice, which is equal liberty.[191] At the second level, the parties choose equality as representatives, "but now they are representatives of peoples whose basic institutions satisfy the principles of justice selected at the first level."[192] There is a correspondence here between disrespect of the principle of equal liberty and resistance or intervention as reactions in the domestic or international planes respectively.

Rawls is cautious enough not to delineate the instances for revolution as whenever equal liberty is violated. Instead, he prefers a more conciliatory

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[187] *Ibid.*, p.363
[188] J. Rawls, "The Law of Peoples", 20 *Critical Enquiry*, (1993), p.36, at p.45, hereinafter cited as *LP*
[189] *LP*, p.47
[190] *TJ*, p.365
[191] *TJ*, p.372
[192] *LP*, p.41

approach, although it seems that the right to civil disobedience extends also to his hierarchical societies which are characterised by a conservative respect for basic tenets of liberalism, mainly human rights.[193] Otherwise, they degenerate into tyrannies and do not avoid intervention in any case.[194]

This correspondence of causes for internal civil disobedience and external intervention contravenes Walzer's approach of distinguishing between and alienating the two situations from each other.[195]

## VII. TOWARDS A TENTATIVE CONCLUSION

Before proceeding to the next chapter which deals with the positivist jurisprudence and humanitarian intervention, we will attempt to summarise the main aspects of natural law in relation to humanitarian intervention. We have presented the historical evolution of this law with its different approaches to the idea of right or positive law. It is also significant that one of the conspicuous characteristics of human civilisation is a search for an ideal, for a redemptive force beyond the posited world. As D'Entrèves has observed, it signifies the: "unrelenting quest of man to rise above 'the letter of the law' to the realm of the spirit."[196] The pleas, some impassioned, for higher standards are more obvious when the laws and institutions are deficient or unsatisfactory or when cruelty reigns. The explanation for humanitarian intervention is simple within this matrix. The laws of humanity which justify in principle humanitarian actions are universal and above the historic, fortuitous laws. These pervasive ideas of a transcended nature are one of the main attractions of natural law which secured its regeneration *malgré* the positivist assault. The latter, as we shall see in the next chapter, is not ignorant of abstractions, as Kelsen's theory proves, but in

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[193] These safeguard "for all persons at least certain minimum rights to means of subsistence and security (the right to life). *LP*, p.52

[194] *LP*, p.47: "Their right to independence is no shield from that condemnation, nor even in grave cases from coercive intervention by other peoples".

[195] M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (N.Y, Basic Books, 1977), p.89

[196] A.P. D'Entrèves, *Natural Law. An Introduction to Legal Philosophy.* (London, Hutchinson University Library, 1970), p.127

general, it is more empiricist. Furthermore, positivism is secular, whereas natural law has, since Grotius, rationalised the process for identifying ideas but not the ideas themselves. Having said that, natural law succeeds in expanding the legal spectrum whereas positivism pretends to secure its distinct character.

Within the auspices of this chapter, we have tried also to present an articulation of naturalist thinking with its perplexities. We have addressed questions such as what is law, what happens when law is failing, or what it is that law can achieve. These issues should be compared with the concerns of positivism as will be demonstrated in the next chapter. One of the principal problems of natural law is the distinction between "is" and "ought". The derivation of prescriptions from descriptions is an anathema for the positivists, but we have depicted the work of Finnis who endeavours to reconcile the distinction. Another issue which interrelates with the next chapter is the justification of the authority of law. If people are rational and endowed with free will to pursue their ends, they can be obliged to do something if there is an accepted formula such as a deity, reason, contract or sovereign will.

In international law, natural law can supersede a statist order because it refers to higher principles. One of the most intriguing conclusions after this exposition is that the law on humanitarian intervention as it is practised in contemporary society, explicitly or implicitly, follows the lines of the Grotian tradition. While we should recognise the impact of Grotian thinking on international law, we should present a fresh approach to humanitarian actions after we present and evaluate the main theories in the field.

# CHAPTER TWO

# POSITIVISM AND HUMANITARIAN INTERVENTION

*The historical facts which prompted the development of positivist legal theory - its international law dimensions - Wolff and Vattel on international law and humanitarian intervention - Austin's sovereign and the repudiation of international law - modern positivist theorists: Kelsen and Hart on international law and humanitarian intervention.*

## I. HISTORICAL BACKGROUND

**I.1** *The emergence of the state.* Positivism as the new legal ideology can be traced back to the emergence and assertion of the political entity of the state, which occurred after the Reformation. Reliance on transcendental truths emanating from God or nature were insufficient explanations for the secular world. Thus, positivism appears alongside the new political entities which came to power following the break up of the medieval feudalist conception of society and the unity of Christendom. Feudalism, by dispersing power to different classes in a society, resides at the antipode of the state as it is realised with a centralised system. However, some of its features, such as the territorial tenure, the loyalty to the prince and that of dominion, assisted in consolidating the new entities. Additionally, the Reformation, and, in particular Protestantism, solidified the supremacy of the state within its territory. The decisive step was the Peace of Westphalia in 1648.[1]

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[1] L. Gross, "The Peace of Westphalia 1648 - 1948", 42 *A.J.I.L.*, (1948), p.20; R.A. Falk, "The Interplay of Westphalia and Charter Conceptions of the International Legal Order", in C.

Having accepted the existence of separate, self-sufficient entities, the threat of disunity and conflict now emerged where previously there was unity. However, a broader unity based on the common interests of those separate entities could be formulated and that unity took the shape of rules which direct and facilitate state behaviour.

**I.2** *The concept of sovereignty.* The rise of the modern state influenced political and legal thought and introduced a new term, sovereignty. Jean Bodin[2] initiated a comprehensive concept which appealed to national unity and facilitated the state's ability to consolidate its power, from a fragmentation of powers, towards a central authority. He attributed to that source of unity the facility of legislation.[3] The legislative power was not arbitrary or absolute but subdued to the law of God and nature, to the constitutional limitations or the fundamental laws and to the *Leges Imperii*.[4] Sovereignty is, hence, relative and legal but also formal and absolute as a political notion of supreme power unrestrained by any external authority. This conceptual bifurcation of sovereignty retraces the medieval tradition of submitting positive laws to the scrutiny of higher laws. Grotius and Vattel are also anchored in the medieval tradition of ethically limited sovereignty.

The legally relative aspect of internal sovereignty vanished in the process of consolidating state power, which became predominantly unfettered and absolute. The reason for the metamorphosis of a legally circumscribed concept to absolute sovereignty was again the political facts which generated new philosophical constructions and transformed sovereignty from a partially legal to a political notion. The growth in governmental power dissolved all the

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Black, R.A. Falk, *The Future of the International Legal Order,* (Princeton, Princeton University Press, 1969), p.32

[2] A. Gardot, "Jean Bodin. Sa place parmi les fondateurs du droit international", 50 *R.C.*, (1934 IV), p.545, at pp.580-629; F.H. Hinsley, *Sovereignty*, 2nd ed., (Cambridge, Cambridge University Press, 1986); L. Wildhaber, "Sovereignty and International Law", in R.St.J. MacDonald, D.M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory,* (Dordrecht, M. Nijhoff, 1983), p.425

[3] "Bodin sees the sovereign embodied in an absolute and perpetual legislative power". A. Vincent, *Theories of State*, (London, B. Blackwell, 1987), p.53

[4] J. Bodin, *Les six livres de la Republique,* (Paris, 1576), livre I, ch.8, p.131: "..... car si nous disons que celuy a puissance absolue, qui n'est point subiect aux lois, il n'est se trouvera Prince au monde souverain: veu que tous les Princes de la terre sont subiects aux lois de Dieu, et de la nature, et a plusieurs loix humaines communes a tous peuples". The incorporation of limitations signifies that they were integral to sovereignty, "working for a limited and not absolute monarchy". A. Vincent, *supra* note 3, p.59

limitations imposed by observance of or fear of superior laws. Positive laws as man-made and emanating from the will of the sovereign were becoming gradually unquestionable. Thomas Hobbes worded the new notion of sovereignty: "it appeareth plainly that the sovereign power ..... is as great as possibly men can be imagined to make it."[5] He identified sovereignty with might. Thus, its alienation from the residue of legal thought transformed sovereignty into an absolute political concept.

As a consequence, the problem of identifying the repository of power in a particular society emerged. The location of the source of power has appeared illusory in its manifestations. The confusion of legal and political precepts is apparent in Austin's exposition of legal theory whereby the law is the command of the sovereign.[6] Although the internal identification of power was uncertain, the external accumulation was more intelligible. The state as a whole was endowed with sovereign quality. This development coincides with the rise of nation-states but the establishment of rules for international contact remains inexplicable. If the state is sovereign and sovereignty is absolute, submission to any rule is problematic. Such a state of affairs is attributed to the fact that sovereignty was dealt with *in abstracto*, not as a requisite for international relations.[7] A way out of the imbroglio which this notion of sovereignty caused is consent.[8] Nevertheless, it is inadequate to address the issue of its morality.

**I.3** *Absolute or conditional sovereignty.* The dichotomy of political, unbridled sovereignty and a legally "tamed" one is persistent in international law. The sacred morality of sovereignty is opposed to the interference of human rights aspirations or the interdependencies of modern life.[9] Humanitarian

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[5] Thomas Hobbes, *Leviathan*, R. Tuck, (ed.), (Cambridge, Cambridge University Press, 1991), ch.xx

[6] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed., (London, Macmillan, 1959), p.76; W.W. Buckland, *Some Reflections on Jurisprudence*, (Cambridge, Cambridge University Press, 1945), ch.9, pp.82-87

[7] J.L. Brierly, *The Law of Nations*, 6th ed., Sir H. Waldock ed., (Oxford, Clarendon Press, 1963), p.45; R.P. Anand, "Sovereign Equality of States in International Law", 197 *R.C.*, (1986 II), p.9, at pp.22-27

[8] F.R. Tesón, "International Obligation and the Theory of Hypothetical Consent", 15 *Yale J.I.L.*, (1990), p.84, at pp.94-99

[9] "..... the increase of civilisation, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty". *North*

intervention is posited in that dichotomy, and acceptance or opposition thereof is closely related to the adopted concept of sovereignty. The legal framework of the U.N. Charter contains an affirmation of state authority and aspirational pronouncements towards the attainment of human rights. The antinomic arguments refer to the exhaustive protection of state sovereignty or its constriction by human rights rules. On the one hand, the interpretative ambiguity of Article 2(4) on the non-use of force is surpassed by a purposive political construction which views it as unambiguously guaranteeing sovereignty.[10] On the other hand, sovereignty should be exercised with a view to maintaining the droit humain. Human rights have a dialectical relationship with sovereignty and, moreover, they have acquired a valuatory standard.[11] Consequently, humanitarian intervention is legitimised as a reaction to the malfeasance of sovereignty. These observations conceal a fundamental intellectual confusion. Human rights or humanitarian intervention attest to naturalist premises of a pre-existing normative order. Positivism has discarded this constraining power and replaced it with concepts such as sovereignty, equality, independence.[12] These concepts are interconnected and also contingent upon the absence of a naturalist framework. In effect, the concepts of sovereignty, independence and equality mirror naturalist concepts of the domestic order in international relations. The "domestic analogy" is persistent in international jurisprudence.[13] It holds that individuals are independent and equal entities and, therefore, states as super-individuals should be independent and equal. In the previous chapter, we explained how Rawls introduces a

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*American Dredging Company of Texas (U.S.A) v. United Mexican States,* IV *Reports of International Arbitral Awards (RIAA),*p.26, at p.28

[10] I. Brownlie, *International Law and the Use of Force by States,* (Oxford, Clarendon Press, 1963), p.267

[11] H. Lauterpacht, *International Law and Human Rights,* (London, Stevens & Sons, 1950), p.186: "The circumstances that the legal duty to respect fundamental human rights has become part and parcel of the new international system upon which peace depends to that immediate connection".

[12] "..... sovereign equality constitutes ..... the fundamental premise on which all international relations rest'. A. Cassese, *International Law in a Divided World*, (Oxford, Clarendon Press, 1990), p.130; See U.N. Resolutions which ritually repeat their faith in independence, equality, sovereignty and non-interference between states, in particular the *General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.* UNGA Res.2625 (XXV), 24 October 1970

[13] A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs,* (Manchester, Manchester University Press, 1986), p.88

domestic liberal theory of justice into international relations and, on that occasion, we also commented that the problems which his theory of international law confronts are seriously affected by this transmutation. This chapter will make evident how theorists such as Wolff, Vattel, Austin, and Hart have articulated a comprehensive legal theory which includes international law, nevertheless, with imports from domestic law. When we deal later with Articles 2(4) and 51 of the U.N. Charter and specific cases of intervention, the domestic analogy and what it signifies will become more apparent.

We come back to the case of antithesis-synthesis between sovereignty and human rights. It highlights the fact that the traditional international legal argument has dissipated with the gradual retreat of state positivism. The infiltration of instrumentalistic principles or the revival of a natural law residuum causes vibrations to the concepts of sovereignty, equality and independence. These concepts emerged concurrently with the jettisoning of the natural order and also with the intellectual extenuation of domestic natural law concepts into international law, as we shall see immediately.

## II. PHILOSOPHICAL TENDENCIES IN THE ERA OF SOVEREIGNTY: FROM WOLFF TO VATTEL

**II.1** *State autonomy.* Wolff and Vattel are considered as the main intellectual pioneers of the new era in the field of international law who succeeded in conceptualising these new developments. Wolff's oeuvre is original, whereas that of Vattel is an abridgement of the former's work. He modified Wolff's work on those areas where his philosophical standing and the actuality of his own era diverged.[14] Both writers locate their Law of Nations in natural law.

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[14] "But I was discriminating in my choice, and I adapted to my design the materials I had collected". E. de Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, trans. Ch.G. Fenwick, (Washington, Carnegie Institution of Washington, 1916), in *Classics of International Law*, vol. III, "Preface", para.8a, hereinafter cited as *DdG*

However, natural law could advance either an unconstrained state autonomy, which is identical to the free moral standing of individuals, or, on the other hand, circumscribing principles of conduct for the regulation of the indispensable interrelations between states. The emergent state satisfied the first aspect. It solidified its power and assertively propounded its autonomy through the concept of sovereignty, which has been misused as an illimitable *raison d'état* whereby each state, promoting its own interests, was in a conflictive attitude towards other states.[15] This state of affairs, conductive to predatory policies and anarchy, jeopardised the integrity of the new states. The feeling of resentment towards such political cruelty, the general outcry for limitations, and most importantly the interdependence of states caused by the economic, technological and territorial expansion was manifested in a certain predilection towards a comprehensive regulation of state conduct in order to moderate its excesses. Wolff and Vattel responded to such a need but their methodological assumptions differ, being aspirational for Wolff whilst realistic for Vattel.

**II.2** *Wolff's great society and Vattel's repudiation.* Wolff remained cognitively within the natural law tradition whereby legal rules are deduced from a unific principle. He acknowledged that civil society, as an aggregation of individuals, imposes certain rules on its members and consequently the society of states, the *civitas maxima*, alters the laws which states may observe in a natural condition. Those rules which facilitate the *civitas maxima*, and are hence particular, form the voluntary law of nations. Wolff's great society derives from a concept of purposive character of nature and it is reminiscent of the Aristotelian, Thomistic, and Grotian sociability of human beings. Additionally, the *civitas maxima* should be viewed under another perspective which is commonly shared by Wolff, the Stoics or Thomas Aquinas. That is, as a device of an intermediary law which facilitates the accommodation of "perfect" natural law with the imperfections of human living.[16]

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[15] A. Sorel, *Europe under the Old Regime*, F.H. Herrick trans., (N.Y., 1964), p.17: "Never before had the reason of state been opposed more imprudently to the most elementary concepts of honor and justice".

[16] N.G. Onuf, "Civitas Maxima: Wolff, Vattel and the Fate of Republicanism", 88 *A.J.I.L.*, (1994), p.280; L. Strauss, *Natural Right and History*, (Chicago, University of Chicago Press, 1953), pp.148-156

Vattel rejects Wolff's initial assumption of a *civitas maxima*[17] presumed as unnecessary in the international plane.[18] He acknowledges state independence and that natural law could facilitate mutual intercourse.[19] This sentiment coincides with the disruptive political function of the *raison d'état* in European politics. It is peculiar, thus, that the unific, associetal concept of the *civitas maxima* is abandoned in favour of a more individualistic and thus menacing concept of the state. The explanation resides more with Vattel's realism and his willingness to articulate a system of rules which would reflect the realities of his time. *Civitas maxima* was an anachronism whereas the sovereign, independent state was a political entelechy. International society ceased to be purposive but contained autonomous units regulated by consensual rules.[20]

The corollary of independence is non-intervention. However, the corresponding rules which form the legal exposition of this correlation are elliptical, admitting a litany of exceptions because Vattel's work is an incohesive accumulation of older statements, personal predilection and because additionally, his philosophical standing fluctuates between natural and positive law.

The foundation of such consequentialism is a non integral theory of natural law which views individuals as autonomous and equal units, free from mutual coercion and which collates individual and state relations: "It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another".[21] The analogy between the individual reserved sphere of non-intrusion and non-intervention among states[22] as a consequence

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[17] *DdG*, "Preface", para.10a: ".....it is enough that nations conform to the demands made upon them by that natural and world-wide society established among all men"

[18] "But it is clear that there is by no means the same necessity for a civil society among Nations as among individuals. It cannot be said, therefore, that nature recommends it to an equal degree, for less that it prescribes it". *DdG*, para.9a

[19] *DdG*, "Preface", para.10a

[20] S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, J. Tully (ed.), trans. M. Silverthorne, (Cambridge, Cambridge University Press, 1991), p.xvii

[21] *DdG*, bk.II, ch.IV, para.54

[22] See statement by Clement Atlee, 1 U.N. GAOR, (1946), p.24: "We see the freedom of he individual in the state as an essential complement to the freedom of the state in the world community of nations".

of natural law's individualistic aspect is a tenet of liberal theory. It also characterises the fallacious foundations of international law as a projection of domestic legal and philosophical schemata. A comparable attitude informs Austin's repudiation of international law and also subsequent argumentation which proved corrosive to the legal character of international law. The misplaced equation with its inadvertent outcomes has been exposed by the realists[23] and also the Critical Lawyers, who demonstrate the contradiction between the liberal individualistic and altruistic aspect of law, as will be explained in Chapter Four.

**II.3** *The Necessary and Voluntary Law of Nations.* Vattel retains Wolff's distinction between Natural and Voluntary Law of Nations but the scientific presumption is different. Initially it was derived from the concept of a great society, whereas now it can be seen to stem from consideration that ".....we may never confuse what is just and good in itself with what is merely tolerated through necessity."[24] Vattel hence categorised Law into the immutable Necessary Law of Nations and the mutable Voluntary Law.[25] The former refers to the ideological motives of his age, whereas the latter was an attempt at realistically systematising state relations. Wolff's system, based on the unific principle of the *civitas maxima*, became redolent, reminiscent of an old era of European political unity. The singular source of authoritative rules was untenable as an ideational source, whereas Vattel's sources are historical. Hence, Vattel articulated a system reflecting the actualities of his contemporary era. He embarked initially on explicating the contemporary political environment marked by the pre-eminence of sovereign nations interrelated with each other and from that framework he deduced the rules of comportment.

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[23] H. Morgenthau, *Scientific Man Vs. Power Politics,* (Chicago, The University of Chicago Press, 1946), p.115: "Take the doctrines of non - intervention and of domestic jurisdiction, which are both based upon the idea that, in international field, too, there exists a kind of natural sphere to which the activities of the state can be confined by the rule of law, which sphere is to be delimited here not with regard to the activities of the individual but with regard to the activities of other sates".

[24] *DdG,* "Preface", para.11a

[25] *DdG,* "Preface", para.11a : "The Necessary Law is derived immediately from nature; while this common mother of all men merely recommends the observance of the Voluntary Law of Nations in view of the circumstances in which Nations happen to find themselves, and for their common good".

The state becomes the central tenet in his theory.[26] The freedom and independence of the state modifies the Necessary Law of Nations which is the ethical postulate for interstate relations. His position implicitly rejects an unreserved subordination to the Law of Nations and could be identified, in a different context, with Austin's presumption for repudiating international law. Austin's legal premise is a relation of authority which requires a superior and a subordinate. This relation, by definition, cannot exist among equal units. Vattel admits that in civil societies an authority commands and enforces laws whereas this "idea is not to be thought of as between Nations. Each independent State claims to be, and actually is, independent of all others" because "The liberty of a Nation would not remain complete if other Nations presumed to inspect or control its contact; a presumption which would be contrary to the natural law, which declares every Nation free and independent of all other Nations."[27] Vattel has not been as radical in repudiating international law as Austin, because he has purported to advance international law as a philosophical occupation, and also because he still pays lip service to natural law as the enveloping law.

The distinction between Natural and Voluntary Law of Nations is also reminiscent of the realist conception of international law explained by Hans Morgenthau. For him, there exists the necessary international law which contains rules indispensable for the existence of a multi-state system and also consensual international law, created by state agreement.[28]

**II.4** *The purposive character of state and the principles of natural society of states.* Starting from the analogy of domestic societies where individuals, guided by their sociability, construct their societies for mutual assistance, individual duties to humanity are not resolved but performed by the organ which is now conferred with that duty, the state.

The natural society of states is hence conducive to some principles. One is that each nation should contribute to the happiness of others only if this does not

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[26] "Nation here means a sovereign State, an independent political society", *DdG*, para.7a, note k
[27] *DdG*, "Intro.", paras.8a,9
[28] H.J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 6th ed., revised by K.W. Thompson, (N.Y., McGraw-Hill Publ.Co., 1985), p.297

endanger its own happiness.[29] The second refers to the liberty and independence of states;[30] the third that ".....each nation (is) to decide what its conscience demands of it, what it can or can not do, what it thinks well or does not think well to do.....";[31] the fourth is the principle of equality of nations;[32] and the last principle is that "From this equality it necessarily follows that what is lawful or unlawful for one Nation is equally lawful or unlawful for every other Nation."[33] Having set the premises for freedom from compulsion, Vattel intended to ".....produce, before the world at least, a perfect equality of rights among Nations in the conduct of their affairs and the pursuit of their policies. The intrinsic justice of their conduct is not for others to pass upon finally,.....".[34]

All these constituted societies need to exist ".....according to the laws of the natural society of the human race....."[35] and they form the natural society of states. The aim of the aggregation of societies established by nature is ".....that of mutual assistance in order to perfect themselves (states) and their condition."[36] Having said that, one could easily deduce a principle of humanitarian intervention for the amelioration of internal conditions. Such a conclusion would not at all appear arbitrary if it is connected with another statement made by Vattel that ".....it devolves thenceforth upon that body, the State, and upon its rulers to fulfil the duties of humanity towards outsiders in all matters in which individuals are no longer at liberty to act, and it peculiarly rests with the state to fulfil these duties to other States."[37]

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[29] *DdG*, "Intro." para.14
[30] *DdG*, "Intro.", para.15
[31] *DdG*, "Intro.", para.16
[32] *DdG*, "Intro.", para.18
[33] *DdG*, "Intro.", para.19
[34] *DdG*, "Intro.", para.21
[35] *DdG*, "Intro.", para.11
[36] *DdG*, "Intro.", para.12
[37] *DdG*, "Intro.", para.11

## III. THE LEGAL FICTION OF CIVITAS MAXIMA, STATE SOVEREIGNTY, AND HUMANITARIAN INTERVENTION

**III.1** *Initial assumptions.* At this point we should again emphasise the role of presumptions in juridical thinking. From the previous chapter concerning natural law and the present concerning positive law, the articulation and heralding of a legal rule is based on a logical or fictional presumption which provides the legal structure with unity and logical explication. Those initial principles are irrefutable and accredited *in toto*. Hence, we have explained in the previous chapter the role of God as the initial assumption and the revolutionary function which the recognition of man's reason played. Later natural law located its principles on the reason of man and his sociability. The same intellectual process occurs in the positivist camp - either it is the fiction of a sovereign in Austin's system or Kelsen's *Grundnorm*. Both assumptions are conducive to different results concerning the legal character of international law, and in particular the legal notion of humanitarian intervention, and we are going to deal with them later.

**III.2** *The initial assumption of a great society.* It is now necessary to explicate the initial assumptions made by Wolff and Vattel which not only lead to divergent conclusions, but also characterise the advent of positivistic thinking in international law. Wolff acknowledges that the function of his assumption as "in every kind of science" is "for the purpose of eliciting truths as well as providing them."[38] He structured his system and deduced its rules from the presumption of *civitas maxima* as "a fixed and immovable foundation for the Voluntary Law of Nations, and there are definite principles, by force of which that law can be derived from the concept of the supreme state, so that it is not necessary to rely by blind impulse on the deeds and customs and decisions of the more civilised nations ..... ."[39]

The *civitas maxima* is the logical basis of his system, which also has common characteristics with Grotius' system of great society. Both write at a period

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[38] Ch. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, trans. J.H. Drake, (Oxford, Clarendon Press, 1934), in *Classics of International Law*, vol.II, p.21 hereinafter cited as *JG*

[39] *JG*, vol.II, para.21

characterised by a hypocritical political unity across Europe. *Civitas maxima* is the corollary of human sociability, which functioned in Grotius' natural law theory and which in Wolff's system is responsible for forming civil societies. Sociability as a state attribute now assists in forming the great society of nations. Wolff, in common with Grotius, employs natural law, whereas positive law does not transgress those boundaries. Wolff approximates the law of nations with civil law and he explains its mode of derivation, which is similar

> "Les loix civiles peuvent donc apporter certaines modifications aux loix naturelles, ..... afin de faire passer les hommes de l'état naturel, où ils jouissent de droits illimités, à l'état civil, où ils se dépouillent d'une partie de leurs droits pour le bien de la société. C'est par conséquent de ce bien qu'on dérive les raisons des changement que les lois civiles apportent aux loix naturelles, sans néanmoins jamais y déroger essentiellement, ni les détruire."[40]

Nations are comparable to individuals acting autonomously, acceding to the law of nature, whose application admits divergence from its principles and which forms the positive aspect of the law of nations.[41] The adaptation of natural law to the exigencies of international society is again facilitated by a fictitious ruler whose function is to define those rules which determine the relations between nations. The intercession of the ruler, the *rector*, is necessitated to justify the formation of the voluntary law of nations, which is the mutable natural law of nations emerging from the immutable natural law.[42]

The articulation and the role of the *civitas maxima* is similar to that of Kelsen's *Grundnorm*. They both function as logical presumptions for the initiation of a legal system. Their mode of derivation is, similarly, by logical deduction from a particular social context. Individuals show certain traits of sociability which necessitate the formation of civil societies. The natural rights

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[40] M. Formey, *Principes du Droit de la Nature et des Gens, Extrait du Grand Ouvrage Latin de M. De Wolff,* vol.III, livre 8, ch.V, "De la théorie naturelle des loix civiles (XV)", (Amsterdam, Marc Michel Rey, 1758), p.245

[41] *JG,* "Prolegomena", paras.2,3: For the principles of the law of nature are one thing, but the application of them to nations another, and this produces a certain diversity in that which is inferred.....".

[42] *JG,* "Prolegomena", paras.21,22

of men are altered in these societies. States, as moral persons, are compared to individuals in their desire to form a society whose aims delineate the laws which prevail therein. Thus, the great society of states becomes the foundational presumption which explicates and legitimises the particular laws of a society of nations. The interconnection between national law and law of nations is the ruler. The ruler is the "superior" in every state with power to command and, by analogy, becomes the fictional ruler of the great society with power now to adapt natural law.[43] Again, Kelsen's system has striking conceptual affinities. Effectiveness, an important principle for domestic systems, provides the conceptual link, although it is a rather arbitrary principle of international law.

In the same fashion, Vattel infuses the law of nations with the precepts of civil law. A state is regarded as a moral person "..... having an understanding and a will peculiar to itself, and susceptible at once of obligations and of rights".[44] Individuals have a general duty to humanity but when they form a society "..... it devolves thenceforth upon that body, the State, and upon its rulers, to fulfil the duties of humanity towards outsiders in all matters in which individuals are no longer at liberty to act, and it peculiarly rests with the State to fulfil these duties to other States."[45] The transfer of the duties to humanity from individual to state is completed in the natural society of states, whereunder "..... the end of the great society established by nature among all nations is likewise that of mutual assistance in order to perfect themselves and their condition."[46] It appears that the duties to humanity serve as the link between civil and international society. Subsequently, we will try to reformulate Kelsen's link between national and international law on similar lines, from a principle of effectiveness towards human rights. We should also mention at this juncture the similarities with another jurist, Jeremy Bentham. In his "Principles of International Law", he aspires to "the most extended welfare of all the nations

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[43] *JG*, "Prolegomena", para.21
[44] *DdG*, "Intro.", para.2
[45] *DdG*, "Intro.", para.11
[46] *DdG*, "Intro.", para.12

on earth".[47] Under both interpretations, humanitarian interventions for restoring the vestiges of humanity are justified.

**III.3** *Vattel and the sovereign state.* Vattel abandons the concept of a great, integral society and embeds his legal theory in a natural society of states which has specific rules suitable to its subject matter. Vattel's presumption is the sovereign, independent state which is responsible for repudiating Wolff's *civitas maxima* and also for the content the Voluntary Law of Nations acquires.[48]

One reason for such repudiation is the requirement of authoritative command, a thought that will re-emerge later in Austin's legal negation of international law. For Vattel, civil societies require an "authority capable of giving commands, prescribing laws, and compelling those who refuse to obey. .....Such an idea is not to be thought of as between Nations. Each independent State claims to be, and actually is, independent of all others."[49] Wolff's *rector* commands in civil societies but in the *civitas maxima* he is reduced to authoritatively interpreting state interaction within the framework of natural law. Moreover, contrary to civil societies, the formation of international society is not recommended by nature itself.[50]

Vattel's rejection of *civitas maxima* springs also from a reasonable and realistic conceptual foundation in international law which finds fictitious rulers incomprehensible. Thus, the modifications in natural law which form the content of voluntary law should acquire a more concrete basis, deduced "..... from the natural liberty of nations; from consideration of their common welfare; from their reciprocal duties; and from the distinction between internal and external, perfect and imperfect rights."[51] The distinction between the Necessary Law of Nations assimilated to Wolff's Natural Law and the Voluntary Law of Nations is retained, founded on the sources of state practice and not on the *civitas maxima*.[52] The latter was repudiated as a transcendental

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[47] J. Bowring (ed), *The Collected Works of Jeremy Bentham*, vol.2, (Edinburgh, William Tait, 1982), p.538
[48] *DdG*, para.7a, note k: "[nation] means a sovereign State, an independent political society".
[49] *DdG*, para.8a
[50] *DdG*, "Preface", paras.9a,10a
[51] *DdG*, "Preface", para.10a
[52] *DdG*, "Intro.", para.11a

principle, whereas rules in fact should emanate from the actual condition of states. The rules which moderate their relations are the result of consent: ".....nature obliges nations to consent; .....for even if they had not given their consent, the Law of Nature supplies it, and gives it for them."[53]

**III.4** *Vattel on humanitarian intervention.* The distinction between Natural and Voluntary Law has practical consequences for humanitarian intervention. The difference resides in a moral or a legal duty to perform certain actions. In Vattel's system, the individual, and consequently the state, would perform his duty of charity: "[of] mutual assistance which men owe to one another because they are men; that is to say, because they are made to live together in society and are of necessity dependent upon one another's and for their preservation and happiness..... . Now, since Nations are not less subject to the laws of nature than are individuals, the duties which a man owes to other men, a Nation owes, in its way, to other Nations"[54]

Simultaneously, Vattel applies his system to specific cases in order to "show how by reason of the liberty of nations and the rules of their natural society, the external law which they must observe towards one another differs on certain points from the principles of the internal law, which however, are always binding upon the conscience."[55] Consequently, on the point of humanity, ".....since every Nation is free, independent, and sovereign in its acts, it is for each to decide whether it is in a position to ask or to grant anything in that respect."[56]

The Necessary or Natural Law of Nations, concerning a situation where people defend their liberties against an oppressor, was "to give help ..... is only the part of justice and generosity. Hence, whenever such dissension reaches the state of civil war, foreign Nations may assist that one of the two parties which seems to have justice on its side. But to assist a detestable tyrant, or to come out in favour of an unjust and rebellious people would certainly be a violation of duty."[57] According to the Voluntary Law of Nations, in such situations ".....

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[53] *DdG*, Bk III, para.192; "Preface", para.5a
[54] *DdG*, Bk II, para.2
[55] *DdG*, "Intro.", para.27
[56] *DdG*, Bk.II, para.8
[57] *DdG*, Bk.II, para.56

since both are independent of all foreign authority, no one has the right to judge them. Hence, by virtue of the Voluntary Law of Nations, the two parties must be allowed to act as if possessed of equal right, and to be treated accordingly, until the affair is decided."[58]

Legal discourse has not been liberated from the antinomies of natural and positive orthodoxy. In the evolution of the international community towards a legally defined body, its rules have attempted to accommodate a declaratory approach towards humanitarianism and a conservative actualisation of its premises. The U.N. Charter contains both in the Preamble and in Articles 55 and 56 an approximation of the natural law-like principles concerning humanity, though the most vigorously restated principles confirm *étatisme* by protecting the sovereignty and independence of states.[59] That trend of ethical commendation and posited prescription explored in Vattel has preoccupied international lawyers since then.

Those writers who resist the doctrine of humanitarian intervention rely on the principle of sovereignty and independence of states, which dictates against such actions although they may be morally compelling. Pradier-Fodéré offers a classic statement:

> "..... cette intervention (d'humanité) est illégitime, parce qu'elle constitute une atteinte à l'indépendence des États; parce que les Puissances qui ne sont pas lésées directement, immédiatement, par ces actes inhumains, ne sont nullement fondées à intervenir parce que celles qui sont immédiatement, directement lesées, ont des moyens de faire valoir leurs droits qui ne sont pas l'intervention, et que le droit international reconnaît. Si les actes inhumains sont perpétrés sur des nationaux du pays où ils se commettent les Puissances étrangères sont complètement désinteressées."[60]

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[58] *DdG,* Bk. II, para.56
[59] Articles 2(3), 2(4), 2(7) of the U.N. Charter
[60] P. Pradier-Fodéré, *Traité de droit international Européen et Américain,* tom.I, (Paris, A. Durand et Pedone-Lauriel, 1885), p.663, para.430

Those who affirm the morality of such actions, though they disapprove of them legally, include Hall,[61] Lawrence,[62] Heffter.[63] In the Bangladesh case, India's argumentation both in the Security Council and the General Assembly contains humanitarian considerations for the plight of the Bengalis coupled with the main argument of self-defence. The Indian representative, rejecting the suggestion of an immediate cease fire, explained that a premature cease fire may mean a continuation of the oppression of the indigenous population and that "So long as we have any light of civilised behaviour left in us, we shall protect them".[64] The United States alluded to the atrocities committed but deplored the intervention as violation of the U.N. Charter.[65] Sweden was also of the same opinion.[66] The most flagrant contradiction in world opinion involving a genocidal regime was the case of Kampuchea. The reaction to Vietnam's intervention contained condemnation of Pol Pot's morally pervasive regime and also of the perceived effect on sovereignty and independence. France, for example, declared that "the notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous."[67]

The above analysis shows the tensions of a philosophical standing which attempts to compromise natural and positive tenets but also very much mirrors the present disposition towards a law which evidences a dichotomy between its theoretical and its practical aspect. This may be characterised, borrowing a term from Fonteyne, as the "double level" approach.[68] The theory remains

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[61] W.E. Hall, *A Treatise on International Law,* 8th ed., (Oxford, Clarendon Press, 1924), pp.342-344

[62] "An intervention to put a stop to barbarous and abominable cruelty, is 'a high act of policy above and beyond the domain of law'. It is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree". T.J. Lawrence, *The Principles of International Law*, 3d rev. ed., (Boston, D.C. Heaton & Co., 1909), p.121

[63] ".....even the most outrageous inequities, that are committed in a State, cannot provide another (state) with a legal ground for unilateral intervention against the former; for no state is entitled to pass judgment upon another". See J-P.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter", 4 *Cal. W. I.L.J.*, (1975), p.203, at p.217

[64] 26 U.N. SCOR, 1606 mtg., (4.10.1971), para.175

[65] *Ibid.*, para.194

[66] 26 U.N. GAOR, Plen. Mtgs, 2003nd mtg, para.302

[67] 34 U.N. SCOR, 2109th mtg, 12/1/1979, para.36; The ASEAN Foreign Ministers "strongly deplored the armed intervention against the independence, sovereignty and territorial integrity of Kampuchea". U.N. Doc., A/13205, 12/1/1979, p.2

[68] Fonteynne, *supra* note 63, p.246

adamantly prescriptive, whereas the practice is conciliatory, by appealing to standards of morality.[69] Such a position, nonetheless, does not redeem legal discourse from confusion, it only redeems our moral revulsion towards inhumanity. Those writers who adopt that dual approach regard themselves positivists but diverge from one of the most important premises of this philosophy which is the distinction of "is" and "ought". By blurring the lex lata with the lex ferenda, the law which "is" with that which "ought to be"[70], they obscure the legal clarity and predictability of which they consider themselves guardians.

## IV. AUSTIN'S COMMAND THEORY AND THE REPUDIATION OF INTERNATIONAL LAW

**IV.1** *Law as command.* As we have explained above, the consolidation of state power has attributed both an internal and an external aspect to sovereignty. The two aspects were at their excesses illimitable or, concerning the external aspect, limited by consent which emanates from sovereignty and is an aspect thereof. The application of notions of internal and external sovereignty was quite unfortunate in the field of international law and had contributed to confusion and erroneous conclusions. In addition, the concept of sovereignty transgressed the legal plain and became a political notion, whose identification engaged theorists. In fact, the political circumstances prevailing in Europe assisted in assimilating the political and legal notions of sovereignty which moved slowly towards absolutism. Austin, reflecting that climate, becomes an ardent expositor of a sovereign as the source of law and wrote that

> "..... every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character

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[69] Q. Wright, "The Legality of Intervention under the United Nations Charter", 51 *Proc. A.S.I.L.*, (1957), p.79, at p.81; L. Henkin, "Remarks", 66 *Proc. A.S.I.L.*, (1972), p.95, at p.96. See also statements by Franck and Frey in R.B. Lillich, *Humanitarian Intervention and the United Nations*, (Charlottesville, Virginia University Press, 1973), pp.64,107-8

[70] J.N. Moore, in Lillich, *ibid.*, pp.121-122

of a political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a command (and therefore flowing from a determinate source), every positive law is a law proper, or a law properly so called."[71]

In a nutshell, positive law should contain a sovereign, a command, and a sanction. These three facts could be assimilated to the social fact of power. Law is power.[72]

Austin's definition of law has contributed to a debate which has preoccupied legal theorists and whose outcome is either rejection or reconciliation. As an illustration, the concept of command which is pivotal in his theory is objectionable. Austin reduces and personifies the command relation by identifying a sovereign. However, in modern states the commanding authority is diffuse. Furthermore, the interrelation of sovereign and command implies a psychological element, whereas the command should be impersonal for legal purposes. This latter observation signifies the disparity with Kelsen's theory, whereby law is normative and de-psychologised.[73]

Another issue concerns the division of law and morality. Austin defines the matter of jurisprudence as "positive law; law simply and strictly so called: or law set by political superiors to political inferiors".[74] The legal character of a rule is affirmed irrespective of its contradiction with ethical imperatives. Austin said that

> "human laws which conflict with the Divine are not binding, that is to say, are not laws, is to talk nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and

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[71] J. Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, (London, Weidenfeld & Nicolson, 1955), p.134, hereinafter cited as *The Province*

[72] "..... the term superiority signifies might". J. Austin, *The Province*, p.24

[73] *GTLS*, pp.33-36. Olivecrona uses the term "independent imperatives". K. Olivecrona, *Law as Fact*, (Ejnar Monksgaard, 1939), pp.42-43

[74] J. Austin, *The Province*, p.9

condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit act which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity".[75]

The purely formalistic attitude towards law inscribed in the above passage invokes the limitations of arid positivism to engulf societal expectations and also presents a point for disparaging Kelsen's theory. In international law, such a formal approach has contributed to schizophrenic arguments concerning humanitarian interventions. As a matter of principle, humanitarian intervention is proscribed *tout court*, because, according to the U.N. Charter: (i) Article 2(4) includes a general prohibition on the use of force; (ii) Article 51 permits self-defence only when an armed attack occurs and (iii) more often than not, humanitarian interventions are not a Security Council action under Chapter VII. Having said, that and faced with humanitarian disasters of the magnitude of Uganda, Kampuchea, Bangladesh or Rwanda, opponents of humanitarian interventions resort to sophistries in order to address issues of humanism and decency. In such cases, a perceived technical breach of Article 2(4) vies to reconcile the morality of the action which might hence be "more or less condonable".[76] The dilemma between formal illegality and moral acceptability remains unresolved, because an arid text has impaired the possibility of comprehensive legal reasoning.

**IV.2** *The sovereign authority.* Austin's definition of sovereign and independent states is Hobbesian in character and rather circular. The positive and negative attributes of "sovereign" designate the state as independent, whereas the latter does not exist without a sovereign. According to Austin "..... the notions of sovereignty and independent political society may be expressed concisely thus. - If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society,

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[75] J. Austin, *The Province*, p.185

[76] See statement by W. Friedmann, in R.B. Lillich, *Humanitarian Intervention and the United Nations*, (Charlottesville, Virginia University Press, 1973), p.115. Also, *ibid*, pp.64,107-108,114 and statements by T. Farer, *ibid.*, p.151 and I. Brownlie, *ibid.*, pp.139-148; T.M. Franck, N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 *A.J.I.L.*,(1973), p.275, at p.278

that determinate superior is sovereign in that society and the society (including the superior) is a society political and independent. ..... 'By an independent political society' or 'an independent and sovereign nation', we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate."[77]

The positive aspect of sovereignty is that of habitual obedience by the bulk of a given society whereas the negative is the sovereign's lack of obedience to any other superior. Habitual obedience is similar to the "minimum effectiveness" commanded by the Basic Norm and introduced by Kelsen. It triggers the same objection as to whether the separation of law and morality is absolute or whether such definition addresses wider sociological observations.

It is also obvious from such definition of a legal system - apart from its internal inconsistencies - that international law has no place. The sovereigns within each state are by definition devoid of any legal constraint and outside the application of this law. International law lacks a sovereign which could give coherence to the system and, concerning its applicability, it is impeded by the presence of particular sovereigns. Hence, the preassumption of a monolithic sovereign denies legal character to international law, in contradistinction to the presumption of the Basic Norm in Kelsen's system which does the opposite. The recognition of the initial customary character of international law which always played an important justificatory role in Kelsen's and Hart's jurisprudence, fails to persuade Austin of the legal character of that law. According to Austin, customs are transformed into legal rules by judges or legislatures.[78] The dismissal of international law even as customary law may be excused in an era where international institutionalised judicial bodies were absent, but such a position cannot be adopted today where customary rules of international law are recognised and applied by international tribunals.[79]

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[77] J. Austin, *The Province*, pp.194-195

[78] J. Austin, *The Province*, pp.31-32

[79] *The Case of the S.S. "Lotus", P.C.I.J.*, Ser.A., Part 2, Judgment No.10, (1927), p.1, at p.18; *Asylum Case, I.C.J. Rep.*, (1950), p.1 at p.266; *North Sea Continental Shelf Cases, I.C.J. Rep.*, (1969), p.3, at pp.41-50, paras. 70-92; *Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Rep.*, (1986), p.4, at pp.95-104, paras. 178-195; A.A. D'Amato, *The Concept of Custom in International Law*, (Ithaca, Cornell University Press, 1971)

**IV.3** *Bentham's definition of law and humanitarian intervention.* Bentham's less dogmatic definition of sovereignty admits the possibility of legal limitations. Although the sovereign authority could not have in principle "assignable bounds",[80] recognised exceptions refer to the "express convention" defined as : "..... the case where one state, has, upon terms, submitted itself to the government of another: or where the governing bodies of a number of states agree to take directions in certain specified cases, from some body or other that is distinct from all of them: consisting of members, for instance, appointed out of each".[81] This restriction, contrary to Austin's illimitable habit of obedience, springs from the subjects' limited disposition for obedience.[82] The consequences are tantalising concerning human rights conventions. They enshrine limitations on the executive power or a disposition for resistance by the subjects when the covenants are implemented incorrectly. This position is reinforced by Bentham's discussion of the "droit politique". Concerning "les lois qui portent directement sur le pouvoir supreme du souverain", they consist of privileges "réservés ou accordés à la masse originaire de la nation: comme liberté de conscience, liberté de culte, droit de port d'armes, droit de confédération etc."[83] Their enforcement depends on "peines naturelles", however, there are instances of "peines plus déterminées et pour ainsi dire palpables. 1. Lorsque les privilèges dont il s'agit ont pour garant un souverain étranger. 2. Lorsque le souverain qui les accorde se trouve membre d'un corps politique de souverains..... . Dans ce dernier cas il y a même lieu pour procédure."[84] The penalties being unspecified, the options remain open from institutional or conventional actions to unilateral humanitarian actions. The undertaking of a foreign sovereign to ensure the protection of those privileges has wider implications than the mere protection of nationals by their national

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[80] J. Bentham, *A Fragment on Government,* (Oxford, B. Blackwell, 1967), ch.4, para.26

[81] *Ibid.*, ch.4, para.23

[82] H.L.A. Hart, *Essays on Bentham,* (Oxford, Clarendon Press, 1982), p.231: "..... the importance of an express convention in limiting the authority of a supreme legislature was derivative from what he takes to be the fundamental fact of the subjects' limited habitual obedience". H.L.A. Hart, "Bentham on Sovereignty", 2 *Irish Jurist,* (1967), p.327, at pp.330-332

[83] J. Bentham, *Projet d'un corps complet de droit,* cited by J.H. Burns, "Bentham on Sovereignty: An Exploration", in M.H. James (ed.), *Bentham and Legal Theory,* (N.I.L.Q., 1973), p.133, at p.144

[84] *Ibid.*, p.144

state. It has natural law implications as a measure of abidance to principles which are enforced by a foreign power representing world community.

**IV.4** *Austin's repudiation of international law.* We are not going to deal with the other political or legal repercussions of Austin's legal fiction of a sovereign but only those which pertain to international law. The sovereign could be characterised as a "constructive metaphor"[85] similar to that of Kelsen's Basic Norm. It provides the legal system with unity and explains the basis of legal science. Both systems are based, therefore, on a fiction, an hypothesis for the origination of a legal system; that is to say, an "as if".[86] Under this legal assumption it was difficult to accommodate international law. Austin considered international law to be "positive morality". Austin wrote: "they (writers on the Law of Nations) have confounded positive international morality, or the rules which actually obtain among civilised nations ..... with their own vague conceptions of international morality as it ought to be ..... ."[87] We should, nevertheless, recognise Austin's theoretical consistency, whereas Kelsen, who might have reached a similar conclusion, circumvents the issue by introducing debatable sanctions such as war and reprisals.

Austins's definition of international law has caused disillusionment. International lawyers denigrated Austin and resolved to prove the legal character of their occupation. Hence, they elevated his theory inadvertently as the ultimate legal definition. The realist theory of international law shares a common denominator with that of Austin's. International law does not satisfy the definition of law as "organised force" emanating from certain authorities, coupled with sanctions.[88] It, thus, exists only as a compendium to common interests or to the balance of power. The decentralised character of international law discredits any legal definition, whereas a political one appears more appropriate for the realists. However, a less charitable look at Austin's theory of sovereign command reveals its inadequacy, considering the fact that command does not account for all the legal rules, even in domestic

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[85] J.W. Harris, *Law and Legal Science*, (Oxford, Oxford University Press, 1979), pp.31-32
[86] *Ibid.*, pp.31-33, 78-79
[87] J. Austin, *The Province*, pp.187, 127, 141-142, 200-201
[88] H.J. Morgenthau, "Positivism, Functionalism, and International Law", 34 *A.J.I.L.*, (1940), p.260, at pp.273-278 and *Politics Among Nations. The Struggle for Power and Peace.* 6th ed., revised by K.W. Thompson, (N.Y., McGraw-Hill Publ.Co., 1985), pp.295-296

systems. Another misconstruction concerns the perspectives involved in the promulgation of the theory. Austin measured international law by the model of state law, confusing their different premises. Since then, international lawyers have tried to prove the existence of international legal order under the familiar concepts of municipal law. This was a gross mistake because the domestic system is vertical, pyramidical, unlike the international system which is horizontal.[89] As was accurately pointed out by Richard Falk: "..... the more familiar vertical structure of the domestic legal order is taken as the model for the optimum international order. Mere characteristics of the domestic legal order are transformed into prerequisites for international order. The acceptance of either vertical model as a decisive test of the existence of legal order generates irrelevant cynicism as to the stabilising claims of international law."[90]

**IV.5** *The role of custom - humanitarian intervention.* In this section, we shall raise some points relating to humanitarian intervention, although running the risk of plunging into the debate of proving the legal character of international law.[91] One important topic concerns Austin's treatment of custom, because custom is a primary source of international law and also of humanitarian intervention. Austin classifies custom as positive morality until it is recognised by a judicial decision, the sovereign or a subordinate legislature. His treatment, though, of judicial precedents which are functionally similar to custom, is different. They have legal force under a presumption of "tacit" adoption by the sovereign. Inferentially, when the legislature or the judicial process prescribes the requirements for the legal recognition of custom, the latter should become law even if the particular custom has not been recognised explicitly. In Austin's terminology, the adoption by the sovereign is presumed when they

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[89] "Dominant legal theories all relate to the legal order of vertical systems ..... on which there is a vertical or hierarchical relationship between unequal centers of power. This is in contrast to systems in which there is a horizontal or non hierarchical order between equal centers of power". G. Gotlieb, "The Nature of International Law: Towards a Second Concept of Law", in C. Black & R.A. Falk, *The Future of the International Order*, vol.III, (Princeton, Princeton University Press, 1972), p.331, at p. 332

[90] R.A. Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order", 32 *Temple L.Q.*, (1959), p.295, at p.297

[91] "I suggest that we lawyers, in uncritically accepting the command theory and applying it to international law have ourselves been guilty of woolly thinking". R. Fisher, "Bringing Law to Bear on Governments", 74 *Harv. L. Rev.*, (1961), p.1130, at p.1132

satisfy the institutional criteria and, hence, they become laws. International law contains the criteria for identifying custom legally and, additionally, criteria for the derivation of this same law.[92] Consequently, humanitarian intervention should be law because it satisfies the customary criteria, whereas the same argument attributes also legal quality to international law. Had Austin generalised this argument, he would have accepted international law, although it does not fit into his initial definition of law. Alternatively, he could have reached the same result, had he contemplated the acceptance of international law by the particular sovereigns who identify the municipal system. The incorporation of customary law into municipal law solves the problem of its enforceability and sanctioning. Although Austin's requirements refer mainly to statute law, by undervaluing custom, he ostracised a large amount of law.[93]

Unfortunately, it seems that international law received a rudimentary and rather unintelligent treatment. In contrast, later theorists like Kelsen have based the legal character of international law on a pyramidical system with the *Grundnorm* at the apex and on a sanctioning process or, like Hart, on its customary acceptance.

**IV.6** *The role of sanction: Austin and Kelsen.* A problem related to the identification of law with enforcement is the jurisprudential treatment of war. In continental jurisprudence, it was Jehring who acknowledged that the sanctioning process constitutes the legal character of a proposition. In international law it was unregulated, unorganised force, which provided the legal character of international law.[94] T.A. Walker, a contemporary of Austin, is critical of the latter's repudiation of international law. He introduces war as the final sanction, building upon the analogy with municipal law.[95] Moreover, Salmond admits a double medium of enforcement: "international opinion and force".[96]

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[92] Article 38 (1) (b) of the Statute of the International Court of Justice

[93] L. Stephen, *The English Utilitarian,* vol. III, (London, Duckworth and Co., 1900), p.328: "Custom is not really the creature of law, but law the product of custom", and p.331: "..... seeks to explain the first state of society by the last, instead of explaining the last by the first".

[94] R. von Jehring, *Law as a Means to an End*, I. Husic trans, (Boston, Boston Book Comp., 1913), pp.242-244

[95] T.A. Walker, *The Science of International Law,* (London, Stevens & Sons, 1893), pp.1-56; J.B. Scott, "The Legal Nature of International Law", 1 *A.J.I.L.*, (1907), p.831

[96] J.W. Salmond, *Jurisprudence,* 6th ed., (London, Sweet & Maxwell Ltd., 1920), p.62

We shall pursue in this section an analysis of the jurisprudential function of sanction in international law, because we can trace implications for subsequent legal theories. It should be observed initially that the sanction orientation is methodologically similar to Austin's definition of law[97] and shares an unwarranted analogy with municipal law. Sanctions are elements of the municipal concept of law and international law should provide sanctions in order to be called "proper law". However, the sanctioning process in international law can be threefold. It could be identified, firstly, as a hybrid "dédoublement fonctionnel", secondly, as Hartian and, thirdly, as Austinian-Kelsenian. The first aspect of the sanctioning process is explained by the function of the municipal courts in administering and enforcing international law. As we said above, the incorporation of international law into municipal law addresses the problem of its enforceability successfully. The Hartian aspect is explained by the fact that principles of international law secure obedience through international opinion. Although sanctions may well be inadequate, people and states feel bound by international rules. There exists a *censor morum*. The third aspect culminates in war which, as a sanction in itself, or, as a threat thereof, secures obedience.[98] At this point, the difference between Austin and Kelsen arises. Sanction is an independent and external element of the rule but for Austin, actual enforcement is a prerequisite, whereas for Kelsen it is an "ought". As we shall explain later, Kelsen's position is nuanced by the inclusion of efficacy.

Returning to the argument which holds war as a sanction, we should submit that it is circuitous and contradictory. War and force are presented as agents for law enforcement but also simultaneously for law abridgement. In the second instance, they are conditions for sanctions, that is, again war. It is also

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[97] Bentham, on the other hand, did not initiate that fallacy but distinguished war from sanction because the latter is "directed by design". J. Bentham, *The Limits of Jurisprudence Defined*, Ch.W. Everett (ed.), (1945), p.152 cited in G. Schwarzenberger, "Bentham's Contribution to International Law and Organisation", in G.W. Keeton, G. Schwarzenberger, *Jeremy Bentham and the Law*, (London, Stevens & Sons, 1948), p.152, at p.160

[98] See R. Wildman's *Institute of International Law*, vol.I, pp.31-32, cited in J.B. Scott, "The Legal Nature of International Law", 1 *A.J.I.L.*, (1907), p.831, at p.865: "The inadequacy of its sanctions is an imperfection which attaches to international law in common with all other law; ..... Opinion and force are the only sanctions of law, and international and municipal law, so far as the former is capable of being administered by judicial tribunals, are in this respect not distinguishable".

fallacious because the sanctioning process in municipal law is centralised and institutionalised, whereas in international law it is defuse. Hesitancy towards this argument also proceeds from the indeterminacy and non-elucidation of the circumstances which constitute law abridgement.

Kelsen argues from the same analogy when he concludes that international law is real law due to the existence of palpable sanctions. For him, war is either a sanction or a delict and although he admits that there may be no concrete determination, it does not concern him: "Law is, by its very nature, a coercive order. A coercive order is a system of rules prescribing certain patterns of behaviour by providing coercive measures, as sanctions, ..... . The specific sanctions provided by general international law are reprisals and war."[99] This line of argument is paradoxical. International law proceeds in a constant and persistent manner to eliminate war and at the same time it would appear as legalising it as a faculty for performing legal enforcement. It can also be said that by rejecting this paradox, we are bound to recognise that international law is less enforceable today. As it was observed: "It now frowns on self-help, without however, as yet having put anything in its place".[100] In addition, if a "minimum of effectiveness" is required for the validity of a legal system, is the validity of international law decided inclusively by the sanctioning force? Chapter VII of the U.N. Charter contains enforcement action with the purpose of maintaining or restoring peace which is different from the role of sanction. This conclusion should not impinge on the legal character of international law if we are cognisant of the fact that our adopted concept of law is subjective. This concept hypostasizes one element of law only, that of sanction, which is also treated as the *sine qua non* attribute of law.[101] On this account, Kelsen

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[99] H. Kelsen, *The Law of the United Nations*, (London, Stevens & Sons Ltd, 1951), pp.706-707; H. Kelsen, "Théorie du Droit International Public", 84 *R.C.*, (1953 III), p.1, at pp.31-50

[100] G.G. Fitzmaurice, "The Foundations of the Authority of International Law", 19 *Modern L.Rev.*, (1956), p.1, at p.8; H. Kelsen & R.W. Tucker, *Principles of International Law*, 2nd rev. ed., (N.Y., Holt, Rinehart & Winston, 1968), p.87: "In the last analysis, however, criticism of any attempt to restrict the right of self-help, while failing to provide those institutions which would render self-help unnecessary, rests upon a reading of history that can hardly be regarded as self evident. The interpretation must be that more often than not the individual use of force by States has served the purposes of law and that to restrict States in the measures of self-help they may take must seriously jeopardize the prospect of ever achieving a satisfactory and effective rule of law in international society".

[101] G.L. Williams, "International Law and the Controversy Concerning the Word "Law", 22 *B.Y.B.I.L.*, (1945), p.146, at pp.156-158

failed to provide sufficient justification as to whether sanctioning is the only criterion for the validity of laws.[102] It should be submitted that the answer to this issue should incorporate other considerations as well.

## V. KELSEN AND THE PURE THEORY OF LAW

**V.1** *A pure theory of law?* Kelsen proposes a scientific description of law which is pure. It aims to "free legal science of all foreign (non legal) elements".[103] Kelsen's methodology endeavoured to inoculate law from psychological, ethical, moral, sociological or political elements. Their participation in natural law is denounced but such purification also marks a departure from the sociologist and realist tradition of social behaviour or decision making.[104] Kelsen's scientific legal theory is concerned with the sources of legal rules. It contains a chain of validation cells which advance to the apex of a legal pyramid. Those concatenated cells explain the existence of rules and preclude moral considerations. It is a scientific method constructed on fallacious premises, for, the object of his study, law, is not purely scientific. The character of the object for study determines the methodology of study. Maintaining the purity of legal science equivocates in these circumstances to pure ideational exposition.[105]

Kelsen is influenced by the Kantian theory of knowledge which presents the iconoclastic world as the projection of human mental constructions and transmits it into the legal domain. That is, he elucidated a system which assists in recognising valid laws. In order to know valid norms we should first have an account of validity. The *Grundnorm* and the method of imputation

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[102] T.A. Cowan, "Law Without Force", 59 *Cal. L.Rev.*, (1971), p.683

[103] H. Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First edition of the Reine Rechtslehre or Pure Theory of Law*, trans. B.L. Paulson, S.L. Paulson, (Oxford, Clarendon Press, 1992), para.1, p.7

[104] S.L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", 12 *Oxford J.Legal Stud.*, (1992), p.311

[105] J. Raz, "The Purity of the Pure Theory", *Revue Internationale de Philosophie*, (1983), p.442, at p.442

underpins this effort.[106] According to Kant, the mind constructs certain presuppositions which are essential for our cognition of the actual world, and interprets phenomena independently of their influence on man's reason. The same construction applies to law. We should start from a hypothesis which objectifies and legalises the subjective meaning of an act. The chain of validation is not casuistic but imputed, that is, the validity of legal norms depends on the validity of other norms until we reach the apex of the pyramid which is our initial hypothesis.[107] Kelsen also adopts a Humistic approach to moral imperatives by rejecting the existence of moral absolutes. There exists, thus, an analogy with natural law which concerns the method but not its characteristics. Both Kelsenian positivism and natural law share a common method of legal understanding through regressive links but with different objectives. Kelsen achieves imputation whereas natural law achieves causation.[108] Law is the creation of mental operations and, thus, it is not causative but attributive. To put it differently, it is normative, it prescribes right conduct in contradistinction to the causality of natural sciences. The validity of any rule is not ascertained by reference to facts but only by means of derivation from other rules and those rules derive their validity from the *Grundnorm* which is meta-legal and its validity assumed. The *Grundnorm* validates the system but nothing can account for its validity. The logical consistency of this system fails to consider the reasons why it is only this system which offers correct reasons for validity.[109] It is submitted that there are other aspects referring to purposes or ethics which should also be considered.[110]

Furthermore, establishing a principle of higher norm which validates the legal system implies a reticent naturalist method. As we explained in the previous chapter, the law of nature has abandoned absolute ideas and accepted higher

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[106] H. Kelsen, *The Pure Theory of Law*, Max Knight trans. (Berkeley, Calif., University of California Press, 1967), p.72,202-203, hereinafter cited as *PTL* (1967),

[107] H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg, (Cambridge Mass., Harvard University Press, 1949), p.113: "The Basic Norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive or loose their validity." Hereinafter cited as *GTLS*

[108] PTL (1967), pp.76-77

[109] PTL(1967), p.72

[110] See S.L. Paulson, "Kelsen's Legal Theory: The Final Round", 12 *Oxford J.Legal Stud.*, (1992), p.265

ideas. These ideas can be transformed to positive higher norms during the process of societal organisation and, hence, the difference will disappear.[111] There are also other similarities with natural law. Kelsen constructs an a priori assumption whose codification is contingent to the findings of empirical observation and it implies a deduction of "ought" from "is" statements. The only solace against the implication of subjectivity in this construction is to accept the purity of his model from the *Grundnorm* onwards.

According to Kelsen, the *Grundnorm* should command a "minimum of effectiveness", a minimum of support. Otherwise it is replaced by another which presumably commands support under reappraised circumstances. Effectiveness contains two conditions: (i) that the norm is applied and (ii) that it is obeyed.[112] Acknowledging the possibility of altering an ineffective *Grundnorm*, we should question not only the purity of the system but also the premises which command effectiveness. Is justice or morality a prerequisite for maintaining an effective *Grundnorm* and is there an urge towards altering it whenever it is defunct? Admitting that the *Grundnorm* should partake of these values, the whole system built thereupon is consequently based on such ethical positions. Moreover, the Kelsenian norm takes the form: "if X, then Y ought to happen". Indirectly, sanction Y underlines a value in the prescription of X. It shows that the distinction between the "is" and the "ought" is not tenable in his theory. The factual statement contained in the first part of the hypothesis produces a normative "ought" by the imposition of sanctions. One can evidence here a latent natural law tenet. It also introduces a further compromise in his jurisprudence. If, for legal promulgation, a sanction ought to be delivered when the conditions apply, then effectiveness is an unsuitable requirement for legal validity. Effectiveness is concerned with the probability of a sanction being imposed and consequently reformulates Kelsen's norm

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[111] Kelsen appears to admit that there is no difference: "The reason for the validity of law is according to (natural/positive law) a hypothetical basic norm. ..... The only difference is that the validity for which the basic norm of legal positivism furnishes the reason is the validity of the positive law, its own validity". H. Kelsen, "What is the Reason for the Validity of Law', in D.S. Constantopoulos, C.Th. Eustathiades, C.N. Fragistas, *Grundprobleme Des Internationalen Rechts. Festschrift für Jean Spiropoulos*, (Bon, Schimmelbusch & Co., 1957), p.257, at p.261

[112] PTL (1967), p.11

into: "if X, then Y is to happen". Be that as it may, the problem concerning the content and formation of the *Grundnorm* still remains.

**V.2** *The status of the Grundnorm.* The *Grundnorm* is presupposed in juristic thinking. Kelsen variegates terms in his characterisation of that norm: presupposed, hypothetical, fictional. This norm is not posited (*gesetzt*) but meta-legal (*vorausgesetzt*). It is legal through its function of attributing objective validity to subjective acts.[113] If we consider the Basic Norm an hypothesis, it might mean a supposition that could be verified. That does not concern Kelsen. On the contrary, he employs the *Grundnorm* as a device for explaining the logic of legal science[114] and on that account it is similar to the Vaihingerian philosophy of "As if". The *Grundnorm* is the fictive construct of the mind which assists the discursive thought while the existing materials fail in that function.[115]

According to this reasoning, there are similarities between natural law and the meta-legal device of his positive theory. Both resort for validation or initiation to extra-legal principles in the form of either the *Grundnorm* or God, Nature or Reason. The resemblance extends also to the mode of delivering this highest norm. It is the end of syllogism when the human mind declines further syllogism. Consequently, it is an indispensable mental construction for the validation of a legal system. The discrepancy refers mainly to the character of those sources. The *Grundnorm* is a human mental construction, a syllogism for the explanation of legal phenomena, whereas God is a superhuman ontology that conveys with it more than logical constructions.

**V.3** *The formation of the Grundnorm.* The formation of the *Grundnorm*, that is the articulation of a certain, specific *Grundnorm*, is enigmatic. Kelsen made the assertion that it is introduced by legal cognition which hence "purifies" the system. Nevertheless, the purity of his construction could not be maintained because the choice of the *Grundnorm* is not an act of cognition. It is an act of will or intuition, whereas what is presupposable is an act of cognition. Those

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[113] H. Kelsen, "Professor Stone and the Pure Theory of Law", 17 *Stanford L. Rev.*, (1965), p.1130, at p.1141

[114] J.W. Harris, *Law and Legal Science*, (Oxford, Oxford University Press, 1979), pp.78-79

[115] I. Stewart, "The Basic Norm as Fiction", *Jurid. Rev.*, (1980), p.199

two different mental operations should be distinguished and cognitive quality should not be attributed to the *Grundnorm*, only to the action for its articulation. The *Grundnorm* as the outcome of cognitive activity is itself an act of volition and, therefore, is relative and subjective.

It is useful in applying Kelsen's theory to start with an appreciation of the social order or an observation of those physical facts which constitute the meaning of a legal order. It is necessary then to trace and connect the initial social condition which amounts to or explains the existing order. The *Grundnorm* furnishes the analysis of a legal system with coherence and unity by objectifying the subjective meaning of acts. If the *Grundnorm* presupposes a social context - though it is itself a mental construction - and is related to the efficacy of the legal order, its formation could not avoid "impurity". The description of its formation could be as follows. Because that particular social system is legal and efficacious, because there is a particular pattern of legal mentality, then the Basic Norm should be x. Hence, the *Grundnorm* is the legal expression of a social conjecture. It is a logical, abstracted deduction from a factual situation.

The description of its formation leaves a mysterious aura in regard to its standing, and Kelsen's interpretation is not apt in conveying a definite signification. The *Grundnorm* could be extra-systematic, the apex of the legal pyramid and hence not socially conditioned, or intra-systematic[116] and construed from the systematic legal structure. If the latter is the case, the social context impinges on the purity of his theory. If the former is the case, then the impasse is obvious. The function of the *Grundnorm* is to concretise an aggregation of norms to a system of law but we cannot do that unless we identify the *Grundnorm* and we cannot have the latter unless we demarcate a legal system in order to find the *Grundnorm*.[117] They both exist in a dialectical relation. The difficulty arises because the articulation of the *Grundnorm* entails a simultaneous deduction and abstraction, it involves observation and

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[116] J. Stone, "Mystery and Mystique in the Basic Norm", 26 *Modern L. Rev.*, (1963), p.34, at pp.44-46

[117] J. Stone, *Legal System and Lawyers' Reasoning*, (Sydney, Maitland Publ. PTY Ltd, 1968), p.130: ".....for it is ex hypothesis impossible to determine whether they are legal norms, until the apex norm is determined."

departure from facts. As was observed by H. Lauterpacht: "The tension between the factual and the normative must not be too great (if the fundamental rule is to retain its usefulness), just as it ought not to be too small (if law is to remain a normative as distinguished from the explicative sciences)."[118]

**V.4** *Validity of the Basic Norm.* The *Grundnorm* is a peculiar construction of factual abstraction or factual pre-assumption. For Kelsen, as soon as the *Grundnorm* is deducted, its abstraction is absolute. The *Grundnorm* then becomes a "depsychologised command" and in common with the initial assumption of natural law, its validity is presupposed because there is no other validity tracing process against which the validity of the former can be examined. "It is not ..... valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as legal, especially as a norm - creating act".[119] The difference from natural law lies in the fact that the provided standard of validity is more stable. The initial assumption of natural law can create and discard legal validity whimsically. The *Grundnorm* attributes legal signification to acts, it determines the participation of a rule in a legal system and it is not metaphysical in its creation, although it acquires a position of initial assumption. Having said that, much of Kelsen's aversion to natural law leaves a lot to be desired.

The *Grundnorm* is functioning as a methodological instrument for the creation of legal objects, and, thus, absolute principles are absent from its grounding. We have also seen that natural law has distanced itself from this tradition. On another occasion, we explained above that it is logically and practically indispensable for the *Grundnorm* to concur with the actual experience of a system; an aspect identical with the tenet of the "classical" natural law theory according to which observation of facts yields the "ought" rules. This argument, restricted now only to the *Grundnorm*, could be characterised as

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[118] H. Lauterpacht, "Kelsen's Pure Science of Law", in W.I. Jennings (ed.), *Modern Theories of Law*, (London, Oxford University Press, 1933), p.105, at p.111
[119] *GTLS*, p.116

ascending because it is directed towards its formation. A second, descending argument concerns the application of the *Grundnorm* to physical occurrences which it eventually objectifies. The factual situation does not give rise to legal statements; they are only organised into an intelligible system by the application of the *Grundnorm*. Hence, it plays the role of authorising legal rules in a process of concretisation. That connection apart, the context of the legal system is not a matter of concern, whereas in natural law the content of a rule is a matter of evaluation according to the initial assumption. However, natural lawyers do not arrive at the same conclusions on this point: some hold that unjust laws are not valid laws whereas others like Finnis or Aquinas before him do not deny legal validity to unjust laws. But content is not the only important connection with morality. Kelsen fails to address the question of whether, for an efficacious system, obedience is achieved through morality. It seems that there is room to make such connection at least on the reduced point of whether obedience as such is morally required, but not the wider question of what induces obedience.

## VI. KELSEN ON INTERNATIONAL LAW

**VI.1** *Monism and the link between international and national law: effectiveness or human rights?* Kelsen elevates the determining principle of national legal orders to a higher evaluative system, which is now international law. He chooses a monist system because this model corresponds with his methodological assumptions and aesthetic views.[120] He acknowledges the heuristic character of his universalistic model, but that does not concern him from a legal point of view, though "from the point of view of political ideology the choice is important".[121] Kelsen purports to achieve the unity of legal knowledge avoiding discontinuities which might be incurred had the

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[120] "Both systems are equally correct and equally justified. It is impossible to decide between them on the basis of the science of law". *PTL* (1967), pp.345-346

[121] *GTLS*, p.398

national systems formed their *Grundnorm* separately and individually. This being aspirational, it raises the question of whether the unity should be grounded or dictated. Kelsen prefers the latter, which corresponds to his ideal of an "enveloping legal community"[122] but confuses the question of the legal character of international law with that of its authority between equal states. Hence, the primacy of international law is compatible with the equality of states by presupposing a higher authority which realises it. If states are equal, then a norm pertaining to a higher order should bestow equality by delineating their area of valid jurisdiction. That norm can be defined as the intermediate norm which links national and international order, and for Kelsen it is the principle of effectiveness. Effectiveness determines the validity of national orders by endowing them with legality. Being a principle of international law, it embraces all valid national legal orders which are contained consequently in international law. The system then has a solid appearance. Effectiveness as both national and international property is the uniting principle which attributes also pre-eminence to international law.

> "The reason for the validity of the individual national legal order can be found in positive international law. In that case, a positive norm is the reason for the validity of this legal order not merely a presupposed norm. ..... a government which, independent of other governments, exerts effective control over the population of a certain territory, is the legitimate government; and that the population that lives under such a government in this territory constitutes a "state" in the meaning of international law, ..... Translated into legal language: A norm of general international law authorises an individual or a group of individuals, on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm, thus, legitimises this coercive order for the territory of its actual effectiveness as a valid legal order..... ."[123]

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[122] J. Cohen, "The Political Element in Legal Theory: A Look at Kelsen's Pure Theory", 88 *Yale L. J.*, (1978), p.1, at p.20; W.L. McBride, "The Essential Role of Models and Analogies in the Philosophy of Law", 43 *N.Y.U.L.Rev.*, (1968), p.53, at pp.62-72

[123] *PTL* (1967), pp.214-215; H. Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", 55 *Harvard L.Rev.*, (1941), p.44, at pp.66-70

Consequently, the intermediate norm for legitimising the position of states anticipates effective coercion. This contention is ambiguous and essentially dangerous, while it invests effective coercion with disproportionate value. It locates the validity of national orders on their potential for effective coercion. Monopolisation of coercion is not a sufficient prerequisite for validation because it appears that "might makes right". It is important to demonstrate the trail of Kelsen's essential, not procedural, mistakes. Legal unity is achieved by a dubious principle. Effectiveness is not identical with validity and a domestic system is only partly conditioned on effectiveness for validity. Does international law command any minimum of effectiveness? If the sanctions offered in international law are reprisals and war, then the intellectual dilemma approximates the legal essence of the latter. The object of international law is to prevent both of them. How do they appear then as justification for the legality of international law? Effectiveness is a thin and insufficient link but rather a strong element in Kelsen's philosophical standing. Again, the choisist, subjective character of his theory, criticised in natural law, reappears. The postulate for unity being effectiveness, it would be intolerable not to include in that principle an ethical element and also to recognise domestic orders which fail in that respect. By choosing indissoluble unity and the primacy of international law, Kelsen has given the juristic hypothesis a political core which should also be linked with an ethical environment. The state system represents subjectivism and for Verdoss that postulate should have an ethical as well as a juristic content and it should find its justification in some conception of justice.[124]

At this point, we will attempt to rectify the moral indignation which a formalistic application of Kelsen's theory may cause by recognising a right of humanitarian intervention implicitly accommodated in his theory. If the essence of effective law is coerciveness, then sanctions are *conditio sine qua non*. Kelsen's characterisation of law is that sanctions *ought to* apply when certain conditions are satisfied. Extensive maltreatment of people even to

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[124] A. Verdross, "Le fondement du droit international", 16 *R.C*, (1927 I), p.245, at p.286: "le droit positif est donc, il est vrai, une valeur relative, qui change avec le developpement de la civilisation mais tout de meme, il est fondé sur la valeur absolue de l'idée de la justice; comme toute valeur relative n'est valeur qu'en relation avec une valeur absolue."

genocidal dimensions is not a delict because sanctions are not provided. In that case, the legal formalistic inadequacy impinges on the minimum human ethical standing. Humanitarian intervention viewed as a sanction in international law, which as a primitive legal order resorts to individual state sanctioning methods, can attribute a legal character to genocide.

On the other hand, dismissing an outmoded criterion of effectiveness based on coercion is also necessitated by a different perception of state authority. It contains two aspects, a radical and a reconciliatory one. The radical aspect envisages a novel link between international and national law. It preserves the logical underpinnings of Kelsen's theory but the link is now transformed to human rights. Human rights norms, either expansive or restricted to the protection of essential rights, prominent among them the right to life, have become principles of international law. They could consequently function as validation norms for domestic systems. Therefore, domestic jurisdictions should be evaluated according to their compliance with those norms. That is an aspirational model which identifies strong and persistent trends in international mentality, but at a jurisprudential level, its actualisation is not hindered by the pure theory model. This reconciliatory model retains effectiveness as the link ascribing to an ethical imperative as well. The effectiveness of domestic systems consequently would reside on the political fact of authority exercised in an ethical manner. Human rights protection within systems becomes a prerequisite for the effective exercise of power, whereas their abuse, even if it contains effective control, de-legitimises effectiveness.

**VI.2** *The Basic Norm in international law.* The primacy of international law and hence the construction of a unified coherent system, is an affirmation of Kelsen's belief in human mental capabilities and the dignity of man. Natural law is for him anathema. It is rejected because it includes absolutes. Positive law is a man-made law, it surpasses the religious or metaphysical dualism of natural law which betrays lack of confidence in human capabilities and projects man as the creator of law.[125]

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[125] H. Lauterpacht, "Kelsen's Pure Science of Law", in W.I. Jennings (ed.), *Modern Theories of Law*, (London, Oxford University Press, 1933), p.105, at pp.128-131

It is disheartening then to admit that his theory, though sympathising with human dignity at the level of intellectual potentialities, is lacking human dignity at the level of ethical postulates. His legal science is the product of his belief in the authority of man, it is initiated from moral premises, but two elements should be distinguished. One is the liberation of the method from ethical postulates and the other is its liberation from the facts. He believes in the creative potentialities of the human mind which does not attempt to depict the ideal law of nature but which autonomously creates legal rules, that is, positive law. The *Grundnorm* in Kelsen's articulation has a teleological purpose, it is the ultimate end or the regressive beginning and the difference from classical natural law is that, contrary to the latter's absolute ideals inaccessible to human cognition, Kelsen's norm is accessible.

The Basic Norm of international law is "coercion of state against state ought to be exercised under the conditions and in the manner that conforms with the custom constituted by the actual behaviour of states".[126]

The Pure Theory as an "exercise in logic, not in life", presents its limitations in the palpitating conditions of international law where enquiries into other spheres, beyond the ambit of the pure theory, are invited. The function of the *Grundnorm* is to proffer an objective premise of initiation for his whole theory. Nevertheless, its articulation is not independent of state practice. As in national law, the *Grundnorm* is the distillation of experience in the particular international context, the principle which explains the present conjecture. And because the legally defined body of international law is more limited than that of national law, it involves improvisation within those less pure premises. The same *Grundnorm* as custom supports this conclusion if we consider the fact that international law has been developed through custom. Custom is the rationalisation of actualisation, in other words international law is a prescription, an "ought", derived from a description, an "is". Kelsen has rejected the view that an "ought" can be derived from an "is" which belongs to his stigmatised natural law. There is no doubt that humanitarian intervention

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[126] *PTL* (1967), p.216

residing in the customary field of state practice is completely justified under Kelsen's theory.

The contradiction in his *Grundnorm* now refers to the fact that it could justify simultaneously intervention and non-intervention. Equality of states fictionalised in the *Grundnorm* is a premise for non-intervention, whereas the *Grundnorm* as a customary practice is an invitation for humanitarian intervention according to the customary law. Another contradiction in his theory is his stated aim to liberate it from the "ideological fright" and his use of ideology which even the sheer choice of a value neutral theory betrays. He is conscious that ideology may be used by those in power for their own purposes.[127] True though this might be, the articulation of an ideologically tainted *Grundnorm* fails to liberate his system from the burden of ideology unless someone accepts it injudiciously. Ideological subjectivism is a recurrent recrimination by those who oppose humanitarian intervention as ideologically biased.[128] The opposite position to non-intervention nonetheless is equally ideologised. It promotes the attainment of peace, however precarious, as the main objective in international law.[129] In Chapter Five we have the occasion to present the bifurcation of the international legal argument between order/peace and justice/human rights.

Kelsen develops his theory of law in order to sever the relation of law and morals. The *Grundnorm* would be ethically repugnant and cause problems of obedience as a morally sterilised imperative. We could find ethical ideas which are recognisable in every civilisation. However, each moral system can include but a part of those ethical principles. Kelsen failed to address the question of whether there exists common values in every relativist morality and whether legal systems enshrine those values as did Hart who found a minimum content. Kelsen's contingent thesis of denying the connection

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[127] *GTLS*, p.xvii: "The overwhelming interest that those residing in power, as well as those craving for power, have in a theory pleasing to their wishes, that is, in a political ideology."
[128] T.M. Franck , N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 *A.J.I.L.*, (1973), p.275, at p.304
[129] Article 2(4) of the U.N. Charter; G.A Res. 2734 (XXV), 25 *U.N. GAOR*, Supp. 28, at 22, U.N. Doc. A/8028 (1970); I. Brownlie, *International Law and the Use of Force by States*, (Oxford, Clarendon Press, 1963), p.436: "There is even greater agreement and community of interest behind the proposition that, in the era of nuclear and thermonuclear armament, self-help involves intolerable risks."

between laws and moral values addresses, then, a different question and it appears narrowly constructed.

We could consider the primordial thesis of life as a value for protection. It is both ethical and practical and impinges on the minimum content of his *Grundnorm*. If "law is an order of human behaviour"[130] then humans are presupposed. People are prerequisites for legal order, yet they make the political order as well. In such circumstances they should be protected. The protection of life is also an essential ethical verity. Kant said that life is a thing in itself, necessarily presupposed. Life then bridges legal and moral ideals and serves the point where ethical ideals become identical with the "logical ideal".[131]

**VI.3** *Collective security as constitutionalism: Kelsen; Franck and Bettati. The role of the individual and the state.* For Kelsen, collective security is the security afforded by a social order, national or international. This social order is in both cases also a legal order, thence, collective security is legal security, that is, security established by law. International security is guaranteed by international law which preordains that a law-abiding state will be redeemed in case of a violation.[132] Following his repeated pattern of employing parallelisms between national and international order, security is the common interest which federates citizens and states and shares in both national and international level common elements such as policing; sanctions; and centralisation.

Legal orders, including collective security systems, provide for sanctions as reactions to delicts.[133] Collective security gains subsistence in the centralisation of the coercive order constituting the legal community. The use of force is imputed to the legal community acting through its organs, establishing, hence, "a force monopoly of the legal community".[134] Consequently, the collective character of the security established by the legal

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[130] *GTLS*, p.3
[131] *GTLS*, p.440
[132] H. Kelsen, "Collective Security under International Law", in *International Law Studies*, Naval War College, Navpapers 15031, Vol.XLIX, (Washington, Government Printing Office, 1957), pp.1-5, hereinafter referred to as *NWC*
[133] *Ibid.*, pp.37-38
[134] *Ibid.*, p.6

order enjoys two features: (i) prohibition of the use of force; (ii) collective reaction against an illegal use of force. However, due to discrepancies, a residue of self-help is admitted within a collective security system.[135]

Kelsen, interestingly, observes that an international organisation which establishes a system of international security can request a state to sacrifice the lives of its subjects in order to guarantee international security,[136] and that an international security organisation which provides for military sanctions imposes such an obligation.[137]

Contemplating the main features of a collective security system, it should be endowed with (i) a centralised procedure for the ascertainment of a delict and for determining the party responsible and (ii) centralisation in applying the sanctions.[138] The former is achieved by transferring the determining power to an institutional organ such as the Security Council in the United Nations' system. It is also assisted by the rule of law principle which satisfies the legal security which pre-established rules rather than principles provide.[139]

The second trait in Kelsen's scheme is the centralisation of the use of force as a sanction.[140] It can occur at different levels, from low, such as self-help and collective self-defence, to high, such as peaceful settlement through judicial decisions or collective sanctions. For Kelsen, the execution of sanctions can be effectuated by establishing a centralised organ, or, by individual members which are authorised by the security organisation to fulfil this function.[141] The U.N. Charter envisages such an international security system in Chapter VII. A determination of a breach or threat to the peace provokes, initially, collective non-coercive measures, or, at a later stage, coercive ones. These measures may be executed by the institutions which are provided for by the organisation or by individual states under the authorisation of the central organ of the security organisation that is, of the Security Council. Hence, cases such as Haiti, Rwanda, or Somalia have been deemed as threatening peace and states,

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[135] *Ibid.*, p.7
[136] *Ibid.*, p.4
[137] *Ibid.*, p.5
[138] *Ibid.*, pp.12-14
[139] *Ibid.*, p.16
[140] *Ibid.*, pp.23-26
[141] *Ibid.*, pp.104-105

according to this interpretation, have been authorised to use a variety of measures in order to ameliorate the situation.[142] These cases also share in common another denominator. They involve human disasters and degradation, however, they have been included in the wider framework of peace and order.[143] As maintained above, this statement concurs with the observation that the U.N. system of collective security works on a delegated basis lacking its own means. Threats or breaches of peace either *stricto sensu* or *lato sensu* containing human rights concerns have been addressed mainly by individual states.

We should, at this point, consider an issue which pertains to the constitutional law of the U.N. Charter, however attractive a collective reaction may appear to be. Our non-allayed concerns refer to the extend of discretionary power enjoyed by the Security Council to authorise forcible humanitarian actions. Human rights violations do not necessary constitute practically a threat to the peace as the Somali case reveals. If institutionality implies proceduralism, can the Security Council overstep the legal confines of Chapter VII which delineate the relevant circumstances requiring forcible action? This issue involves quests on the character of discretion which can be characterised as weak or strong according to Dworkin.[144] According to the strong sense of discretion, the body which makes decisions can introduce law afresh, unconstrained by specific rules. It is only constrained by the procedural rules which empower it to make decisions. Following this interpretation, the Security Council, which is empowered by the U.N. Charter rules of competence to make determinations concerning forcible actions, can incorporate human rights violations therein. Hence, there looms the new law according to which human rights violations constitute a breach or threat of peace involving collective reaction. Consequently, the aforementioned cases can be interpreted analogously. In particular, the Somali case, although

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[142] S.C. Res.940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994), (Haiti); S.C. Res.794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992), (Somalia); S.C. Res.929, U.N. SCOR, 3393rd mtg., U.N. Doc. S/RES/929 (1994), (Rwanda)

[143] see bellow Chapters Five and Eight

[144] R.M. Dworkin, *Taking Rights Seriously*, (London, Duckworth, 1977), pp.31-39

factually questionable, it has been deemed by the Security Council to entail a threat to the peace triggering a collective reaction.[145]

On the other hand, according to the weak interpretation of discretion, the authoritative body is constrained by standards and, although its decision is not reviewable, it can be accused of misapplying the law. Concerning the area of the use of force, the Security Council may be accused of applying the law incorrectly. This refers to the standards contained in Chapter VII and which do not mention human rights violations or, additionally, to the general standards contained in the purposes which mention human rights. A strict adherence to institutionality may confine the decision to the applicable by Chapter VII standards and, thus, the cases of Haiti, Rwanda or Somalia will appear to be un-institutional because human rights concerns are not contained therein. On the other hand, employing the general standards included in the Preamble allows for a less narrow construction of Chapter VII, henceforth the above cases are institutional. Consequently, it should be maintained that, concerning this issue, there exists certain confusion among those who adhere to institutionalism or, *faute de mieux*, it is politely ignored. However, they agree on the crux of the matter as it has also been observed in the recent practice of the Security Council that human rights violations constitute threats or breaches of peace.

In the same vain, the legitimacy of any action assimilated to resort to force is discovered according to Thomas Franck "in the discursive processes of the (Security) Council".[146] His institutional approach crumbles when he considers national interests in the area of self-defence.[147] Self-defence is an individual measure which, denoting a decentralised action, does not sympathise with institutionality at the point of its application. On the other hand, it affirms a social order because only within such a socio-legal order an exemption of self-defence exists.[148] Franck anticipates an institutional decision as to the reasons

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[145] The U.N. action was prompted by the "magnitude of human tragedy" caused by the civil war which did not by itself pose a danger to international peace. See Chapter Eight, Section II.2

[146] T.M. Franck, *Fairness in International Law and Institutions*, (Oxford, Clarendon Press, 1995), p.313, hereinafter referred to as *Fairness*

[147] *Ibid.*, pp.292-298

[148] *NWC, supra*, note 132, pp.26-28

and limits of self-defence but any determination will only be *ad hoc* and *ex post facto* because it extends to the realm of state auto-interpretation of relevant circumstances. The requirement of reporting to the Security Council according to Article 51 of the U.N. Charter only follows the exercise of the right of self-defence and, moreover, self-defence action is exercised until the Security Council takes action. Thus, it appears that institutionality cannot hinder a unilateral state action. Where his policy considerations are more evident and reveal contradictions is when he attempts to accommodate anticipatory self-defence within an institutional system.[149] By itself, anticipatory self-defence lies at the opposite pole of an institutional system. He accepts a residue of validity in the consideration that in a nuclear era anticipatory self-defence is permitted but then again, he subjects the determination of an imminent attack to an institutional body. This is brimming with contradictions. It either assures the opportunity for mutual destruction whereby the members of this institutional body authorise one member with the nuclear capabilities to annihilate everyone in a pre-emptive nuclear attack, or, by retaining their sobriety and wisdom they contain such a right and, therefore, practically, emasculate the right of anticipatory self-defence. It is either that the institution subscribes voluntarily to a writ of death or the issue of anticipatory self-defence becomes a non-issue. In the opposite case where anticipatory self-defence should be retained as a possibility within an institutional system, it should be conceded that it can be even severely circumscribed by the institution, in particular concerning the mode of its application. Au contraire, Franck does not distance himself from the traditional "state-conscience" of international lawyers when he expects only an institutional - prospective or retrospective - decision on the *bona fides* of the claim. It seems that all depends on the rhetoric aptitude of the state.[150]

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[149] *Fairness, supra,* note 146, pp.266-271

[150] *Ibid.*, p.267. An "institutional" determination of the reasons which allow for anticipatory self-defence and its authorisation would only, according to this writer, diffuse the responsibility or guilt for a nuclear Armageddon. It is also interesting to note on this occasion that there is no adjudicatory decision on this matter. The International Court of Justice in the *Nicaragua Case* expressed "no view" on the issue of anticipatory self-defence. *Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Rep.*, (1986), p.14, p.103, para.194

On the issue of humanitarian intervention, Franck resorts to presumptions. Faced with the international reality, he requires that a state should first exhaust the remedies envisaged in the Charter before resorting to unilateral action.[151] This is reminiscent of the exhaustion of local remedies rule included in international adjudication and now applied to use of force issues. Here, we have the opposite, that is, exhaustion of international remedies before the employment of unilateral-state remedies. The U.S. unilateral action in Panama has been condemned as deficient on this procedural issue, whereas that in Haiti was justified as procedurally legitimate. In Chapter Eight we shall explore the different justifications offered for these actions and they will be considered under the assumption of human dignity. Suffice here to say that these actions do not loose their particular-unilateral character even with the stamp of the U.N. approval. On the other hand, he employs a sophistry when he says that when the Security Council is paralysed and declines decision, this should be interpreted as a decision not to pursue any action.[152] In the majority of analogous cases, lack of decision is credited to political considerations and it would be a mistake to imply, as Franck does, that no decision is equivalent to a legitimate process. Thus, legitimacy within the collective security system could barely hide the role of the state, unless presumptions are employed. It is interesting that Franck does not consider the role of the General Assembly in circumstances of Security Council paralysis. On this issue, his ideological and political influences are more than apparent and concern the well-documented power manipulation within the Security Council, whereas for Kelsen, in such circumstances, the General Assembly which is more representative is empowered to consider the matter.[153]

What is intriguing, additionally, is that Kelsen envisages a court which will execute this function of authoritative determination. He acknowledges that this function may be exercised by a centralised organ which is also endowed with the power to execute sanctions such as it is the Security Council, however, his

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[151] *Fairness, supra,* note 146, p.272

[152] *Ibid.*, pp.273-274

[153] *NWC, supra,* note 132, p.126. See the "Uniting for Peace" Resolution of the General Assembly concerning Korea, G.A. Res.377, 5 U.N. GAOR, Supp.(No.20), U.N. Doc. A/RES/377 (1950), p.10; N.D. White, *Keeping the Peace,* (Manchester, Manchester University Press, 1993), in particular Chapter Five, p.127

preference lies with a judicial body. He attributes any hostility to this proposal to particularised state interests which vie to retain their political influence within the security organisation, because, otherwise, an independent court, having discretion to decide a case, will also include political considerations.[154] Thus, it seems that his collective security organisation is the antipode of the United Nations because in his system the judicial organ dominates the decisional one that is, the Security Council.

Inferentially, humanitarian intervention is permitted within the Kelsenian collective security system through a wider construction of the preponderant aim of preserving peace and is effectuated institutionally either by the collective organisation itself or through authorisation.[155] This observation recapitulates the trend of the United Nations system which submits the humanitarian element into a comprehensive and primary requirement of peace and order following the Grotian tradition as it has been explained in the previous chapter.[156]

Likewise, concerning humanitarian intervention, Franck, treats certain cases like Somalia or Rwanda as an institutional action by the Security Council, thus, a process oozing fairness and legitimacy.[157] These actions will be addressed in subsequent chapters where their contradictory character and their multifaceted justifications will be revealed. However, adopting a reflective view on these cases, their individual components should be addressed and in particular their unilaterism. In such cases, according to Franck, the participant states still retain what he considers to be legitimacy and fairness because they have satisfied the procedural even if hypocritical requirements of institutionality. These comprise of reference to the Security Council and authorisation by the latter. We submit that the cases reside beyond this institutionality and only by a reflective view the requirements of human dignity can be addressed.[158]

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[154] *NWC, supra*, note 132, pp.120-122
[155] *NWC*, p.44: "An international legal organisation for collective security presupposes the value of peace to be higher value than the value of justice."
[156] see Chapter One, section V.3 and Chapter Five, section VI
[157] *Fairness, supra*, note 146, pp.272-274
[158] see Chapter Five, section IV.5 and Chapter Eight, section II.2

A common criticism addressed both at Franck and Kelsen is that their institutional - constitutional system seems to retain the *status quo*. Franck conceals this trait behind an elaborate and appealing institutional procedure whereunder the Security Council is eminent however, the distribution of power therein or its repercussions is not illustrated. Suffice to say that the "Big Five" are predominant and this affects the performance of the Security Council. Kelsen, on the other hand, addresses this issue and attributes it to legal ideology. Collective security as a legal order should be, for him, conservative and aims at preserving peace not justice.[159] Also, ineffectiveness is attributed to a "false" interpretation of the legal order established by the collective security. It could be maintained, hence, that both Kelsen and Franck employ presumptions in order to justify their institutionality. Franck mistakes the real with the ideal, whereas Kelsen the ideal with the real. Kelsen proffers an idealised collective security system in abstracto, therefore, any criticism which will spring from real circumstances may address a different audience. However, faced with a real and operative system of collective security as established by the U.N. Charter, his points seem to be irrelevant. Why is it presumed that the status quo guarantees peace and what if what is considered very subjectively by him as "false" interpretation of the collective system is sustained and subsequently substitutes his "correct" interpretation?

The erroneousness of both expositions is that they seem to ignore or to downplay the relational framework beyond the institutional one. The latter does not absorb or hide the former. Whenever the United Nations have reacted, it has always been after political consultations mainly between the "Big Five", often late, with contradictions, and sometimes inefficiently. The cases of Somalia and Rwanda are instructive. Concerning these cases, the U.N. Secretary-General sought a comprehensive settlement which required a different, not conventional disposition of U.N. functions. However, the Somalia action was an institutional "echec" as it will be described in Chapter Eight, whereas the U.N. action in Rwanda followed the unilateral French action. According to the U.N. Secretary-General, Boutros Boutros-Ghali: "The delay in reaction by the international community to the genocide in Rwanda

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[159] *NWC, supra*, note 132, p.44

has demonstrated graphically its extreme inadequacy to respond urgently with prompt and decisive action to humanitarian crises entwined with armed conflict."[160]

A prominent exposition of the new humanitarianism is found in the work of Mario Bettati which has institutional implications similar to those of Kelsen and Franck as explained above. Bettati has been involved, together with Bernard Kouchner and in close relation with the administration of François Mitterrand, with developing the concept of "l'ingérence humanitaire". This term, translated into English, does not denote the same concept which the English term humanitarian intervention does. Bettati makes fine distinctions whose transposition into the English language may be confusing. At this stage we are not concerned with explaining the semantic approximations. We are more concerned with presenting the constitutional element in his work and the similarities it exhibits with the work of Franck and Kelsen. However, we should describe what is understood by "droit d'ingérence humanitaire" because otherwise the confusion and "quiproquos" are assured.

The pertinent right contains the "intervention humanitaire" and the "intervention d'humanité". The former concerns only one type of interference, what he names "intervention habilitée".[161] It is effectuated by the United Nations which authorises members to provide direct assistance; protect threatened populations or establish minimum security by re-establishing normal conditions. The second aspect of the "intervention humanitaire" is to create secure areas for the victims. These include: "zones préventives", "zones protégées par les Nations Unies", "zones de sécurité", or "zones d'interdiction de survol".[162] Such operations were those pursued by the Allies in Iraq, in Somalia, Rwanda or Yugoslavia.[163] Thus, operation "Provide Comfort"

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[160] *Report of the Secretary-General on the situation in Rwanda*, S/1994/640, 31 May 1994, para.43

[161] M. Bettati, *Le droit d'ingérence: mutation de l'ordre international*, (Paris, O. Jacob, 1996), p.186: "Cette délégation de compétence ne signifie pas que l'État agissant supplante l'ONU, mais plutôt qu'il s'y substitue par subrogation." Hereinafter referred to as *Le droit d'ingérence*

[162] M. Bettati, "Ingérence, intervention ou assistance humanitaire", in N. Al-Nauimi and R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law*, (The Hague / London / Boston, M. Nijhoff Publ., 1995), p.935, at pp.957-962

[163] *Le droit d'ingérence*, *supra*, note 161, pp.187-203

instituted by Resolution 688[164] in Iraq for the protection of Kurds comprised of humanitarian aid, "relais humanitaires" and "centres humanitaires".[165]

"Intervention d'humanité", on the other hand, concerns the "soustraction unilatérale des victimes", that is, extraction of victims.[166] These operations are unilateral, unfolding without institutional authorisation or the consent of the recipient state and also have a contested legal basis. He also considers operations strictly characterised as protection of nationals as constituting "intervention d'humanité". On this issue, the position of the present writer as explained in Chapter Six approximates Bettati's view, motivated, though, from different concerns. For Bettati, protection of nationals is the modern residue of the old concept of "intervention d'humanité", whereas for us, it is the purpose of these operations to safeguard lives and the human dignity of threatened nationals which credits them with the humanitarian character.[167] Additionally, we do not consider only this type of unilateral action as humanitarian intervention but also other actions, unilateral, multilateral or institutional which share a humanitarian mandate. The legitimacy of the "interventions d'humanité" is easily established, not though their legality. Their legitimacy is reminiscent of Grotius and accrues to defending the public order. As formulated by Georges Scelle, they "assur(ent) le respect d'un certain nombres de règles fondamentales, respect de la personne humaine, de sa vie, de ses libertés, de sa proprieté."[168] On the other hand, they have a contested legality in international law.

The conceptual and technical perplexity which springs from the proposed definitions is manifest. The fine terminological distinctions may produce consternation but legally, the usage of more neutral terms, relieves the issue from the impregnated connotations which the word intervention carries.

In more detail, the first case of "intervention humanitaire" may be confused with humanitarian assistance.[169] In order to distinguish, it should be submitted

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[164] S.C. Res.688, U.N. Doc. S/RES/688 (1991) in 30 *I.L.M.*, (1991), p.858
[165] M. Bettati, in N. Al-Nauimi, R. Meese (eds.), *supra,* note 162, pp.952-957
[166] *Le droit d'ingérence*, *supra,* note 161, p.204. Also *supra,* note 162, p.952
[167] see Chapter Six, title V
[168] G. Scelle, *Droit International Public,* (Paris, D. Montchrestien, 1944), p.622
[169] *Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Rep.*, (1986), p.14, at p.114, para.242: "there can be no doubt that the provision of strictly

that, according to Bettati, "intervention humanitaire" is a wider concept and includes the panoply of measures which can be adopted internationally when there are humanitarian needs of certain gravity and the territorial state does not respond and/or hinders any such action. It is, therefore, evident that humanitarian assistance is only one aspect thereof, the first one, and confines itself to responding to humanitarian needs. The second stage is the "intervention humanitaire" *stricto sensu* when the state does not respond to and does not obey the elementary obligations which these humanitarian needs give rise to and, therefore, the need to react to these violations arises. Consequently, although they should not be confused, the "intervention humanitaire" enters into play only when the humanitarian assistance does not function. It may as well require security afforded *manu militari* as the *ultima ratio* in cases where the recipient state is recalcitrant or for the protection of the "Good Samaritans".[170]

These operations distinguish themselves from the "intervention d' humanité" on three grounds: (i) they are not unilateral but always require the authorisation of the Security Council; (ii) they are preceded or followed by United Nations forces and (iii) they share in common with the traditional genre of "intervention d'humanité" the fact that they try to secure the population of a third state.[171]

"Intervention d'humanité" and "intervention humanitaire" have not the same juridical basis because they do not share the same technical and political nature. Misunderstandings on this issue, generates confusion on its permissibility. The legal basis for the "intervention humanitaire" operations is the maintenance of peace under Chapter VII of the U.N. Charter.[172] There is an

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humanitarian aid to persons or forces in another country, cannot be regarded as unlawful intervention, or as in any other way contrary to international law."

[170] L. Condorelli, "Intervention humanitaire et/ou assistance humanitaire? Quelques certitudes et beaucoup d'interrogations", in N. Al-Nauimi and R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law*, (The Hague / London / Boston, M. Nijhoff Publ., 1995), p.999, at pp.999-1004. See S.C. Res.1101, U.N. SCOR, 3758th mtg., S/RES/1101 (1997) concerning the delivery of humanitarian assistance to Albania.

[171] M. Bettati, "Ingérence, intervention ou assistance humanitaire", *supra*, note 170, p.935, at pp.952-953

[172] According to Resolution 688, the Security Council: "*Gravely concerned* by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to the massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the

evaluation of causes and effects and the Security Council authorises a number of states to pursue the requested action.[173] Hence, the institutional framework comprises of the U.N. Charter with its mechanism of evaluation, authorisation and execution. The fact that the relevant mechanism is construed differently than initially envisaged happens, "faute de mieux", in the absence of other more agile and satisfactory mechanisms. As observed above, also Kelsen and Franck accept a delegation of powers from the Security Council to national states which execute the humanitarian action.

However, and this criticism is addressed to the described institutionality of the Bettati, Kelsen and Franck, the Security Council is heavily politicised in order to react impartially or routinely concerning its humanitarian activities. The cases where it reacted have been characterised by the most exceptional circumstances on the ground concerning the humanitarian catastrophe and within the Security Council, concerning the political balances.[174]

What is implied, surreptitiously, in certain actions included by Bettati in his genre of "intervention humanitaire" is an amalgam of assistance and sanction. In the case of Iraq or Yugoslavia the created "safe havens" or "safe areas" are not the same as the "protected zones" sanctioned by international humanitarian law.[175] In Iraq, the distinction between humanitarian and political aims was blurred, whereas in Yugoslavia, Resolution 819[176] which created a "safe area" for Srebrenica, and Resolution 824[177] creating a "safe area" for Sarajevo, Tuzla, Zepa, Gorazde and Bihac was coupled with the enforced demand to the parties to cease all armed attacks. As observed: "..... the threat of force to

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region ..... Insists that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance....." *supra*, note 164

[173] *Le droit d'ingérence, supra,* note 161, pp.223-224

[174] "..... such Security Council decisions, as they have been taken until present, remain ad hoc and do not afford constitutional principles for further action." T. Carty, *The Failed State and the Tradition of International Law - Towards a Renewal of Legal Humanism,* Inaugural Lecture, University of Derby, 6 December 1995, p.14 (unpublished paper)

[175] P. Alston, "The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath", 13 *Australian Y.B.I.L.*, (1993), p.107; G. Best, *War and Law Since 1945,* (Oxford, Clarendon Press, 1994), pp.318-323; D. Pallister, "When Food Relief Comes Out of the Barrel of a Gun", *The Guardian,* 7 May 1994, p.16

[176] S.C. Res.819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993), in S. Trifunovska, *Yugoslavia Through Documents: From its Creation to its Dissolution,* (Dordrecht / London / Boston, M. Nijhoff, 1994), p.906

[177] S.C. Res.824, U.N. SCOR, 48th Sess., 3208th mtg., U.N. Doc. S/RES/824 (1993), *Ibid.*, p.936

assert demands naturally implies, in addition to adequate military means, seeking a political solution to the conflict, which thus goes beyond the scope of international humanitarian law."[178] The danger behind this approach is that the intermingling of political considerations in the concept of "intervention humanitaire" which, among others, includes humanitarian assistance would result in the reluctance of states to receive even the minimum of assistance. Therefore, conceptual and practical confusion with humanitarian law would render disservice to both areas of humanitarianism, whereas humanitarian intervention in its classical form is more clear in its objectives, recipients, modes and timing.

Concerning the legitimacy of "intervention humanitaire", it is contained, as Franck also explains, within the cadre of the United Nations. It is the authorisation which attributes legitimacy. As it was observed above, even the manipulation of the institutional authorisation would suffice for Franck, Bettati or, inferentially for Kelsen, to attribute institutionality thereto. Although it is not denied that the United Nations could instigate collective humanitarian actions, the discussed cases cannot be detached from their strong parochialism. They are, in effect, unilateral actions without this fact impinging on their legality according to our view. The United Nations imprimatur pacifies or distracts certain states and saves an Organisation from being seen condemned into impotence. The Rwanda case is illustrative. The U.N. mission in place was incapable of detaining the aggravating situation. Therefore, it was with the initiative of France that an intervening force was secured. Resolution 929 which authorised the French action was adopted with the insistence of France and this unilateral operation was followed by a U.N. force.[179]

The debates in the Security Council which preceded Resolution 929 reveal the differing attitudes of states: some requiring a purely U.N. action, whereas others accepting authorisation by the United Nations. New Zealand, speaking for many states, made obvious the preference for a U.N. action. It said: "Nous admirons et respectons hautement la motivation humanitaire dont a fait preuve

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[178] Y. Sandoz, "The Establishment of Safety Zones for Persons Displaced within their Country of Origin", in N. Al-Nauimi, R. Meese (eds.), *supra*, note 170, p.899, at p.925
[179] see Chapter Five, section IV.5 and Chapter Eight, section II.1

la France en saisissant le Conseil de ce projet de résolution. La seule divergence concerne les moyens."[180]

The acknowledgement of the unilateral character comes also from another source. Some states are persistent in repeating the exceptional character of these actions, requesting the consent of the recipient state[181] and underlining their limited reach.[182] If they were indeed institutional reactions, there would be no need for such qualifications. One of the most prominent NGOs, the Médecins sans frontières (MSF) took a more realistic line to which we subscribe: "Une intervention des Nations Unies aurait sans doute été préférable mais le seul fait qui doit être pris en considération, c'est qu'il y a génocide et qu'il faut l'arrêter par tous les moyens."[183]

Concerning the ethical basis for such operations, humanity is looming as the ideological substratum in the work of Bettati. On this issue, there exists agreement with this present work which is concurrent to the idea of human dignity and individual humanity. The difference lies in the methodological, practical, ideological effectuation of humanism as it will be explained subsequently.

Theoretically, Bettati reminds us of Grotius who advanced the individual as a respected unit in international law or Scelle's *dédoublement fonctionnel.*[184] The prominence of the individual anticipates his entitlement to humanitarian assistance which individual states offer in the name of humanity when the

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[180] Mr. Keating, S/PV 3392, 22 June 1994, p.7

[181] see the "Memorandum of Understanding" detailing the conditions of the United Nations humanitarian presence in Iraq, signed in Badgered 18 April 1991. *The United Nations and the Iraq-Kuwait Conflict 1990-1996,* (United Nations, N.Y., Department of Public Information, 1996), p.210-211. *Letter from the Permanent Representative of Iraq to the Secretary - General transmitting the Memorandum of Understanding dated 18 April 1991 between Iraq and the United Nations concerning humanitarian assistance*, S/22513, 22 April 1991

[182] see the opinion of the Argentine representative to the Security Council, Mr. Ricardes, concerning Rwanda, S/PV 3392, 22 June 1994, p.10. Resolution 794 on Somalia mentions its "unique character", S.C. Res.794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992) and also that on Haiti refers to the "uniqueness" of the case, S.C. Res.940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994). The representative of Romania Mr. Munteanu, discussing Resolution 688 said : "..... we should not create a precedent that could be used - or rather, misused - in the future for political purposes." S/PV 2982, 5 April 1991, pp.23-24. Also the Representative of Turkey to the Security Council Mr. Aksin "..... firmly support[s] the independence, sovereignty and integrity of Iraq." *Ibid.*, pp.3-7

[183] *Liberation*, 23/6/1994, p.3

[184] *Le droit d'ingérence, supra*, note 161, p.186

institutional order malfunctions.[185] Concerning the lego-philosophical issue of the role of the individual, one could trace a common property with McDougal's jurisprudence. For both, the individual is citizen of the state but also a unit of international law and, therefore, s/he should be afforded the necessary protection.[186] What is impressive is the humanism evidenced in their work, the rule of the human being. The difference between Bettati and McDougal is methodological and practical. Whereas for the policy-school individual states can provide or restore humanism, for Bettati or Franck this can only be done institutionally.

Another issue with major implications is their approach to sovereignty. There is ample criticism of the notion of sovereignty-fortification. For Bettati, McDougal or, Grotius in the past, the residue of humanity requires a limited respect of state sovereignty. Instead of state monopoly, the human rights revolution has tampered with sovereignty and the protection of the individual which derives from a common human patrimony mobilises states. According to Bettati, the word "ingérence" conveys any juridical meaning only when it is followed by the world "humanitaire" because only then it has a "finalité" which, otherwise, would render it illegal. He does not dispense though at all with sovereignty but recognises "une modulation de son (sovereignty's) excercise".[187] This statement affirms the observation that we have reached a stage in the development of human civilisation where the violation of human rights is not tolerated. It requires a moral, psychological and legal transformation which is gradually evidenced. However, the psychological transformation has not definitely affected as yet the ubiquity of the state but only modified its function. In a nutshell, it only requires that the sovereign prerogatives "s'exercent de façon plus humaine."[188]

At this point and discussing the role of individual and the state, we should present its theoretical antipode which is the work of Phillip Allott as a non-state utopia and the conservatism of Koskenniemi who, amid criticisms and

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[185] *Le droit d'ingérence*, *supra*, note 161, p.37: "..... promouvoir son statut (l'individu) de sujet universel." And at p.186: " ..... l'État qui intervient agit pour le compte de la société internationale défaillante."

[186] see Chapter Three, section II.2, IV.2

[187] *Le droit d'ingérence*, *supra*, note 161, p.119

[188] M. Bettati, "Un droit d'ingérence?", 95 *R.G.D.I.P.*, (1991), p.639, at p.653, 667-668

deconstructions, emerges as defendant of the state. Finally, the distinction with our position will be made.

Koskenniemi, in contradistinction to Bettati, defends the state on its formal not substantive character. Whereas the quality a state sovereignty acquires is a matter for evaluation and justifies humanitarian actions according to Bettati, defending the formal quality of the state is oblivious to such actions and represents a form of mental antediluvianism if the substance is not distinguished from the form.[189]

His defence of the state is peculiar. It resides on an extreme formalism and on an extreme suspicion of subjectivism. Thus, he admits that the state's "formal-bureaucratic rationality provides a safeguard against the totalitarianism inherent in a commitment to substantive values, which forces those values on people not sharing them".[190] However, he repeats the same mistake which he criticises. Sovereignty as a "deified" concept plays this role of obstructing other issues such as human rights into developing.[191]

From the above statement one can make two conclusions. The first, shared theoretically with Franck, is the formal justice of formality. The institutional-procedural aspect produces neutrality and obeisance. The similarities though stop at this level. We are not going to repeat the criticisms addressed at this procedural aspect[192] however, Franck or Bettati adhere to a certain purpose which is peace, public order or humanitarianism. Koskenniemi, pathologically

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[189] M. Koskenniemi, "The Future of Statehood", 32 *Harvard I.L.J.*, (1991), p.397. Tony Carty deplores the "failure of the (legal) profession to respond in a creative way to the developments which have affected the composition of the state..... . [T]he approach of the international lawyer to the Failed State has a simpler theoretical explanation. The lawyer remains a state positivist." For him, human rights "are regarded as relevant to a judgement as to the validity of a state at present." T. Carty, *The Failed State and the Tradition of International Law - Towards a Renewal of Legal Humanism*, Inaugural Lecture, University of Derby, 6 December 1995, pp.5-9 (unpublished paper)

[190] M. Koskenniemi, "The Future of Statehood", 32 *Harvard I.L.J.*, (1991), p.397, at p.407. M. Koskenniemi, "Theory: Implications for the Practitioner", in P. Allott, T. Carty, M. Koskenniemi, C. Warbrick, *Theory and International Law: An Introduction*, (London, The British Institute of International and Comparative Law, 1991), p.1, at p.42: "..... statehood functions as precisely that decision-process which tackles the problems of multiplicity of ideas and interpretative controversy regarding their fulfilment. Its very formality intends to operate as a safeguard so that these different (theological) ideals are not transformed into a globally enforced tyranny."

[191] R. Ashley, R.B.J. Walker, "Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies", 34 *Int'l Studies Q.*, (1990), p.367

[192] see Chapter Seven, section I.1

suspicious of any overriding aim, implies an uninhibited raison d'état. However, there is a fundamental mistake in his observation. The *Rechtstaat* as institutionalism is the first stage in the organisation of a society which gives way to a more contextual *Sozialstaat*. The other fundamental difference with Franck or Bettati in his primitive institutionalism is that for Koskenniemi, the state still remains the hegemonic actor. It was explained above that both Franck and Bettati prefer an institutional reaction to humanitarian needs. Individual state reaction is included into this institutionality, either genuinely or by default and, additionally, it alludes to certain standards as public order or humanism. Even the *dédoublement fonctionnel* ensures for Bettati that the higher standards, justice, peace or humanism are guaranteed, whereas for Koskenniemi, it guarantees that states remain in control.[193] This is different than expecting of the omnipresent state to safeguard human rights. In the latter case as considered by Bettati, McDougal or Franck, the state adopts a mission, a moral mission. Thus, states act as envoys of higher ideas being also subjects of the international procedure.[194] *Au contraire*, state agnosticism provides the best reason for upholding statehood according to Koskenniemi, in the absence of a "universally shared substantive faith".[195]

Koskenniemi's approach to sovereignty can only be viewed as an exercise in rhetoric. It reproduces the basic themes of the Critical Lawyers in the analysis or defence of statehood. Critical Lawyers criticise the traditional approach of defining modernity with sovereignty and history. They criticise the traditional scholarship for revering the past, awaiting a reformed future but forgetting the present.[196] What is his response, though, to the substantive problems of the present? Koskenniemi leaves the answer in limbo. If the past was an unremitting statism and the future a human rights utopia, Koskenniemi is ambivalent. A staunch defence of the state is followed by the statement that "statehood remains a second best" without proffering to what: to human rights,

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[193] M. Koskenniemi, "The Future of Statehood", 32 *Harvard I.L.J.*, (1991), p.405
[194] A-M. Slaughter, "Liberal International relations Theory and International Economic Law", 10 *Am. U.Int'l. L. & Pol'y.* (1995), p.717, at pp.729-730
[195] M. Koskenniemi, in P. Allott, *supra*, note 190, p.43
[196] D. Kennedy, "A New Stream of International Law Scholarship", 7 *Wis. I.L.J.*, (1988), p.1, at pp.2, 12

order, or peace?[197] If the main grid in his exposition is the interchange of "apologetic" and "utopian' arguments, he falls victim to his own binarisms. He simultaneously embraces and criticises sovereignty. He only justifies one of the *CLS* tenets that law is rhetoric because the legal structure depends on the mutual reliance of the opposing arguments which, in this case, sovereignty releases.[198]

Whereas Koskenniemi describes the quests of an enlightened but frustrated jurist, Phillip Allott journeys through "consciousness" to a new international society.[199] This international society is above the state society but behind everything lies the human being as a member of both state and international society.[200] On the other hand, the present state-structured society produces anomy because the state dominates our consciousness.[201] The new international society of human beings transgresses national borders and induces our human feelings of sympathy and responsibility for other human beings. Thus, "human societies and human beings everywhere at last begin to take moral and social responsibility for the survival and prospering of the whole of humanity."[202] Finally, all depends on the human spirit which is formed as "self perfecting, self-ordering ..... [when] humanity [acts] in love and hope."[203]

This seems to be a radical position because it unsettles the consciousness of international lawyers, however, it does not say how and with what means it will be achieved or, at least, approximated. On the other hand, Allott is

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[197] M. Koskenniemi, "The Future of Statehood", 32 *Harvard I.L.J.*, (1991), p.406

[198] D. Kennedy, "A New Stream of International Law Scholarship", 7 *Wis. I.L.J.*, (1988), p.1, p.38

[199] P. Allott, *Eunomia: New Order for a New World,* (Oxford, Oxford University Press, 1990), para.16.17, p.303: "International law is a reality-forming of international society which does not recognise the reality of the total social process by which all reality is formed. It chooses to recognise only the social process of the interacting of the governments of state-societies, as if they constituted a self-contained and self-caused social process, as if they constituted the whole of the total social process of international society." Also, *ibid.*, paras.15.26,15.36, pp.270,275

[200] *Ibid.*, para.16.36, p.311. P. Allott, Reconstituting Humanity - New International Law", 3 *E.J.I.L.*, (1992), p.219, at p.251, para.40.3

[201] P. Allott, *Eunomia: New Order for a New World,* (Oxford, Oxford University Press, 1990), paras.15.41, 16.16, 17.40, 18.18, pp.277-278,303,354,382

[202] *Ibid.*, p.xxiii

[203] P. Allott, "Reconstituting Humanity - New International Law", 3 *E.J.I.L.*, (1992), p.219, at p.252, para.41.4. "..... societies are systems made by human beings for human survival and human prospering, not for human oppression and human indignity." P. Allott, "International Law and International Revolution: Reconceiving the World", *The Onoh Memorial Lecture 1989,* (Hull, University of Hull Press, 1989), pp.2-3

ambivalent on a fundamental issue which represents the gist of individual human dignity as it is developed in the present work.[204] He does not address the issue of whether smaller communities - ethnic, religious, linguistic - will retain their possibilities within the new international community or whether they will be foreclosed.[205] Singleness which encroaches upon individual humanity is threatening and destructive. The humanitarian crisis caused in the history of mankind witness the repercussions of foreclosure.

If the present work is stimulated from a concern for human dignity, where does it stand between the opposites of statism or humanity? It should be submitted that our approach differs in its assumptions and its emphasis. We are not concerned with the state itself as an institution or its position in international legal structures. The state may exist or not, it may be hierarchically superior or subordinate. Our emphasis is on humanitarian disasters and our reaction to them. This can be effectuated by states, organisations or individuals. Consequently, the state looses its prominence in our legal disposition and becomes a second rated interest exercising a residual function. We are not concerned with the state, its institutions, and, how they create human disasters or, on the other hand, heal them. We are concerned with the individual and the preservation of human dignity. The question of who, either states or international organisations, will provide humans with protection is included as a description of the fact of restoring the human dignity of threatened human beings.

## VII. HART'S CONCEPT OF LAW

**VII.1** *Descriptive sociology and the bridging of "is" and "ought".* Hart bridges two legal traditions: those who hold like Kelsen or Austin that law is a correlation of authority, command and sanction and those who see law as a

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[204] see Chapters Seven and Eight

[205] P. Allott, *Eunomia: New Order for a New World,* (Oxford, Oxford University Press, 1990), para. 13.41-13.56; 20.24-20.26, pp.221-226, 418

social fact. The description of legal orders reveals certain common forms and human attitudes which are also elements of natural law. Hart asserts that legal systems share a minimum common denominator. He articulated an elementary overlapping between law and morality by acknowledging the contingent facts of human nature, those truisms which offer the reason why "Law and morals should include a specific content"[206] in order to achieve the aim of survival.[207] What Hart says is that the observation of human nature and activities which aspire towards survival are accredited to some "ought" propositions which law should envelop. This argument could be considered as a reversal of the purposiveness evidenced in natural law. Whereas in the latter the purpose is all-inclusive and determines the facts and subsequently the law, in Hart's system, between the "is" propositions, which allude to the observable facts of human nature, and the "oughts", which refer to the content of laws, another value-judgement is interposed, that of survival. In the next chapter, we shall witness the same intellectual twisting performed by the policy school. For them, the observation of facts reveals the values of human dignity but how do we identify them if we do not presuppose the value of human dignity? The difference is that survival is explicitly stated as a purpose, whereas human dignity nests at the background of the juristic mind.

True as all this is, Hart adheres to the positivist tradition of denying any conceptual connection between law and morality, as advanced by classical natural law theory. The links between natural and positive law depend on their "functional similarity" and thus, he rejects what he calls the extreme Thomistic perception of natural law which maintained that there are principles of morality discoverable by human reason and that laws should conform therewith.[208] Contrary laws are not invalid and, on this point, we should emphasise the similarity with Finnis's restatement of natural law. Rejecting

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[206] H.L.A. Hart, *The Concept of Law*, (Oxford, Clarendon Press, 1961), p.254, hereinafter cited as *CL*

[207] *CL*, p.189: "The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible".

[208] N. MacCormick,, *H.L.A. Hart*, (Stanford, Stanford University Press, 1981), p.24; *CL*, p.152

the infusion is, however, itself a moral position which permits the distinction between invalidity and immorality.[209]

It appears that, although Hart does not accept the doctrine of lex uniustia non est lex,[210] the minimum content indicates the type of rules incorporated into the legal system. As a consequence, it excludes some for the benefit of those rules which conform therewith and describes a rather similar function of natural law not in pervasiveness but in procedure. Additionally, he maintains that the minimum content is necessary for the viability of a legal system not for its existence. An unresponsive rule may exist but not endure. This alludes to a temporally longer process for rule invalidation, whereas natural law can offer an instant one.[211] Transmuting this observation into international law, it gives ammunition to those revisionists who see in the Charter and in particular in the rules on the use of force or self-defence an obsolete system, which is unresponsive to the needs of modern society and indifferent to the observed traits of international society which include the protection of human beings. As a consequence, this system may continue as a legal one but in the absence of these traits, its viability is shortened and it may cease to exist.

**VII.2** *Humanity's survival and the minimum content of natural law.* As was stated, Hart articulates an "empirical version of natural law"[212] and traces contingent links between law and morality. Human beings are inclined towards their optimum end of survival which is reminiscent of the teleological character evidenced in traditional natural law theory whereunder things are directed towards their optimum state of existence. The proximity and sociability of the human cosmos contains certain features which correspond to the so-called minimum content of natural law and which are indispensable for

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[209] *CL*, pp.206-207

[210] *CL*, pp.195, 205-207. See N. MacCormick "Natural Law and the Separation of Law and Morals", in R.P. George (ed.), *Natural Law Theory*, (Oxford, Clarendon Press, 1992), p.107, at p.109, where, comparing Finnis' account of natural law and positivism, he says: "But the positivistic theory I have in view yields just the same conclusion - the law is a valid law, but if the duties it imposes are duties in violation of the demands of justice, it will follow that the moral issue whether or not to comply is prima facie an open one."

[211] A.P. D'Entrèves, *Natural Law*, (London, Hutchison University Library, 1970), p.199: "In the end does Hart present natural law as a "central and privileged sphere of morality distinguished by its sacred and inviolable character?".

[212] *CL*, p.254

the aim of survival.[213] The observed contingent facts of human nature are: (i) human vulnerability; (ii) approximate equality; (iii) limited altruism; (iv) limited resources; (v) limited understanding. These traits of human existence are universal and ingrained in moral laws as well. To that extent, there is a certain correspondence and influence in the content of moral and legal rules. The truisms provide the reason, not the causes for the specific content of a rule and, hence, they resolve the "hoary perennial known as Natural Law versus Legal Positivism".[214]

Hart claims that the projection of survival as the aim of minimum natural law is attained by sociological inquiry, probably to avert criticism of discretion in his choice of an end. Survival as an aim is indisputable and easily acceptable even by the most vociferous critics of natural law. Human survival entails a reduction of the optimum content of law and appeals to a "common sense" approach. Maintaining the objectivity of choice is not sufficiently convincing. Hart appears dubious when he acknowledges that there are also ".....simpler, less philosophical, considerations than those which show acceptance of survival as an aim to be necessary ..... ."[215] Those other reasons place the choice under subjective scrutiny and positivism would be reluctant to countenance the implications.

First, the nature of the choice reveals a certain contingency with 20th century history infested with catastrophic wars and the nuclear threat. It is reminiscent of what Albert Camus once wrote: "One might think that a period which, in the space of fifty years, uproots, enslaves, or kills seventy million human

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[213] *CL*, pp.185-188:"Moreover, we can, in referring to survival, discard as too metaphysical for modern minds, the notion that this is something antecently fixed which men necessary desire because it is their proper goal or end. Instead we may hold it to be a mere contingent fact which could be otherwise, that in general men do desire to live, and that we may mean nothing more by calling survival a human goal or end than that men do desire it". And at p.176: "These simple facts constitute a core of indisputable truth in the doctrines of natural law."

[214] H.L.A. Hart, "Kelsen Visited", *U.C.L.A Law Rev.*, (1963), p.709. "The simple truisms we have discussed not only disclose the core of good sense in the doctrine of Natural Law. They are of vital importance for the understanding of law and morals, and they explain why the definition of the basic forms of these in purely formal terms, without reference to any specific content or social needs, has proven so inadequate ..... It is in this form that we should reply to the positivist thesis the "law may have any content". For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have". *CL*, pp.194-195

[215] *CL*, p.188

beings should be condemned out of hand".[216] Secondly, survival as a purposive end could only raise a multitude of questions. Is it strictly connected to individual or to group survival? If the latter, then individual survival might be occasionally compromised and the chain of argumentation is too dangerous to pursue. The other questions it may involve is what percentage of the population should survive and is the survival of some people the goal of society? Does it include the cultural or only the physical content of a society? Does it include the survival of humanity as a whole? Limited to individuals, it appears vague and abstract in many respects. If survival with the signification of maintaining life denotes what Aristotle refers to as "good life"[217] and Hobbes as "commodious living", it involves evaluative considerations that would be immediately rejected by positivism. Another objection refers to the incipient truisms which count for protean societies but not for modern ones which are more sophisticated. Modern societies pursue aims other than survival or a qualified notion of optimum survival. Acknowledging this evolution, the content of law should change.[218] Hart understates his case by adopting mere survival as the basic aim of societies. However, by adhering to such minimisation, he avoids the Scylla of natural transcendental theories and the Charydbis of absolute distinction.

**VII.3** *Minimum content of natural law and humanitarian intervention.* In order to recapitulate, Hart distils five features within social organisation which correspond to human qualities and are essential for survival. Human vulnerability and limited altruism are of particular interest for our case of humanitarian intervention. The first corresponds to restrictions on violence: "thou shalt not kill";[219] and the second is a measure of limited mutual benevolence. Men are not devils where rules would be impossible, nor angels where rules would be unnecessary. They exhibit altruism but they are driven also by self-interest. "As things are, human altruism is limited in range and

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[216] A. Camus, *The Rebel*, trans. A. Bower, (Harmondsworth, Penguin, 1962), p.11
[217] Aristotle, "Nicomachean Ethics", in J. Barnes (ed), *The Complete Works of Aristotle,* vol.II, (Princeton, Princeton University Press, 1984), 1095a (13) - 1096a (10), 1097a (15), 1096b (10), at pp.1730-1734
[218] M. Krygier, "The Concept of Law and Social Theory", 2 *Oxford J. Leg. Studies,* (1982), p.155, at pp.178-180
[219] *CL*, p.190

intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled".[220] The two are thus interconnected and form a system of mutual forbearance.

The above argument of limited altruism and immeasurable self-interest transmuted into international law echoes the positivist thesis of scepticism and eventually condemnation of humanitarian intervention. In other words, the legal evaluation of humanitarian actions contains a hard core of applying the non-intervention rule strictly, whilst the intervenors are suspected of selfishness. Hence, forbearance means non-intervention and secures the aim of survival. On the other hand, positivists also address instances whereby the notion of human compassion may "condone" such actions as in Bangladesh or Rwanda. In the jargon of international lawyers as it is presented in Chapter Five, mutual forbearance among states commends non-intervention in order to secure the aim of peace, which secures the aim of survival. The latter, however, is attained at the cost of condemning some people to extermination. We consider two instances: the case of genocide and of gross human rights violations endangering life. Forbearance as non-intervention may secure peace and survival "generally speaking", but not the survival of those threatened individuals. In that case, it is expected that minimum altruism would revolt.

The inherent contradiction between these two truisms has been successfully grasped by the Critical Legal Studies movement as we shall see in Chapter Four. In order to do justice to Hart, we should point out that he is not concerned with the content of the rules which arise from the minimum content of natural law or the consequences of his observations concerning the contingent facts of societal living. Nevertheless, we shall speculate on this fundamental question concerning the content of the rules. More specifically, we are going to speculate on the content of international rules which emanate from the truisms of altruism and forbearance. Our predictions would not differ considerably from the contemporary rules of international law. The U.N. Charter contains altruistic rules invoking human rights but also individualistic ones requiring forbearance. Moreover, because the survival of mankind as a

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[220] *CL*, p.192

whole is preponderant, the individualistic rules of non-intervention are given precedence. On the other hand, altruism is introduced by default as a component of forbearance.

The contradiction between altruism and forbearance is exacerbated by the lack of exceptions. Restriction on violence instructed by the first truism appears inconsistent with the aim of survival when a menacing attack has been inflicted upon an individual and the latter is precluded from resorting to force in self-defence. In international law, the case is tautological in regards to the right of self-defence, individual or collective, when the survival of the state is threatened. Minimum altruism, on the other hand, may justify coercion in order to vindicate survival. Abhorrent criminal policies or genocidal events such as those committed in Uganda, Kampuchea or Rwanda, could legitimise intervention in order to secure the survival of the indigenous population. A purposive, coercive action in that case derives from a sense of human affiliation which is the essence of altruism.

As it stands befuddled, Hart's minimum natural law content is transmogrified from empirical to cynical when he says that ".....though a society to be viable must offer some of its members a system of mutual forbearances, it need not, unfortunately, offer them to all."[221] By reserving forbearance to some members of a society, he affirms the viability of such a society but this is inadequate without certain criteria for evaluation. For example, South African society under apartheid was a society under the Hartian restrictive application, but the non-white majority conceived it otherwise. Hart uses interchangeably two concepts of society on a qualitative basis without defining their criteria. This static and regressive concept, however problematic its application appears in domestic societies, would not be inconsistent with attributing societal qualities to the international community, for the minimum standards do not cover the whole scope of international society. Consequently, mutual forbearance would not disclaim interventions by "advantageous" states against the "disadvantageous" ones. What Hart does not say is if, when, and how states or humans excluded from the umbrella of minimum protection could enter such

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[221] H.L.A. Hart, *The Concept of Law*, 2nd ed., (Oxford, Clarendon Press, 1994), p.201

status. We can only speculate, but the protection of human rights in a particular state appears to be a strong candidate for legitimising a regime and protecting it against intervention. This argumentation is reminiscent of John Rawls's qualitative selection of states in the original position which consequently determines the content of the principles of justice. As was maintained in the previous chapter, forbearance and non-intervention prevail among just states only. Unjust states do not participate in these principles.

Another point which needs more clarification is the right to resistance. Hart constricts the application of minimum protection without denying societal character to those formations. If in a particular society the morality of the majority or of the dominant group is imposed and contradicts the morality of the minority, do people excluded from protection have the right to resist in order either to enforce the expansion of the minimum protection upon themselves, or to realise their ultimate end of survival when it is threatened? If the offered minimum protection degenerates into oppression, do the laws which clash with the minimum content still hold the quality of laws or are they repelled? If they are valid, however iniquitous, does the population have the right to resist?

**VII.4** *Hart on international law as custom and humanitarian intervention.* Concerning international law, Hart proceeds with a double denial. First, he denies Austin's description that international law is "positive morality" and also he denies the existence of a *Grundnorm*.[222] As we said above, Kelsen's approach is influenced by his striving to achieve legal unity and by a philosophical predisposition towards universal aspiration. His system therefore is vertical with international law at the apex. Hart's international structure is horizontal, centripetal, developed through state interaction. States find in their activities common grounds which elevate into legal propositions[223] and therefore Hart's system is more flexible than Kelsen's because it enables a

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[222] *CL*, pp.230-231: "Again once we emancipate ourselves from the assumption that international law must contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states? .....but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties".

[223] J. Cohen, "The Political Element in Legal Theory: A Look at Kelsen's Pure Theory", 88 *Yale L.J.*, (1978), p.1, at pp.30-31

multitude of rules to be established by state practice at different levels, whereas Kelsen's model is singular.

International law, as a primitive system, contains only the primary rules and does not enjoy the promotional function a rule of recognition ascribes to.[224] Being an embryonic system, one should look at the binding force of the rules, that is, whether those rules are accepted and observed. Lacking a validating rule of recognition, the binding force of international rules is similar to the rules of the game. A state, playing according to the rules of the game, implicitly accepts those rules and also the rules which are formulated as legal propositions from the relevant practice. The rules are legal distillations of crystallised practices and consequently are binding: "International law in the usual terminology of international lawyers is a set of customary rules of which the rule giving binding force to treaties is one".[225] The only aspirational reference in this rudimentary exposition concerns treaties as a putative rule of recognition.[226]

Three points should be further elaborated concerning his concept of international law and their relation to humanitarian intervention. One concerns the role of custom in his system and its relation to humanitarian intervention. The second is the bridging of "is" and "ought" propositions, which elevates the practice of humanitarian intervention into a normative rule. The third concerns his concept of international law and the institutional comparison with municipal law.

Hart considers the international legal system as a pre-legal system where, similar to primitive communities, ".....the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterised rules of obligation. A social structure of this kind is often referred to as one of "custom".....".[227] Employing

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[224] *CL*, p.209: "The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation ..... ."
[225] *CL*, p.228
[226] *CL*, p.231: "Perhaps international law is at present in a state of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system."
[227] *CL*, p.89 and p.106: "The statement that a rule exists may no longer be what it was in the simple case of customary rules - an external statement of the fact that a certain mode of behavior was generally accepted as a standard in practice"

anthropological inquiries, he argues that custom or "the standard modes of behaviour" is the central point for legal reference in legally primitive societies. The similarities with Kelsen's position that "States should behave as they have customarily behaved" are rather obvious. Notwithstanding, he criticises this proposition as a "reduplication of the fact that a set of rules are accepted by states".[228]

His negative attitude stems probably from a distaste for abstractions and his inclination towards a pragmatic "medium" line. A second reason, apart from this general attitude, is that he regards international law as a primitive system through an inappropriate and unnecessary institutional comparison with municipal systems, following a common theoretical trend. According to his legal exposition, it could only have primary rules, not secondary ones which are appropriate for more advanced systems. Admitting the existence of secondary rules would deny verity to his system. Nevertheless, primitive societies also contain some elements which Hart attributes to developed ones and have a legal content.[229] For this instance, we are going to show the association of the "standard modes of behaviour" and treaties. Hart suggests multilateral treaties should become a rule of recognition which "would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states".[230] Under such transformation, the formal similarities between international and municipal law would become strong enough for the former to be recognised as law.

This position shows a dubious foundation in philosophical reasoning and additionally an inappropriate and unnecessary comparison of two different fields. It has other implications as well. Treaties are legislative acts of states. They may represent state practice hardened into legal words and they also may extend to non-parties by attributing customary character to that treaty or to some of its provisions.[231] If treaties become the rule of recognition for Hart, it

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[228] *CL*, p.230

[229] S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology*, (Harmondsworth, Penguin, 1979)

[230] *CL*, p.231

[231] I. Brownlie speaking of "law-creating" treaties says that such treaties may produce a law-creating effect as strong as that of "general practice considered sufficient to support customary

is because of his longing for a legislative system similar to the municipal one. Explication of his treaty proposition directs us to simpler, more familiar notions, such as custom, or the "standard modes of behaviour" and of course back to Kelsen's *Grundnorm*. Hart derives "ought" propositions from "is" statements. He observes the practice of states and finds the mooring points which become the "ought" propositions of international law. It is ironic to say that Hart "reduplicated" Kelsen's *Grundnorm*, rendering a disservice at the same time to international law on three accounts. He denies the existence of a *Grundnorm*, which, even for him is custom; secondly, he attributes a legal character to international law only at the cost of reducing it to primitiveness; and finally he blurs the distinction between international and municipal law with conceptual consequences. In order to recapitulate, the Hartian jurisprudence allows two antithetical constructions concerning international law: a primitive order or a developed system with treaties as the rule of recognition. Behind both constructions resides the element of custom. Kelsen acknowledged this in the articulation of the *Grundnorm*, whereas Hart dithers. On both grounds, Kelsenian or Hartian, humanitarian intervention as customary rule is justified.

**VII.5** *International law as law containing secondary rules*[232] *and humanitarian intervention.* The final observation concerns the presumption that international law is a primitive system. The secondary rules in Hart's system remedy the defects of the primary rules with regard to their ascertainment, alteration and enforcement. They are the "rule(s) of recognition"; "the rules of change" and "rules of adjudication" whereas the union of primary and secondary rules is essential for legal quality.[233] Hart's view of international law - more progressive than Austin's whose legal exposition he refines - is still fragmentary and leans towards the superficial. In international law, the secondary rules refer to the sources of international law

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rule. By their contact non - parties may accept the provisions of a multilateral convention as representing general international law". *Principles of Public International Law*, 4th ed., (Oxford, Oxford University Press, 1990), p.12. *North Sea Continental Shelf Cases, I.C.J. Rep.* (1969), p.3, at pp.32-41, paras.47-69

[232] K.C. Wellens, "Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends", 25 *Neth. Y.B.I.L.*, (1994), p.3

[233] *CL*, pp.78-79,90-96

which integrate the procedures for change, and to dispute settlement. The sources or rule of recognition are contained in Article 38 of the I.C.J.'s Statute. For treaties, identification and legal inclusion is contained in the 1969 Vienna Convention of the Law of Treaties. The global order is regulated by the U.N. Charter which contains primary rules, in particular those related to the use of force and self-defence, rules for law production, administration and change, and enforcement.

It is important to mention the particularised character of those rules, and whilst doing so we may consider that this special character was the reason they were overlooked by Hart. Contrary to domestic law, where the rules of recognition and change apply uniformly to all situations, international law is compartmentalised and the rules are defined by the area of application.[234] The subject-matter and the interests attached to a particular area determine the use of treaties or custom separately or concurrently as rules for recognition or change. The primary rule for the protection of human rights evidences an interplay of custom and codification. Its special subject-matter attached to state interest has procured a division of issues within the rule and exclusion of change concerning particular rights which are inalienable. The primary rule on the non-use of force is also influenced by customary and conventional law.

The procedure for change is more flexible than in domestic systems, depending on the circumstances, the inadequacy of the legal framework and the character of the participants. The enforcement of primary rules in international law is effectuated at two levels: structural and decentralised. The structural level contains the mechanisms provided in the U.N. Charter which involve the Security Council. The intervention of the latter traditionally concerns the primary rule on the use of force, but also recently the primary

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[234] A similar view of diversity is expressed by Myres McDougal: "..... the contemporary world arena exhibits no such international law or public order, effectively applied on a global scale. What we have instead is rather a variety of "international" laws and an anarchy of diverse, contending orders - orders proclaiming and embodying the values of human dignity in different degree, and aspiring to application and completion on many different scales of international, regional, and global compass". M.S. McDougal, "Perspectives for an International Law of Human Dignity", 53 *Proc. A.S.I.L.*, (1959), p.107, at pp.107-108. The difference in that approach of non uniformity concerns its foundation on political and cultural traits which are dissipated by the proffered methodology whereas in Hart's system is within the legal system.

rules on human rights.[235] The special character of international law permits also discretionary and decentralised modes of enforcement. The use of force in self-defence is an acknowledgement of this feature as well as the provision of sanctions. Those measures are regulated by convention and custom.[236] Concerning the primary rules on human rights, the subject-matter determines their conventional or customary enforcement. Humanitarian intervention could be practised as a customary sanction when there are gross violations of human rights.

We should now address a fundamental problem which affects the quality of international law as law in Hart's system. The secondary rules in international law are contingent to the subject-matter, the participants and the importance of primary rules. Consequently, they are inclusive and flexible. The crucial question is whether this particular feature negates international law. It is not a threat when the diversity of secondary rules is perceived cumulatively as guaranteeing the effectiveness of primary rules and of international law in general.[237]

A final observation with implications for the legality of humanitarian intervention concerns the primary rules on human rights and their practical and jurisprudential differentiation. There exists a "variable geometry" of fundamentality concerning human rights coupled with a reluctance to change them, as well as differentiation in the means of protection according to their seriousness. Certain rights, prominent among them the right to life, form the "core" of human rights and are considered absolute and non-derogative.[238] The

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[235] See S.C. Res. 688, U.N. SCOR, 2982nd mtg., (1991), concerning the Kurds in Iraq; G.A. Res. 182, U.N. GAOR, 46th Sess., U.N. Doc. A/Res/46/182 (1992) concerning humanitarian assistance; S.C. Res. 770, U.N. SCOR, 3106th mtg., U.N. Doc. S/RES/770 (1992), concerning humanitarian assistance to Bosnia; S.C. Res. 794, U.N. SCOR, 3145th mtg. U.N. Doc. S/RES/794 (1992), concerning Somalia

[236] Article 51 of the U.N. Charter; Article 60, para.5 of the 1969 Vienna Convention on the Law of Treaties.

[237] B. Simma, "Self-Contained Regimes", 16 *Neth. Y.B.I.L.*, (1985), p.111, at p.135

[238] Article 4 of the United Nations Covenant on Civil and Political Rights; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford, Clarendon Press, 1989), pp.193-194: "Most observers would also agree that the small, irreducible core of rights that are deemed non-derogable under the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights constitute fundamental, and perhaps even peremptory norms of international law."; *Case Concerning the Barcelona Traction, Light and Power Company, Limited, I.C.J. Rep.* (1970), p.3, at p.32: "..... the principles and rules concerning the basic rights of the human person" are considered *erga omnes* obligations.

legal ascertainment and integration of those rights, that is, the rule of recognition, is custom and convention. Their enforcement mechanisms should include consequently traditional and conventional modes. Humanitarian intervention is the primitive enforcement mechanism of a primary rule, which, at the second level, satisfies the differentiation element in those primary rules relating to content and degree. Humanitarian intervention only concerns the "hard core" of primary rules on human rights and situations when there are gross violations.

## VIII. TOWARDS A TENTATIVE CONCLUSION

Positivist thinking, under its different approaches, is still dominant in the theory of international law. In this chapter we presented the main representatives of this jurisprudence: the analytical school; Kelsen's pure theory and the modern reinterpretation of analytical and normative jurisprudence by Hart. We also presented the historical context - legal and political - which gave rise to positivism and in particular the works of Wolff and Vattel, who are considered to be the forefathers of this jurisprudential stance in international law. They first arrogated certain concepts of natural law such as equality, individualism, freedom, or the concept of an organised community in new interpretations which have become, since then, the bastion concepts of positivism in their restatement as state sovereignty and non-intervention.

Consequently, the observation that the concept of humanitarian intervention has not been dealt with systematically in the preceding exposition of positivist theory in international law will not come as a surprise. Later, in Chapters Five and Six dealing with the U.N. Charter and in particular with Articles 2(4) on the use of force and Article 51 on self-defence, we shall have the opportunity to unfold the performance of the positivist doctrine in the field of humanitarian intervention by dealing with certain cases.

At a more theoretical level, positivism is not concerned with humanitarian intervention or sometimes even with international law. Its definition of law as sanction-oriented could only deny legality to this area of law, as Austin has consciously done. Hart, on the other hand, revisiting the latter, has recognised international law as primitive, customary law. The most developed and comprehensive exposition is that of Kelsen's. He stands at the other end of the line above Austin's negation and Hart's lukewarm acceptance. For him, international law is a mature legal system; a hierarchical, enveloping system. However, he achieves this conclusion only by some dubious reasoning concerning the function of sanctions. As we observed above, war and reprisals are the pertinent sanctions in international law but this sounds aberrant. One would expect that humanitarian intervention would gain certain ground within such a detailed occupation with international law. It has not done so because Kelsen is not concerned with the detailed rules of the system as such, but with describing a legal system. He wants to know what law is and how it is produced, not whether there is a certain law and how it functions. Therefore, our references to humanitarian intervention in Kelsen's theory or in that of Austin and Hart are only by inference. These inferences try to argue from within their legal theories and their structure in relation to humanitarian intervention. Our purpose was to show that these systems are not as closed as believed and that they offer room to argue for humanitarian actions.

In the next chapter we are going to deal with the policy school, which stands at the opposite pillar of Kelsen's decantated theory, by being invested with all these elements which Kelsen attempted to rescue legal theory therefrom and also is more explicit in its sociological and behavioural attitudes than Hart's tepid jurisprudence.

# CHAPTER THREE

# THE POLICY-ORIENTED SCHOOL IN INTERNATIONAL LAW AND HUMANITARIAN INTERVENTION

*The development of the policy-oriented school as a reaction to legal formalism - the main jurisprudential characteristics of this school - a critique of its tenets - a critique of its ideological principles - an articulation of humanitarian intervention within the jurisprudential and ideological tenets of this school.*

## I. THE ORIGINS OF THE POLICY-ORIENTED SCHOOL AND ITS PREMISES CONCERNING INTERNATIONAL LAW

**I.1** *The Realist Movement.* The realist school of law has emerged as a reaction to traditional jurisprudence, and in particular positivist formalism.[1] The latter which had preoccupied legal thinking since the 19th century, had consummated its ability to address the new problems facing the world. In this environment, the realist school developed its tools for a functional interpretation of legal phenomena within their social context. As a reaction to the positivist theories, the realists displayed scepticism towards legal rules, and also, according to another aspect of that movement, scepticism towards the facts.[2] That scepticism could be enveloped in the conviction of the indeterminacy and inadequacy of legal rules to provide viable answers to

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[1] N. Duxbury, *Patterns of American Jurisprudence,* (Oxford, Clarendon Press, 1995), chs.1,2

[2] J. Frank, *Law and the Modern Mind,* (Gloucester, Mass., Peter Smith, 1970; orig. publ. 1930); W.E. Rumble, *American Legal Realism: Scepticism, Reform, and the Judicial Process,* (Ithaca, N.Y., Cornell University Press, 1968)

social phenomena. The belief in the inadequacy of rules is also a main tenet of the Critical Legal Studies movement. However, the policy-school, as an evolution from realism, succeeds in projecting a scheme for legal explication and does not confine itself only to a demonstration and critique of the latter. In this regard, the policy-school also differs from mainstream realism which put emphasis on the social effects of law, whilst it proved prudish about projecting a larger vision.[3]

**I.2** *The emergence of the policy-school and its international law tenets* The policy-oriented school emerged from a sense of dissatisfaction concerning the perceived lapses of the other jurisprudential schools, realism included.[4] This disenchantment induced McDougal to formulate a liberal purposive theory by "unremitting efforts to apply the best existing scientific knowledge to solve the policy problems of all our communities."[5] International law is perceived as a process of authoritative decisions for achieving a minimum order of restricting coercion and an optimum order of achieving human dignity, that is, the wider allocation of the separate values which comprise the ultimate value of human dignity.[6]

The factor which propagated a theory of international law arrogating indices from other disciplines, and which would present a theory for legal development instead of legal description,[7] was the exploration of certain

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[3] K.N. Llewellyn, "Some Realism about Realism-Responding to Dean Pound", 44 *Harvard L.Rev.*, (1930-31), p.1222. One of the most persistent critics of Realism is Roscoe Pound for whom, realism "eliminate[s] from its science of law all question of what ought to be, all disputes as to canons of value, ....". R. Pound, "The Future of Law", 47 *Yale L.J.*, (1937), p.1, at p.6. Also, realism "is essentially an art that cultivates the ugly ..... in jurisprudence it is the cult of what we always supposed abnormal". R. Pound, "Modern Administrative Law", 51 *Reports of the Virginia State Bar Association*, (1939), p.372, at p.385

[4] "McDougal had a doubly negative orientation: he was dissatisfied with traditional jurisprudence; he was disenchanted with American legal realists. He at once received the possibilities of a comprehensive, affirmative and empirical method". H.D. Lasswell, "In Collaboration with McDougal", 1 *Denver J.I.L &Pol.*, (1971), p.17, at p.17

[5] M.S. McDougal, "The Law School of the Future: From Legal Realism to Policy Science in the World Community", 56 *Yale L.J.*, (1946-47), p.1345, at p.1349

[6] Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy Oriented Perspective*, (New Haven, Yale University Press, 1989), p.4

[7] R. Pound, "Philosophical Theory and International Law", 1 *Bibliotheca Visseriana*, (Leyden, 1923), p.71, at p.89: "But we may demand of him (jurist of the immediate future) a legal philosophy that shall take account of the social psychology, the economics, the sociology as well as the law and politics of today, that shall enable international law to take in what it requires from without, that hall give us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition".

trends in humanity. Those trends were the rising demand of people for greater sharing of values and security, the interdependence of human beings, the inclination towards the realisation of an affluent free society and finally the inadequacies of contemporary theories to respond sufficiently.[8] The social factors which generate law and their study underlines the sociological trend in policy-school's jurisprudence and also reminds us of the Hartian descriptive sociology. The parallels are, though, limited. Hart identifies the truisms but not the content of the law, whereas the policy-school expands the spectrum of law towards its teleology.

Positivism is inadequate to apprehend and engulf the inexorable non-legal features of a rule, by insisting on understanding law as a system of rules, and also in the distinction between the *lex lata* and *lex ferenda*. This is characterised as the "normative ambiguity" of rules, because under an innocent insistence of univocalism lies a commingled statement of preferences and facts.[9] The policy-school transcends the illusory distinction between *lex lata* and *lex ferenda* by advocating an intermingling of the two. Law as process is simultaneously concerned with rules, values, aspirations and suitable choices. Hence the dichotomy evaporates in a non rule-oriented jurisprudence.

The other pillar of the policy-school's criticism is realism, or the "pure theory of power". By emphasising naked power realists misconceive the function of law. For the policy-school law is instead a process of authority and control. Absence of those ingredients transforms law either into an illusion or naked power.

The major premises of the school's conceptual thinking concerning international law could be adumbrated in the following propositions. International law exhibits a high degree of decentralisation, with the national states as the main components of the system. The nation-states, through their

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[8] M.S. McDougal, "International Law, Power and Policy: A Contemporary Conception", 82 *R.C.*, (1953 I), p.133, at pp.137-191, hereinafter cited as *Power and Policy*

[9] H.D. Lasswell, M.S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest", 52 *Yale L.J.*, (1943), p.203, at pp.266-272, in part. p.267: "..... a speaker may conceal his own preference or volition on contentious matters and increase the attention paid to what he says by enunciating norms whose sponsor appears to transcend the speaker.".

officials, dispense a double function in international law similar to Georges Scelle's *dédoublement fonctionnel*. The state actors, in the absence of a centralised valuator authority, are simultaneously claimants in the international process and authoritative interpreters of their actions and the actions of other claimants.[10] Because law, for the policy-school, consists of authoritative decisions, it seems that the "authority elites" are performing the function of international legislation, adjudication and enforcement which happens indistinguishably in the domestic or international plain. Also, whereas states are perceived as the exclusive participants in the decentralised field of international law, the world exhibits an inexorable interdependence which is evidenced even within the smaller components of the community.

**I.3** *The policy-school's critique of positivist thinking.* Having described the plan for interaction, the policy-school proceeds in demonstrating the inadequacies of established theories when attempting to manage the problems of the social process of international law. The positivist school is lamented for its unjustified credence in the omnipotence of rules, its dogmatism and formalism. The rules-oriented school of international law exhibits a delusory self-sufficiency and inner logic which becomes precarious when mechanical application is abandoned. In addition to the legal rigidity a strict rule application exhibits, it is also devoid of a conscious deliberation of other aspects related to the rules. Rules show indeterminacy in meaning and appear in complementary sets. The application of a rule is hence not mechanical but involves consideration of wider perspectives, the included values and those aspired to. The application of a certain rule therefore requires an intellectual employment which positivism renders unnecessary. It requires an exploration of the values inherited in the rules, and those a purposive legal system would serve. This intellectual task could not be neutral, as positivism claims by an illusory submission of choices and values to the unemotive power of past decisions. Positivism offers a thin disguise to the policy choices involved in the application of rules, maintaining a procedural rigidity that denies any legal

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[10] Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy Oriented Perspective*, (New Haven, Yale University Press, 1989), p.9. For the concept of *dédoublement fonctionnel*, *see* G. Scelle, "Règles générales du droit de la paix", 46 *R.C.*, (1933 IV), p.331

system including international law the dynamism necessary for its application. The choices, however, should be made explicit by exploration of the consistent trends in community values, and the decision-maker should be informed by the ultimate considerations of the legal system of which he is a component. The sanctification of past decisions becomes incongruous in an ever-changing world, and condemns creativity. In addition, positivism, by insisting on an automatic application of rules for dispute resolution, overlooks the fact that rules are complementary and that a situation does not invoke automatically the application of a certain rule without evaluation of the facts. A factual instance of aggression does not place it automatically within the framework of Article 2(4) of the U.N. Charter, irrespective of the evaluation of events as either aggression, self-defence, reprisals or justified intervention.

A rule-obsession obfuscates the normative ambiguity of rules, which contain in their framework a stabilised component of past decision, an aspirational component of future decisions and also an evaluative one of preferred decisions. Non-intervention may be a descriptive statement of operative facts, or a statement of evaluative or wishful importance. The policy-school attempts to find an answer to these problems by constructing a theory *about* law and not *of* law. These theorists start from the insights of the realist movement in the U.S.A but surpass its limits by delineating a purposive theory, which recognises law as an instrument for the achievement of wider values aggregated in the ultimate value of human dignity. Law becomes a process of authoritative decisions and control, thus breaking with the tradition of rigid, automatic rules and attributing a degree of flexibility and creativity to legal systems. It is easy in this framework to trace the reasons for criticism. The stabilising and impartial function of rules is replaced by choiceness and partiality. Law is intermingled with power, policy or social aspirations. The criticism, however, resides either in misinterpretation or misunderstanding of the policy-school. The latter could be better described as a reconciliation of power and authority, of "is" and "ought". The dichotomy perpetuated by

positivism is overcome by ingeniously performing the policy methodology and clarifying the values.[11]

In a nutshell, "the policy-oriented approach is contextual, problem-solving, and multimethod in nature".[12] It is multimethod because it is enriched with the insights of other disciplines in the social sciences. It is problem-solving because it provides the framework for a purposive usage of law as an instrument for value optimisation, and also it is contextual, through taking cognisance of the relevant social context.

## II. THE POLICY FRAMEWORK

**II.1** *The framework.* As said previously, the policy-oriented school, contrary to realism's philosophical disorganisation, offers a framework for application. We are going to present their proposals and then demonstrate the merits and limitations of that framework. In the end, we will try to adapt humanitarian intervention in that expositional framework and also evaluate its place within the broader ideological commands of the policy-oriented school. The policy-oriented approach should include:[13]

**II.2** *The establishment of an observational standpoint.* The observer should acquire a standpoint which is detached from the events he is scrutinising. The observer should be freed from the subjectiveness of his position in the social process, of which he is both participant and scrutiniser. The distinctiveness of the observer's standpoint liberates him from the parochial interests which could heavily affect his evaluation. The suggested observational point is that of the citizen of humankind, which assists in diagnosing the interests and values of the world community.

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[11] R. Higgins, *Problems and Process: International Law and How We Use It,* (Oxford, Clarendon Press, 1994), ch.1, pp.1-16

[12] Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy Oriented Perspective,* (New Haven, Yale University Press, 1989), p.15

[13] M.S. McDougal, W.M. Reisman, "International Law in Policy-Oriented Perspective", in R.St.J. MacDonald, D.M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory,* (Dordrecht, M. Nijhoff, 1983), p.103

**II.3** *The formulation of problems.* The policy-school offers a comprehensive categorisation of problems which overshadow the parochial biases of individual cultures. The identification of problems is achieved by locating the disparities between human values and their actualisation. This categorisation assists in performing the intellectual tasks for policy decisions by delimiting the field of particular inquiries into the approximation of policies to values. The values identified are: respect; power; enlightenment; well-being; wealth; skill; affection; rectitude. In order to make the inquiry sufficient, these values are supplemented with institutional devices such as participation; perspectives; situations; base values; outcomes.

**II.4** *The delimitation of the focus of inquiry.* The focus of inquiry is the authoritative decisions which, according to the policy-school, count as the law. The decisions should be both authoritative, that is, correspond to peoples' expectations of authority, and also controlling, that is, effectively applied. Lack of those two factors casts law into disrepute or transforms it into naked power. The definition of authority as securing the common interests of people, transmuted into the international arena, implies a comprehensive understanding of mankind's interdependent interests.

The authoritative decision, on the other hand, consists of constitutive and public order decisions. The former establish the authoritative decisions by performing seven functions: intelligence; promotion; prescription; invocation; application; termination and appraisal. The public order decisions emanate from the constitutive process and are directed towards achieving the community values. For international law, a wider perception of the relevant intellectual tasks is essential and also a study of the interplay between the national and international arenas.

**II.5** *The explicit postulation of public order goals.* The policy-school postulates the goal of human dignity. That goal is not arbitrary but the distillation of the contingent values of all cultures and civilisations. The difference from existing theories, though, is that the goal is now postulated and not derived by mental exercises into practices and ideologies.

Another difference is the abrasive and open manner in which human dignity is postulated, contrary to the value timidity and implicitness of existing theories. The postulated value of human dignity in international law assists in reconciling the dichotomy which has plagued international law - that between justice and order. The hierarchical opposition between those two postulates has obscured the real question of appraising policies. Human dignity is the indication for testing whether the formulations of public or just order are responding to that ultimate criterion. Human dignity includes polymerous justificatory modes; metaphysical, religious or intellectual. This goal also demonstrates diversification in its realisation.

**II.6** *The performance of intellectual tasks.* The legal task in a policy context extends beyond the traditional legal investigation into logical derivation and application towards the clarification of goals, description of past decisional trends, analysis of the factors which affect decisions, projection of future trends and also invention and evaluation of policy alternatives.

Adherence to that framework of inquiry offers the best device for value optimisation and in particular the achievement of the value of human dignity, by scrupulous investigation into the dynamics of international interaction. This conceptual project, however, is deficient in many respects and we shall proceed now with the exposition of the intellectual frailties of such a project before we discuss the place of humanitarian intervention therein.

## III. A CRITIQUE OF THE FRAMEWORK

**III.1** *The conception of law.* As already pointed out, McDougal was influenced by realism's criticism of legal formalism. It has been commented that legal realism emerged as a "revolt against formalism".[14] For McDougal, the most fundamental obscurity in contemporary theory about international law is the "..... over-emphasis, by most writers and many decision-makers, upon the potentialities of technical "legal" rules, unrelated to policies, as factors and instruments in the guiding and shaping of decisions.....".[15] Thus, McDougal shares in common with the realist movement a distrust towards the normativity of rules. However, he adopts a dynamic and functional approach to law as a medium for social projection and realisation of values and policies, achieved through a thorough examination and appreciation of the social process.[16]

Kelsen's Pure Theory of Law is a prime target because it engages the jurist only in a "syntactic clarification" of the rule by retaining the distinctiveness of the legal profession.[17] Counterposed to this is an intermingling of law with policy, whereby rules are constantly redefined and reformulated in the context of reappraised situations.[18] In a realist system, the function of rules, instead of being one of automation, is "to serve as summary indices to relevant crystallised community expectations, and, hence to permit creative and adaptive, instead of arbitrary and irrational, decisions."[19] Any hint of

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[14] W. Twining, "The Significance of Realism", in *Lloyd's Introduction to Jurisprudence*, M.D.A. Freeman (ed.), 6th ed., (London, Sweet & Maxwell, 1994), p.723

[15] *Power and Policy*, p.143

[16] "The life of law has not been logic but experience". O.W. Holmes, *The Common Law*, (Boston, Little, Brown, 1881), p.1; K.N. Llewellyn, "Some Realism about Realism", in *Jurisprudence: Realism in Theory and Practice*, (Chicago, University of Chicago Press, 1962), p.42, at pp.55-57: "..... [a] conception of law in flux, of moving law ..... . An Insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects".

[17] M.S. McDougal, H.D. Lasswell, M.W. Reisman, "Theories about International Law: Prologue to a Configurative Jurisprudence", 8 *Va. J.I.L.*, (1968), p.188, at p.243

[18] *Power and Policy*, *supra*, note 8, p.156

[19] M.S. McDougal, F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (New Haven, Yale University Press, 1961), p.57

subjectivity is dispersed by a systematic use of the methodology and by the fact that choice is inevitable even within "neutral" rules.[20]

Associated with this is the belief in the indeterminacy of legal rules.[21] This contains two interrelated aspects. A rule derives its existence and validity from its attachment to the expectations of a particular community. The test of validity is similar to that of customary law. An aggregate of shared perspectives and a material conformity should be ingrained in that rule.[22] The ever-changing social context induces a continual process of evaluation and identification of perspectives and actualisation.[23] Law, as a mergence of community shared expectations and operations, is homocentric because it pre-empts explicit value identifications and choices. This human derivability is contrary to the transcendental identifications of natural law or the logical theoretical abstractions of positivism. Whereas for Kelsen intrusion of values would interfere with the purity of the project, Hart, on the other hand, starting from a sketchy sociological position and concerned with linguistics, proceeds in a lukewarm acknowledgement of shared perspectives or "assumed common human objectives" approximating to McDougal.[24]

Secondly, the intrinsic indeterminacy as the outcome of the contextual formation of rules is exhibited in form by the imprecise terminology and the complementary itinerary of rules.[25] The indeterminacy and normative ambiguity of rules is indeed accentuated in a decentralised and polymorphic system, and thus it could be detrimental to the essence of international law if it is viewed as an open-ended process. Contrary to realism, the policy-school

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[20] H. Lauterpacht, *The Development of International Law by the International Court,* (London, Stevens & Sons, 1958), p.399; R. Higgins, "Integrations of Authority and Control: Trends in the Literature of International Law and International Relations", in W.M. Reisman and B.H. Weston, (eds.), *Towards World Order and Human Dignity,* (N.Y., Free Press, 1976), p.79, at p.85

[21] R.A. Falk, *Legal Order in a Violent World,* (Princeton, Princeton University Press, 1968), p.501: "..... indeterminacy to be an all - pervasive attribute of legal process".

[22] J.J. Paust, "The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen and McDougal - Lasswell", 52 *Temple L.Q.,* (1979), p.9, at p.15: "Without shared perspectives behind them, an opinio juris at their base, formal rules will not reflect law but something else".

[23] R.A. Falk, *Legal Order in a Violent World,* (Princeton, Princeton University Press, 1968), p.89: "..... McDougal sacrifices too many of the stabilising benefits of a rule-oriented approach to international law by stressing policy flexibility".

[24] H.L.A. Hart, "Positivism and the Separation of Law and Morals", 71 *Harvard L.Rev.,* (1958), p.593, at p.628

[25] "travel in pairs of opposites", *Power and Policy, supra,* note 8, p.156

defies the uncertainty of such an approach by providing an intellectual framework for the "neutral" scientific identification of the change. For them, a scientific and methodological enquiry into the social context could assist in the identification of values.[26] The distillation of those subjectivities requires a coherent mapping of context beyond Hart's partial exploration of the assumed common human objectives. The policy-school proceeds, though, from an empirical identification of values to an abstraction - human dignity - similar to that of Kelsen's abstraction of the Basic Norm from an empirical observation.[27]

The point of divergence with Kelsen is that the policy-school does not through reliance on pure norms escape from but instead recognises the function of values in guiding our perception of law.[28] Kelsen, as highlighted above, observes the social context in order to designate his Basic Norm but he conceals the extent of the exercise by insisting in measuring only the degree of experience. This is not a comprehensive exploration because it attempts to ignore the subjectivity inherent in the experience. Past practice incorporates values and one should extricate those values in order to evaluate their conformity with present practice. An illusive insistence on existence has the defect of exploring only partially the experience and also lacks the indices for comparing values for present purposes. Another defect is the potentiality of characterising as law a consistent distorted practice, which lacks community perspectives, or of denying the attribute of law to a pattern of expectations. For instance, interventions are historically repetitive and occur under multiple perspectives, communal or parochial. Therefore, a myopic measurement may provide them with a legal attribute due to the distorted or elliptical apprehension of the community expectations. On the other hand, one may deny or ignore a consistent pattern of conduct with consistent perspectives as

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[26] "..... to focus attention on the necessity of goal definition and to make final choices explicit for appraisal by others.....". J.N. Moore, "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell", 54 *Va. L.Rev.*, (1968), p.662, at pp.676-677

[27] *Ibid.*, p.676: "The policy plugged into the system is largely independent of the system".

[28] J. Dewey, *The Public and its Problems*, (N.Y., Holt & Co., 1927), pp.175-176: "The glorification of "pure science" is a rationalisation of an escape.....".

with humanitarian intervention because of a general negation of the conduct.[29] Hence an exploration is suggested of past practice and perspectives concerning humanitarian intervention and their evaluation with the extant perspectives of present context. The method of enquiry, then, assists in the exploration of humanity's demands[30] by delimiting personal preferences and avoiding the mixture of personal and communal perspectives that occurs in natural law.

Any criticism concerns the claimed scientific character of the method. It is the impossibility of practical, not conceptual, disassociation of empirical observation from the values sought. The theoretical or empirical justification of certain values presupposes the embedment of those values in the suggested schedule for observation. Failure to vindicate these values as the outcome of enquiry implies that the framework cannot be maintained. On the contrary, continual affirmation of the same value outcomes evidences the surreptitious inclusion of those values into the structure.[31] The framework of enquiry and the observer are not thus neutral, contrary to the affirmations of the policy-school. The values cannot be perceived as external to the enquiry unless we proceed, as Kelsen did, in an illusory abstraction. The consistency of McDougal's framework in reproducing the value of human dignity indicates that this value is inherent in the mode of enquiry.

It is ironic that Kelsen's cognitive approach to the legal system, advertised as procuring "exactness and objectivity" for scholarly inquiry[32], is embedded with human values and choices. Kelsen escapes the exploration of the latter by resorting to conclusive statements which make redundant the need for a methodological framework. But when Kelsen requires the external observer to

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[29] Hart nearly admits that when he says that otherwise "In so doing, one will miss out a whole dimension of the social life of those whom he is watching.....". H.L.A. Hart, *The Concept of Law*, (Oxford, Clarendon Press, 1961), p.87, hereinafter cited as *CL*

[30] M.S. McDougal, "International Law and Social Science: A Mild Plea in Avoidance", 66 *A.J.I.L.*, (1972), p.77, at p.79: "The realist question is whether these choices are to be made by the criteria of mysticism or obscurantism or by theory and procedures designed best to promote long-term aggregate common interest. It is a layman's fantasy to hope that some set of words can be found to make choice easy or automatic".

[31] C. Taylor, *Philosophy and the Human Sciences*, vol.II, (Cambridge, Cambridge University Press, 1985), pp.75, 77-81

[32] H. Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", 55 *Harvard L.Rev.*, (1941), p.44, at p.47

identify the social and legal context in order to extract the Basic Norm, that excursus, although cognitive, is charged with subjectivities and additionally it lacks the methodology for a systematic articulation.

A point where Kelsen, Hart and McDougal meet in different degrees is the issue of shared legal expectations. Although for Kelsen normativity is derived from the law creators, the objective meaning of a norm involves the subjectivities of the law creator, the specific actor and that of "a third individual not involved in the relation between the two".[33] This is a peculiar sociological observation, particularly when the validity of the act is still affirmed although the perspectives of those persons have changed. In this instance, Kelsen includes patterns of authority in his consideration of patterns of control. For Hart, there must be a general acceptance of the rule and also an internal aspect[34] evidenced in criticisms towards deviatory behaviour: "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great".[35] These features - "acceptance", "pressure"- may persuasively denote "volition", that is, preferences towards certain ends.[36] By linking norms to societal commands, Hart admits the formative role of societal expectations. However, he does not acknowledge the fact that the subjectivities may change and his system does not provide the tools for handling these inquiries as McDougal's does. On the other hand, Hart's mature legal system is equally hierarchically oriented as Kelsen's, by constricting the internal aspect solely to the officials.

We have already spoken about the validity of a rule according to the policy-school and its differences or affinities with the Kelsenian or Hartian approach. Another issue which should be contemplated is that of its binding character. McDougal is explicit in his preference for "effective control" instead of

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[33] H. Kelsen, *The Pure Theory of Law,* Max Knight trans. (Berkeley, Calif., University of California Press, 1967), p.7

[34] *CL*, p.55; N. MacCormick, *H.L.A. Hart*, (Stanford, Stanford University Press, 1981), p.25, and chs.3,4

[35] *CL*, p.84

[36] N. MacCormick, *H.L.A. Hart*, (Stanford, Stanford University Press, 1981), pp.33-34; J. Finnis, *Natural Law and Natural Rights*, (Oxford, Oxford University Press, 1980), Chapters 3-4

"formal authority" which is refuted as "mystical".[37] The antithesis to Kelsen is not so absolute as it *prima facie* appears, because they both make or imply concessions towards the other aspect of the distinction. We have already explained how Kelsen inserts the criterion of effectiveness, which in a formal-normative system implies actualisation. In this regard, McDougal approximates to Kelsen, because effective control may well imply sanction, which is a *conditio sine qua non* for legality according to Kelsen. The difference is that McDougal includes a multitude of parameters in his articulation of effective control, of which actual sanction is only one element.[38] On this issue, Kelsen's exposition is confusing and permits different interpretations. Effectiveness can mean actual sanction or normative sanction, an 'ought'. On the other hand, McDougal says that community expectations may produce effectiveness and detaches international law from actual sanction, thus assimilating it with Hart's acceptance of rules by the community.[39] One can reverse the argument and ask whether sanction is a prerequisite for the formation of community expectations. This brief exposition shows, however, that a caricature of these jurisprudential schools emphasises their disparateness, whereas a more sagacious approach can eventually expose their links.

**III.2** *The process of decision-making: Participants.* As stated above, McDougal, in order to describe the decisional process, offers an economical indication of the features of such decisions. Participants are "..... an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subjected to claims".[40] McDougal rectifies the persistent injustice in international law of considering the states as exclusive participants in the world constitutive process, and projects the

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[37] *Power and Policy*, pp.185,194-198

[38] M.S. McDougal, W.M. Reisman, "International Law in Policy-Oriented Perspective", in R.St.J. MacDonald, D.M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, (Dordrecht, M. Nijhoff, 1983), p.103, at pp.104-106

[39] J.L. Brierly, *The Law of Nations*, 6th ed. rev. by C.H.M. Waldock, (Oxford, Clarendon Press, 1963), p.52: "..... is observed, not because it has been consented to, but because it is believed to be binding, .....".

[40] M.S. McDougal, H.D. Lasswell, W.M. Reisman, "The World Constitutive Process of Authoritative Decision", in R.A. Falk, C.E. Black, *The Future of the International Legal Order*, vol.1, (Princeton, Princeton University Press, 1969), p.73, at p.81

individual into the equation. The recognition of the individual as a participant in the process of authoritative decision-making transcends the traditional controversy concerning the subjects of international law.[41] It is presented as a consequence of the values shared by the author and also a component of his scientific framework. The international movement of human rights is crucial for that conceptual change and has proved subversive to the dominance of states.

McDougal humanised and democratised the decisional process not only by admitting values but also by defusing the participants therein. Kelsen has equated authority with sanctions and the law creators.[42] This shows a predisposition towards authority, but again it does not escape the emotive element. Hence, a large deal of subjectivities are incorporated in the pure theory; namely, those predominant within the elites, as opposed to those shared by the community.

The criticisms levelled at McDougal, that he is transmitting his conceptual standing, his values into the empirical field, that is, the framework of enquiry, would now appear less fervent. The dominance of the state in practice and in legal thinking made any proposals for elevating individuals appear either subversive or wishful thinking. Now, individuals are not extraneous to the world process. The criticism would be valid if it referred to a certain abstraction in the framework, or to the failure to elucidate which values the decision-makers hold. McDougal states the participants in a descriptive mode, without articulating further their interdependencies and their implications in the system. On the other hand, there is the presumption that participants, and in particular decision-makers, share the postulated values. Otherwise, they may opt for other values. Before assuming that they hold values, we should answer a more cardinal question of whether they see law as a system of rule or as a process.

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[41] M.S. McDougal, "Review of Hersch Lauterpacht's *International Law and Human Rights*", 60 *Yale L.J.*, (1951), p.1051, at p.1055: "..... the whole controversy about the "subjects" of international law might be more explicitly recognised as a verbalistic quagmire.".

[42] H. Kelsen, *Principles of International Law*, 2nd ed., R.W. Tucker (ed.), (N.Y., Holt, Rinehart & Winson, 1966), pp.410-411: '..... the contents of the norms must be determined by acts of authorised individuals ..... . They are valid if they are created in this way, ..... whatever their contents may be".

**III.3** *Base-values - strategies.* McDougal is concerned with the operational or interpersonal definition of base values. This includes, firstly, the establishment of a constitutive relationship between the participants in the world arena and, secondly, the proportionality of exclusive and inclusive jurisdiction. In relation to the first aspect, he establishes a consensual and procedural system. The enumeration of the values of human dignity as power, respect, enlightenment, wealth, well-being, skill, affection and rectitude rephrases the content of existing human rights instruments and, hence, enables these values to be "identi[fied] with the whole of humankind".[43] What is implicit in McDougal's theory is that reasonable people would agree on these values and, hence, a connection with Rawls could be founded. Rawls derives the primary goods, which establish the principles of justice, from reason. Dworkin's observation concerning Rawls's theory that it entails "choice conditions ..... constructed so as to reflect ..... principles of reasonableness suited to the political culture of Western liberal democracies" is an accurate analysis addressed also to McDougal.[44]

Concerning the second dimension of the operational definition of bases and under the guiding principles of interdependence and world-wide humanity, McDougal believes that only an inclusive operation achieves a better apportionment of base values. He admits that certain matters are effectively enjoyed at the domestic level but again they are submitted to review by the inclusive authority. Also he observes that the "chief trend is towards the attention of exclusive competence (domestic jurisdiction) and the broadening of inclusive authority".[45] McDougal proceeds towards the internationalisation of matters which are considered within the domestic jurisdiction of states, and

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[43] M.S. McDougal, W.M. Reisman, "International Law in Policy-Oriented Perspective", in R.St.J. MacDonald, D.M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory,* (Dordrecht, M. Nijhoff, 1983), p.103, at pp.117-119, 121-123; B. Rosenthal, *Étude de l'oeuvre de Myres Smith McDougal en matière de droit international public*, (Paris, Librairie générale de droit et de jurisprudence, 1970), pp.54-57

[44] R. Dworkin, "What is Equality? Part 3: The Place of Liberty", 73 *Iowa L.Rev.*, (1987), p.1, at p.14; B. Rosenthal, *Étude de l'oeuvre de Myres Smith McDougal en matière de droit international public*, (Paris, Librairie générale de droit et de jurisprudence, 1970), pp.123-127; W.A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State,* (Cambridge, Cambridge University Press, 1991); P. Allott, "Language, Method and the Nature of International Law", XLV *B.Y.B.I.L.*, (1971), p.79, at pp.122-125

[45] M.S. McDougal, H.D. Lasswell, W.M. Reisman, "The World Constitutive Process of Authoritative Decision", in R.A. Falk, C.E. Black, *The Future of the International Legal Order,* vol.1, (Princeton, Princeton University Press, 1969), p.73, at p.110

thus the treatment of human beings within the exclusive sphere is predicated upon its legality according to international standards. McDougal regards domestic jurisdiction as a concession to national states by the general community[46] and in that respect he distances his theory from the confines of absolute sovereignty, which pervades international law. Humanitarian intervention is extricated as the natural outcome of theorising and practising international concern and indeed it could be linked with strategies for achieving human dignity.

"Strategies are the modalities by which base values are manipulated in the decision-making process".[47] Humanitarian intervention as humanity's reaction to the inadequacy of domestic arenas in safeguarding human rights is an aspect of the authoritative decisional process:

".....the concept of "international concern" which underlies so much of international law, and all its supporting doctrines have historically performed the function of permitting an elite external to any particular nation-state to intervention in the affairs of that nation-state in the name of a wider community of a wider body politic. The whole function of international law is to permit such intervention in affairs which would otherwise be regarded as internal".[48]

By opposing the exclusive domestic jurisdiction in the field of human rights and also by raising the prospects of international concern and action, he pre-empts a structural change in the international substratum as it was formatted in the post-World War years with the pre-eminence of states combined with a timidity towards concerns for human rights. McDougal resides, in this respect, within the natural law tradition, which advocated international action in the interests of humanity when gross and abhorrent violations of human rights occur.

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[46] M.S. McDougal, H.D. Lasswell, Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, (New Haven, Yale University Press, 1980), p.214

[47] M.S. McDougal, H.D. Lasswell, W.M. Reisman, "The World Constitutive Process of Authoritative Decision", in R.A. Falk, C.E. Black, *The Future of the International Legal Order*, vol.1, (Princeton, Princeton University Press, 1969), p.73, at p.119

[48] M.S. McDougal, "Remarks on International Concern versus Domestic Jurisdiction", 48 *Proc. A.S.I.L.*, (1954), p.120

**III.4** *The explicit postulation of the basic public order goal of human dignity*: The postulation of human dignity provokes criticism related to the perceived neutrality of the scientific research when arriving at its findings. It was queried above whether human dignity as the outcome of research does not implicitly direct the latter. It could be maintained, though, that the explicit and specific exposition of values "objectifies" the pursued research by making the participants conscious of those values which permeate the latter.[49] Personal predilections would otherwise interfere surreptitiously with research.[50]

For McDougal, the goal of human dignity is attained both from an observational and empirical point. The observational point is that of citizen of the world, as was explained above. The postulation of that goal is not derived but explored and established in the empirical plain.[51]

Still, the question remains whether that goal is subjective and whether McDougal objectifies it by empirical research. First, the observer could not be neutral. He lives in a community and he is affected by the values and schemata of that community. Any inquiry, therefore, could not escape the intricacies of the received experience. This concerns theories of law, and of course theories about law are affected by human fallibility as well. Secondly, the system is purposive. Contrary to the reification of past decisions, the observer in the policy-school should promote through clarification, explication, and commitment the goal he is engaged with. It could be referred to as democratic "evangelism" because it activates the dialogue concerning the content of that principle and does not commit the participants to a uniform application of that principle, but recognises flexibility and institutional diversity.

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[49] G. Myrdal, "A Methodological Note on Facts and Valuations in Social Science", in *An American Dilemma*, (N.Y., Harper & Bros Publ., 1944), p.1035, at p.1043: "The attempt to eradicate biases by trying to keep out the valuations themselves is a hopeless and misdirects venture..... . There is no other devise for excluding biases in social sciences than to face the valuations and to introduce them as explicitly stated, specific and sufficiently concretised value premises".

[50] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford, Clarendon Press, 1983), p.132

[51] H.D. Lasswell, M.S. McDougal, "Criteria for a Theory About Law", 44 *S. Cal. L. Rev.*, (1971), p.362, at p.393

However liberal the effectuation of human dignity, it does not counter the suspicion of subjectivity and arbitrariness in the adoption of the postulate. It could be encountered through empirical inquiry. McDougal contends that the values comprised in the ultimate value of human dignity are not an "idiosyncratic or arbitrary choice"[52] but attributes them to a "common inheritance", not articulated by him. It seems that he eschews empirical inquiry in order to avoid employing the observational techniques which he criticises. Those techniques refer to the methods of natural law with the metaphysical or transempirical derivation of principles and to legal formalism with logical abstractions. Although he avoids explicating the sources of those values for the reasons just stated, he refers to some trends in the world arena which induce the observer to adopt that particular goal. Hence his method, instead of being empirical, is purely descriptive, and defective due to limitations of time and place. It is also unconvincing as a scientific method if it does not explicate derivation and formation of the phenomenologically objectified reality. The merit of such disposition is that it overcomes the disagreement concerning value derivation. Observation of the aggregate finite trends in the world arena facilitates the extrication of an "objective" value by minimising the value references. The postulation of human dignity is global in perspective from the observational point. That process is thus deductive and not derivative. It could be described as the reception of polymorphic stimuli, their articulation and the projection of such distillation. McDougal is not concerned with the derivation of values and thus the critique concerning the non - derivation of his postulate is not entirely justified. However, by side-stepping that matter, the necessity of indicating the indices in his global vision of the world process from which he distils the value of human dignity remains unfulfilled. Proffering no such hint, his postulate could be characterised as transempirical.[53]

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[52] M.S. McDougal, H.D. Lasswell, Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, (New Haven, Yale University Press, 1980), p.90

[53] J. Stone, "A Sociological Perspective on International Law", in R.St.J. MacDonald, D.M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, (Dordrecht, M. Nijhoff, 1983), p.263, at p.274

McDougal does not validate his postulate of human dignity because he recognises the diversity of epistemological methods in acquiring knowledge of its content. Although this counts against the perceived epistemological security, it mirrors the diversity of the observational point, which is the individual. In the end, his framework is like Janus, incorporating simultaneously precepts of weakness and strength.

One other weakness is that McDougal does not suggest how the conflicts that may arise between the different values which constitute human dignity may be accommodated. By stating them in a general form, the decision-makers unfortunately exercise their discretion concerning the mode and degree of their actualisation. The potential for derogation is thus acknowledged.[54]

## IV. HUMANITARIAN INTERVENTION UNDER THE CRITERIA OF THE POLICY-ORIENTED SCHOOL[55]

**IV.1** *The context.* The policy-oriented school views law as an authoritative process, contrary to the traditional perception of law as a body of rules. Under the remit of such a definition, one should look beyond the rules which formally prohibit humanitarian intervention, to the endless process of claims, counter-claims and decisions, the underlining policies of past trends and the expectations of the wider community, in order to formulate a viable perception of the legal merits of humanitarian intervention itself. A flat rejection of the latter is injudicious, because it disregards the process of authoritative decision-making and the lack of sufficient control which an observation of the factual situations produces.

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[54] J. Stone, "Approaches to the Notion of International Justice", in R.A. Falk, *The Future Of the International Legal Order*, vol.1, (Princeton, Princeton University Press, 1969), p.372, at p.424: "As with the list of values ..... the real difficulties begin after the values have been listed and named, either in general or for the particular conflict. It is after that, usually, that the crucial choices have to be made about which of them is to be sacrificed and how far. For, except in the simplest cases, not all of them can be equally secured".

[55] See for a version of this section, N. Tsagourias, "The Lost Innocence of Humanity: The Tragedy of Rwanda and the Doctrine of Humanitarian Intervention", 2 *International Law and Armed Conflict Commentary*, (1995), p.19

The aggregate legal context under which humanitarian intervention is to be posited is that of the post-war order, delineated in the U.N. Charter. This framework contains an appraisal norm on non-aggression, namely Article 2(4) within an aspired effective system of collective security. Thus, Article 2(4) is not "an independent imperative of pacifism"[56] but a contextual one. The other feature of the established legal order is the "aspirational" norms, that is, those related to the promotion of human rights.

The function of this order unfortunately betrayed the concept. The collective security system as a corollary to the non-use of force has lapsed into desuetude, and Article 2(4) has fallen into disrespect. A system of claims, counter-claims, reactions and approvals has developed and this system, complex as it is, needs to be explicated in order to evaluate humanitarian actions. Demonstration of the latter's compatibility with Article 2(4) is not adequate. One should incorporate diverse factors into its appraisal. The most important issue to consider is the perspectives of the wider community for the promotion of the values of human dignity which are the distillation of humanity's optimum order and, on the other hand, to reject reliance on parochial interests.

The criteria for appraisal should not be value-neutral, concentrating exclusively on the methods and procedures for such intervention. They would otherwise overlook the necessity for providing a substantive calculus of evaluation. Additionally, they invite and legitimise parochial actions if the procedural criteria are followed. Nor could such actions be tied to value conservation which has been promulgated as the maintenance of peace. This could not be the case, because humanitarian actions are by definition value expansive. On the other hand, value conservation is static and parochial if it does not take into consideration humanity's general aspirations. The value of preserving peace should be considered equally with the value of promoting human dignity.

The criteria for a doctrine of humanitarian intervention in a policy context could be presented in the uniformity of trends concerning the situations, the

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[56] M.W. Reisman, "Article 2(4): The Use of Force in Contemporary International Law", 78 *Proc. A.S.I.L.*, (1984), p.74, at p.76

participants, the perspectives, the strategies, the outcomes and the effects of such actions.

**IV.2** *Observational point.* For McDougal, as was said above, the observational point is that of the world citizen. That position is reconciled with the adoption of humanitarian intervention as a method for protecting human rights. Such a predisposition is palpable, because humanitarian interventions do not emanate from state sovereignty; on the contrary, the two are antinomic. Human rights have emerged from a sense of affiliation among human beings, which is the essence of natural law philosophy, and also as a medium for protecting and maintaining the attributes of humanity within a state order. The sanctity of life has become a moral imperative and is contained in what is characterised as the *droits humains*,[57] that is, the exceptions to a vigorous exercise of sovereignty. The U.N. Charter has strengthened that process by reaffirming and emphasising the faith in human rights, as well as the interrelation of the latter with the maintenance of peace.[58] The anthropocentric character of international law has not been immediately consented to, and in this field the contribution of the policy-school is immense. Having adopted a homocentric perception of international law, humanitarian actions for the restoration of the vestiges of humanity are hence condoned.

**IV.3** *Situations.* The situations which command such intervention should be characterised by gross, extensive, and heinous affronts to human rights.[59]

Concerning the constitutive power of the state, humanitarian intervention is an affront to sovereignty. Therefore, it could take place in situations of internal

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[57] A. Rougier, "La théorie de l'intervention d'humanité", 17 *R.G.D.I.P.*, (1910), p.468, at p.472

[58] See U.N. Charter: Preamble; Article 55 according to which the United Nations should promote: "universal respect for, and observance of, human rights and fundamental freedoms"; Article 56: "All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55"; Universal Declaration of Human Rights; H. Lauterpacht, *International Law and Human Rights*, (London, Stevens & Sons, 1950), p.186: "The correlation between peace and observance of fundamental rights is now a generally recognised fact".

[59] "An immediate threat of genocide or other widespread arbitrary deprivation of human life in violation of international law.", T.J. Farer, "On Professor Moore's Synthesis", in J.N. Moore, (ed.), *Law and Civil War in the Modern World*, (Baltimore, J. Hopkins University Press, 1974), p.549 at pp.553-554

anarchy, when the government is not authoritative and controlling. The public order in these situations is seen as having failed and degenerated into anarchy:

"[W]hen the administration of a State has completely collapsed because of internal unrest and the authorities have lost control of the situation. In such circumstances the State as a subject of international law has been temporarily paralysed; it is unable to protect its citizens, not to speak of aliens sojourning in its territory, or to carry out its other responsibilities."[60]

Such situations include the Dominican Republic (1965) where the State Department issued a statement justifying the intervention in view of the fact that "[t]he factual circumstances of the breakdown of order in the Dominican Republic were such that the landing could not have been delayed beyond the time it actually took place without needless sacrifice of lives.....".[61] On October 25, 1983, United States. and Caribbean forces intervened in Grenada[62] because "[t]he disintegration of political authority in Grenada had created a dynamic that made further violence likely and that spread uncertainty and fear".[63] Other instances of internal disorder are Biafra in Nigeria, Bangladesh, Somalia, and more recently Rwanda. In the latter case, the collapse of the internal order followed the crash of the presidential plane and involved genocidal events. Somalia's internal order was the victim of cold war thaw. Local clans were involved in bitter fighting for control which victimised sectors of the population and hindered relief agencies' efforts to distribute food.[64]

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[60] Comments by V. Saario on the "Report of the International Committee on Human Rights", 52 *International Law Association*, (1972), p.616

[61] U.S. State Dept. Memorandum, "Legal Basis for U.S. Actions in the Dominican Republic", 111*C.R.* 10734, (20.5.1965)

[62] S. Davidson, *Grenada: A Study in Politics and the Limits of International Law*, (Avebury, 1987); W.C. Gilmore, *The Grenada Intervention: Analysis and Documentation*, (London, Mansell Publishing, 1984)

[63] Statement by Deputy Secretary of State, K.W. Dam before the House C/tee on Foreign Affairs, on November 2, 1983, in M.N. Leich, "Contemporary Practice of the United States Relating to International Law", 78 *A.J.I.L.*, (1984), p.200, at p.201; President Reagan's letter to Congress on October 25, refers to "..... the anarchic conditions and the serious violations of human rights and bloodshed that had occurred, and the consequent unprecedented threat to the peace and security of the region created by the vacuum of authority in Grenada.". 83 *Dept. St. Bull.*, No.2081, Dec. 1983, at pp.68-69

[64] *House Comm. on Foreign Affairs, Country Reports on Human Rights Practices for 1991*, 102nd Cong., 2nd Sess. 344

Another aspect of constitutive defects which prompt intervention is when the state abuses its sovereignty by resorting to abuses of human rights. This aspect coincides with the historical trend of treating humanitarian intervention as a remedy whenever the state maltreats its nationals. In a nutshell, it was phrased by Stowell as ".....treatment which is arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."[65] Revulsion against internal abuses of human rights perpetuated by the authoritative elite in a particular state was the most common indication for humanitarian action in the 19th century and as was presented in Chapter One,[66] this is still the case. In Rwanda, it was not only the constitutive disorder which generated the massacres; the remnants of the previous Hutu regime have also manipulated the situation in order to impose their final solution.

**IV.4** *Participants.* Concerning this criterion, opinions are divided between a unilateral or a multilateral initiation of intervention. Even writers sceptical of such actions admit that multinational participation would render the objectives of the pursued action less parochial, and increase the legitimacy of the action.[67] We regard such an opinion as a recipe for inaction or, if pursued, as being infused with the participants' interests. The realities of the post-World War era have shown that ideological division has predetermined or annulled any decision in that direction. It could be argued, though, that in a post-Cold War period the multilateral pursuance of humanitarian actions would be facilitated by the lack of divisions. However, that leads us to the second concern of those who advocate multilateral interventions in order to avoid abuses. The world is now unipolar, and although bipolarity has curtailed any action, unipolarity may increase the prospect of particular ideologically tainted interventions. Therefore, our concern should not be constricted to the participants but to the perspectives of those involved. If unilateral intervention serves the wider community interest towards safeguarding human rights, the singular participant should not be condemned, as in the reverse situation,

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[65] E.C. Stowell, *Intervention in International Law*, (Washington, Byrne, 1921), p.53

[66] See Chapter One; C.G. Fenwick, *International Law*, (N.Y., Century Co., 1924), pp.287-288: "If a sovereign abuses his sovereignty, if he perpetrates crimes against humanity, other states can lawfully use military force in protection of fundamental rights".

[67] L. Henkin, "Remarks", 66 *Proc. A.S.I.L.*, (1972), p.95, at p.96

multi-participants should not be exonerated when they pursue parochial interests.[68] The interventions in Grenada and in Czechoslovakia were negotiated within the relevant political organisations, OECS and the Warsaw Pact respectively, and accomplished with the even nominal participation of allied contingents. Those interventions had nevertheless haphazard legal justifications. Consequently, the transparency of the argument which substantiates the restraining function of multilateral interventions is undeniable. On the other hand, in Rwanda, the intervention was pursued by one state, France, under widespread suspicion concerning the motives of such action. However, this intervention was induced by the sense of revulsion at the inaction of the world community and was temporally and strategically limited.[69]

A related argument adduces to the "impartiality" and hence desirability of a United Nations-instigated humanitarian action. It is maintained that the parochial character of such action is mitigated due to the representativeness of interests which a collectivity involves. This position suffers from political naiveté and practical inadequacies. The United Nations involvement in Somalia would suggest a cautionary remark. An initial U.N. action[70] was obsessively manipulated by its main enforcer, the U.S.A, into a national policy exercise and a foreign debacle.[71]

**IV.5** *Perspectives.* Concerning perspectives, humanitarian interventions have always been fraught with the suspicion of serving motives other rather than the expressed humanitarian concerns. The possibility of abuse, the prospect of fabricating a humanitarian excuse and the lack of objective determination have led many writers and decision-makers towards an absolute prohibition of such

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[68] E.C. Stowell, *Intervention in International Law*, (Washington, Byrne, 1921), pp.63-64: "Desirable as it is that humanitarian intervention should be, whenever possible, both disinterested and collective, this cannot be made a condition for the justification of the action taken".

[69] S.C. Res. 929, U.N. SCOR, 3393rd mtg., U.N. Doc. S/RES/929 (1994): "The Security Council, *Deeply concerned* by the continuation of systematic and widespread killings of the civilian population in Rwanda, *Recognising* that the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community, *Determining* that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region, *Acting* under Chapter VII ..... authorises the Member States ..... to achieve the humanitarian objectives set out .....".

[70] S.C. Res. 794, U.N. SCOR, 3145th mtg. U.N. Doc. S/RES/794 (1992)

[71] J.R. Bolton, "Wrong Turn in Somalia", 73 *For. Aff.*, (1994), p.56

actions. The concerns are legitimate but the answer to the problem is narrow and insufficient. The possibility of abuse should not lead to a flat rejection of a rule but to the invention of modes in order to defy its manipulation.[72]

When there is a mixture of motives, evaluation of the spurious from the genuine humanitarian concerns is necessary[73]. This could be achieved by evaluating the goals of any intervention, whether they promote parochial interests or the inclusive interests of the world community. Humanitarian interventions should serve those inclusive interests: "..... the use of armed force in defence of human rights is as emphatically in the common interest as is the maintenance of international peace and security."[74]

Some examples would suffice to show that the world community takes cognisance and evaluates the arguments for state actions. The Indian action in Bangladesh was not free from ulterior motives.[75] The world community, however, accepted India's action.[76]

The Dominican Republic case offers an example of an initial humanitarian action being transformed into one pursuing the political interests of the USA in containing communism.[77] It was opined:

"That United States action which had been predicated on protection of human life was not subject to extreme criticism, but vehement protest was registered at what was called an arrogant assumption by the United States of power to

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[72] M.S. McDougal, F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion,* (New Haven, Yale University Press, 1961), p.416: "A policy of permitting individual initiative is, ..... susceptible to perverting abuse; but this susceptibility is an attribute common to all legal policy, doctrine or rule".

[73] M.S. McDougal, H.D. Lasswell, Lung-Chu Chen, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry", 63 *A.J.I.L.,* (1969), p.237, at p.242: "It is of particular importance that latent (or disguised) objectives be distinguished from manifest (proclaimed) objectives".

[74] W.M. Reisman, M.S. McDougal, "A Humanitarian Intervention to Protect the Ibos", in R.B. Lillich, *Humanitarian Intervention and the United Nations,* (Charlottesville, University Press of Virginia, 1973), p.167, at p.177, hereinafter cited as *HIUN*

[75] The Representative of Pakistan Agha Shahi quoting Mr. S. Swamy, an Indian political publicist, said: "The break-up of Pakistan is not only in our external security interests but also in our internal security interests. India should emerge as a super-Power internationally and we have to nationally integrate our citizens for this role. For this the dismemberment of Pakistan is an essential precondition". 9 *United Nations Monthly Chronicle,* (1972), p.7

[76] V. Nanda, in *HIUN,* p.66: "..... it appears that this Indian intervention ..... has been accepted by the world community without the taint of illegality".

[77] See Statement of Secretary of State Dean Rusk of May 8, 1965, on communist subversion. "The Dominican Crisis", *Dept. State Pub.* 7971, *Inter-American Series,* (1965), p.92

intervene unilaterally in an internal revolutionary situation in a nation of the Western Hemisphere when the United States unilaterally determined that a dangerous degree of communist participation was involved."[78]

The condemnation of the U.S. intervention in Grenada was poignant and almost unanimous also including states friendly to the U.S. A Security Council Resolution[79] deploring the action was vetoed by the U.S. but the General Assembly adopted a similar Resolution with an overwhelming majority.[80] Nevertheless, the initial stated justification of overriding importance was the protection of innocent lives.[81] In Rwanda, apart from the French affiliation with the previous regime, the intervention provided relief and sanctuary to distraught Rwandese, irrespective of tribe, and the troops were withdrawn within the time limits set. This action served wider interests than those of France, and the purely humanitarian aims could be evidenced in the sentiments of relief and consonance accompanying that action.[82]

In order to recapitulate, the perspective of the intervenor is always scrutinised and should be evaluated according to the interests of humanity.

Concerning the perspectives of the intervenee, it is forcefully argued that the state should consent or give its permission for any such action. Of course, if consent is given, the potentiality of abuse could be reduced and the action is removed from the category of interventions. However, this requirement has the potentiality of emasculating the whole concept, considering the fact that humanitarian interventions are mainly reactions to malfeasance of sovereignty. In such cases, it is highly doubtful that the sovereign would condemn itself to extinction. Additionally, consent was claimed or fabricated in order to legitimise humanitarian actions but it appears as ancillary and not the *conditio sine qua non*.[83]

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[78] A.J. Thomas & A.V.W. Thomas, *The Dominican Republic Crisis 1965*, The Hammarskjod Forum, (N.Y., Oceana, 1967), p.7

[79] U.N. Doc. S/16077/Rev.1.

[80] G.A. Res. 38/7, 2/11/1983 (108 votes for, 9 votes against, 27 abstentions)

[81] President Reagan, *Collective Action by the Caribbean Peace Force, Dep't. St. Bull.*, Dec.1983, p.67

[82] Declaration of the President of the Security Council, 14/07/1994, S/PRST/1994/34.

[83] R.B. Lillich, "Forcible Self-Help by States to Protect Human Rights", 53 *Iowa L.Rev.*, (1967), p.325, at p.340

Furthermore, the possibility of abuse is not annulled, because consent could be fabricated, extricated or manipulated. The Dominican Republic instance again offers an example of a non authentic consent to the U.S. intervention.[84] The intervention in Grenada was effectuated after the Governor-General, Sir Paul Scoon requested assistance. It was maintained that the request was kept secret for reasons relating to his safety. According to a letter addressed to the Prime Minister of Barbados, John Adams, the Governor-General requests "..... your (PM's) help to assist me in stabilising this grave and dangerous situation. It is my desire that a peace-keeping force should be established in Grenada to facilitate a rapid return to peace and tranquillity and also a return to democratic rule. In this connection I am also seeking assistance from the United States, ..... ."[85] The wording of the letter is inadequate to support with certainty any explicit invitation for military intervention. The most crucial issue is the legality of such an invitation, in particular, which constituent authority may issue a request for intervention. A related issue is whether the request should proceed or follow the intervention. In Grenada all these elements are seriously disputed, factually and legally.[86] A similar case is the invasion of Czechoslovakia in 1968 by Warsaw Pact troops, in order to reverse the process of political enfranchising in that country. Immediately after the invasion, an "appeal" for assistance was published which "..... requested the Soviet Union and other allied States to give the fraternal Czechoslovak people immediate assistance, including assistance with armed forces".[87]

**IV.6** *Strategies.* Concerning the strategies for human rights protection, almost all the commentators agree that there should be a gradual increase in the

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[84] See statements by Senators Fulbright, Clark and Morse, 111 *Cong. Rec.* 23001 (15.9.1965), 23366 (17.9.1965), 26185 (15.10.1965); V.P. Nanda, "The United States' Action in the 1965 Dominican Crisis: Impact on World Order - Part I", 43 *Denver L.J.*, (1966), p.439, at pp.466-467

[85] J.N. Moore, "Grenada and the International Double Standard", 78 *A.J.I.L.*, (1984), p.145, at p.148

[86] "..... the Scoon request was almost certainly a fabrication concocted between the OECS and Washington to calm the post - invasion diplomatic storm. As concoctions go, it was flimsy". *The Economist*, Mar. 10, 1984, p.31, at p.34; V.P. Nanda, "The United states Armed Intervention in Grenada - Impact on World Order", 14 *Cal. W.I.L.J.*, (1984), p.395, at pp.411-414; C.C. Joyner, "The United States Action in Grenada: Reflections on the Lawfulness of Invasion", 78 *A.J.I.L.*, (1984), p.131, at pp.138-139

[87] 7 *I.L.M.*, (1968), p.1283; R.M. Goodman, "The Invasion of Czechoslovakia: 1968", 4 *Int'l Law.*, (1969), p.42, at pp.61-63

intensity of the methods adopted, from less coercive to highly coercive, that is, military. The latter is recognised only as a last resort and it should satisfy the requirements of necessity and proportionality.

**IV.7** *Outcomes.* The outcome of any humanitarian action should be the termination of human rights violations. This is, the wider, inclusive goal of promoting human dignity. However, humanitarian actions may also generate other outcomes. These include authority-oriented results in the sense of either influencing or altering the authority structure in a particular state. Prohibition of humanitarian intervention on those grounds is misleading and too narrow because humanitarian actions take place when there is abuse of authority and additionally the past trends show that humanitarian actions are authority-oriented. The intervention in Greece (1827-1830) had the result of creating a new state by assisting the emancipation of the suppressed nation. The creation of Bangladesh (1971) is a contemporary example. The authority-oriented interventions have not always had the character of authority abridgement. They may additionally mean legal delimitation of the governmental power, or submission to international standards of human rights.[88]

Again, the evaluation of humanitarian actions should not be exclusively determined by the magnitude of its impact on the authoritative elite in the particular state, but according to the promotion of the wider interests of human dignity. In the Dominican case, while the safeguarding of lives was appraised as consonant to the promotion of human dignity, the other outcome of replacing authority was condemned as promoting the particular interests of the United States. The intervention in Grenada was swiftly condemned as prompted by the U.S. policy objective of "sanitising" the hemisphere from communism or Soviet influence. According to the report prepared by the American Bar Association, the humanitarian aim of safeguarding nationals was "collateral to the primary purpose of favourably resolving an internal political struggle".[89] The U.S. intervention in Panama was couched in

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[88] J.N. Moore, "Towards an Applied Theory for the Regulation of Intervention", in J.N. Moore, (ed.), *Law and Civil War in the Modern World,* (Baltimore, J. Hopkins University Press, 1974), p.3, at pp.24-26

[89] C/tee on Grenada, Section of International Law and Practice, American Bar Association. *International Law and the United States Action in Grenada: A Report,* 18 *Int'l Law.*, (1984), p.331, at p.379; President Reagan stated that Grenada was transformed into a "Soviet - Cuban

humanitarian terms but the political considerations were overwhelmingly imperative and thus condemned.[90] In Rwanda, the constitutive government had collapsed, but the French action, contrary to initial suspicions, was not intermingled with the power struggle.[91] It was confined to giving sanctuary to refugees, assisting international agencies with their work and relieving neighbouring countries from the bulk of refugees. In Uganda (1979), the alteration of a genocidal regime through foreign intervention has been welcomed.[92]

**IV.8** *Effects.* The main goal of humanitarian actions is to protect human rights and promote the goal of human dignity. They also serve as a future deterrent by increasing the awareness of authoritative elites that violations of human rights will not go unpunished and that their actions are scrutinised by world opinion. Any abuse of humanitarian intervention is characteristic of all institutions which are vulnerable to contraventions. However, what causes indignation is the perpetuation of abuses within internal jurisdictions, if humanitarian intervention is to be prohibited. In Rwanda, the humanitarian character of the pursued action outweighs any ulterior motive. The function and value of the French intervention could only be measured by a relative comparison of the situation and a deliberation of the potential human disaster had the intervention not occurred.

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colony". L. Doswald-Beck, "The Legality of the United States Intervention in Grenada", 31 *Neth. I.L.Rev.*, (1984), p.355, at p.374

[90] See articles by V. Nanda, T. Farer and A. D'Amato in "Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists", 84 *A.J.I.L.*, (1990), pp.494-524

[91] With the victory of the F.P.R., France declared in the Security Council that "les autorités rwandaises sont par définition soveraines sur l'ensemble du territoire rwandais". Letter by the French Permanent Mission to the United Nations, (08/09/1994), S/1994/944

[92] "[T]he Tanzaninan invasion came as some kind of blessing. Though it was charged as a violation of certain peremptory norms of international law, it was never seriously censored". I.J. Wani, "Humanitarian Intervention and the Tanzania-Uganda War", 3 *Horn of Africa*, (1980), p.18, at p.24

# V. TOWARDS A TENTATIVE CONCLUSION

An evaluation of the policy science school could not ignore the criticisms concerning its form or substance. Epithets such as idiosyncratic, elitist, utopian, or apologetic are abundant. Some are unsubstantiated, based on a caricature of its jurisprudence or on a misunderstanding of its inveterate verbiage. McDougal and his associates are responsible because they did not rectify the caginess of verbosity.

Concerning the substance, we have seen that the policy-school provides a blend of realist and naturalist indices. It gave the jurisprudence of international law a vision and a method. It is hardly necessary to say that, as observed, international law, for a long period, has been "discredited and on the defensive". What was needed was the "renovation of international law or the creation of an entirely new system of law adequate to the demands of a new social order". This system would have as its object "the protection of the individual in his eternal struggle for freedom of personality ..... wherever he may be and whatever his national or racial allegiance."[93]

The policy-school was to pick up the gauntlet. The realists inaugurated a contextual legal analysis but were only scantily concerned with international law. Thus, policy science could be viewed as transmuting the realist mood into international law. Emending the scepticism towards legal rules, they see law as a process of authoritative decisions and an instrument for the promotion of values. Consequently, diverse scientific methods are introduced into the corpus of international law which now also acquires a mission. Its mission is to promote human dignity, "the greatest production and the widest possible sharing ..... of all values among all human beings".[94] The values of human dignity are merely those of the western liberal democracies which are promoted as universal. The universal singularity of this ideal has provoked fierce reaction. The whole system has been derided as ideological aggression or propaganda. The Cold War helped in instilling the belief that it mirrored

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[93] P. M. Brown, "International Lawlessness", 32 *A.J.I.L.*, (1938), p.775, at pp.776-7

[94] M.S. McDougal, "Perspectives for an International Law of Human Dignity", 53 *Proc. A.S.I.L.*, (1959), p.107, at p. 107

American chauvinism. The writings of McDougal or of his affiliates on matters of policy have reinforced this opinion. We would like to circumvent this issue because our purpose is the lego-philosophical analysis of the policy teachings.

We said above that human dignity represents the ultimate and unifying value. Its common denominator is natural law values. Both are presented as elevated ultimate values. We can also sense the feeling of aggression, because human dignity is promoted relentlessly. In a world of ideological, political, and cultural differences, the threat is obvious. However, does the collapse of communism and the poaching of the new democracies into (still awkward) liberalism mean that the value of human dignity has won? Or, assuming just for the sake of hypothesis that human dignity prevails throughout the world, does this mean the end of history? It is suggested by Francis Fukuyama that there is a common pattern of the world evolution of mankind towards the direction of liberal democracies and that "..... the idea of a universal and directional history leading up to liberal democracy may become more plausible to people, and that the relativist impasse of modern thought will in a sense solve itself."[95]

Leaving this question to be answered by futurologists or more capable intellectuals, we should submit at this stage that the policy-school has opened the horizon by providing broad ends and also a framework for discussion. Even if one disagrees with the particularities of this framework, it contains the seeds of a potentially fruitful dialogue. A uniform insistence on matters of strict legality in international law is unrewarding. It obscures other important elements. Charges of illegality concerning "violations" of Article 2(4) may erode and rigidify our thinking. A humanitarian intervention should not provoke an automatic response of illegality because this is what the formalistic signals indicate. It should initiate discussion about what happened; what was involved; what we should do; what values are engaged; what are our policies and what will be the result when they are applied. This involves more intellectual reasoning than an automatic reaction does. The policy-school

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[95] F. Fukuyama, *The End of History and the Last Man,* (London, Hamish Hamilton, 1992), p.338

provided vision but not the methods of realising human dignity beyond the belief in educating and training decision-makers in the spirit of human dignity. The dichotomy between a visionary and a pragmatic view of the legal system, and the employment of synthetic perspectives for the explication of legal phenomena is taken up more profoundly by the Critical Legal Studies movement, as we shall see in the next chapter.

# CHAPTER FOUR

# THE CRITICAL LEGAL STUDIES MOVEMENT: INTERNATIONAL LAW AND HUMANITARIAN INTERVENTION

*The development of the Critical Legal Studies as a reaction to formalism and as a systematised outgrowth of realism - the deconstruction of legal argument - the indeterminacy and non-objectivity of legal argument - the fundamental contradiction: individualism and altruism applied in international law and humanitarian intervention.*

## I. THE EMERGENCE OF CRITICAL LEGAL STUDIES

**I.1** *Introduction.* The traditional legal doctrine of liberal legalism either naturalist or positivist contains the concepts of legal determinism and objectivity in order to sustain a comprehensive and unobjectionable legal system. The assumption of determinacy, objectivity and apoliticism marks the dividing line where the subjectivity of individual interests are eventually dissipated.[1] Consequently, legal language reproduces, within its particular linguistic conventions, the reification of social discourse.[2]

As was argued in the previous chapter, legal realism as a reaction to formalism emphasised the indeterminacy and ambiguity of rules and, hence, anticipated

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[1] M. Sandel, *Liberalism and the Limits of Justice,* (Cambridge, Cambridge University Press, 1982), pp.116-118,154-161; R.M. Unger, "The Critical Legal Studies Movement", 96 *Harvard. L.Rev.*, (1983), p.561, at pp.564-573

[2] Claude Lévi-Strauss, *Structural Anthropology,* (Harmondsworth, Penguin, 1979), p.217: "..... language continues to mold discourse beyond the consciousness of the individual, imposing on his thought conceptual schemes which are taken as objective categories". Jaques Prévert, "Dans la maison", in *Paroles*, (Gallimard, 1949), p.99:

"Est - ce qu'on sait ce qu'est une prison?"
"D'ailleurs il ne s'appelle pas réellement comme ça"
"C'est l'homme qui a appelé cet oiseau comme ça"

Critical Legal Studies (*CLS*). The project of the *CLS* is to decompose the rigidity of legal-linguistic reasoning and profess edification. In other words "help ..... readers, or society as a whole, break free from outworn vocabularies and attitudes, rather than to provide "grounding" for the intuitions and customs of the present".[3]

In common with realism, the Critical Legal Scholars challenge the established legal doctrine, nevertheless they have not succeeded in embracing each other. *CLS* reacted against the predominant individualistic liberal doctrine whereby individual rights and welfare should be promoted. The unassumingly individualistic project of the policy-school counters the communitarian extolment of *CLS*.[4] There exists an institutional difference as well. Legal realism was never a systematised legal school: it merely represented a certain mood of dissatisfaction with existing legal doctrines which prompted a reconsideration of rules, policies and values. On the other hand, *CLS* are more institutionalised.

The major difference which actually did not permit a more cordial relationship lies in the differing perspectives. Both realists and Critical Lawyers are debunkers. However, we have observed in the previous chapter that, the policy-school as a branch of legal realism in international law, proceeded towards a reconstruction by projecting a certain vision for societal transformation, whereas Critical Lawyers, with the exception probably of Unger, remained in the field of deconstruction.[5]

**I.2** *Assessment of Critical Legal Studies.* The displacement of congealed legal forms demonstrates their indeterminacy and non-objectivity. This displacement is a familiar realist occupation, but the latter did not consider *why* legal reasoning perpetuates its inconsistency. Moreover, having mitigated the recipient legal absolutism, *CLS* purport a transformation which transgresses the traditional modes of accessing it. Alternatives could be achieved only by a liberating argumentation, not by suggested strategies.

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[3] R. Rorty, *Philosophy and the Mirror of Nature,* (Oxford, B. Blackwell, 1979), p.12
[4] M. Tushnet, "Critical Legal Studies: A Political History", 100 *Yale L.J.*, (1991), p.1515
[5] N. Duxbury, *Patterns of American Jurisprudence,* (Oxford, Clarendon Press, 1995), pp.194-195, in particular footnote 189

The impact of Critical Lawyers on society is difficult to assess. The explanation for this resides on the exaggeration of the techniques they hire in order to achieve their project. They resort to social or linguistic sciences in order to explicate legal systems. Social transformation would spring from an extensive understanding of societal reality. The employment of social sciences by realism is criticised as timid, not allowing legal reasoning to emancipate itself from legal constraints. Critical Lawyers delve into the labyrinth of social, political, philosophical, and linguistic sciences and do not recover but oscillate between utopianism, far removed from socio-legal reality, or ephemerality, by describing a transient social reality which hinders ambitious projects. In the end, they appear divorced from their subject-matter, which is law.

They deride the liberal doctrinal falsification of the neutrality and apolitical nature of rules. Rules are subjective and they imply choices. They oppose the choisist character of realism - grounded on shared expectations and fundamental values. Values are co-determined with societies and legal rules reflect that. Koskenniemi in his attempt to expose contextual justice endorses legal formalistic "orthodoxy". He denies choice because it requires non-legal considerations and the dominance of certain values.[6] Reconstruction is thus denied because legal rules cannot escape contingency. Legal argument can only experience the sense of pessimism.

Demonstration of legal incommensurability assists in demystifying law and in querying legal complacency. It could be an effective means for projecting transformation if it was accompanied by a vision but unfortunately, criticism and deconstruction is self-perpetuating, cynical, and eventually disregarded.[7]

Our intention in this chapter is to present the main arguments of *CLS* concerning international law and apply them to humanitarian intervention. Thus, we build upon their methodology. However, we overcome the deconstructive barrier and by reassessing and re-evaluating legal reasoning we suggest an alternative based on a conversational model.

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[6] M. Koskenniemi, "The Politics of International Law", 1 *E.J.I.L.*, (1990), p.4, at p.32

[7] M. Tushnet, "Critical Legal Studies: An Introduction to its Origins and Underpinnings", 36 *J. Leg. Ed.*, (1986), p.505; D. Livingston, "Note: Round and Round the Bramble Bush: From Legal Realism to Critical Legal Studies", 95 *Harvard L.Rev.*, (1982), p.1669

## II. INDETERMINACY

**II.1** *Legal determinacy.* Indeterminacy is not a novel concept. Legal realists have introduced this argument and redirected the study of law towards its effects.[8] But realists opted eventually for certainty through the notion of prediction. The predictivist function implies the need of achieving certainty. Although it blends the study of legal rules with other factors, these factors will eventually secure a more certain prediction.[9] Realism's difference with formalism is modest on this matter, but it emphasises the radicalism of the *CLS*.

The assumption of determinacy in liberal legal theory is formulated mainly in opposition to the arbitrariness of unhampered, unrestricted governmental or judicial power. Legal theorists such as Kelsen, Hart, Rawls and Dworkin have articulated a framework of principles which, if accepted and applied consistently, would eventually assist in determining the rules of conduct. That framework's role is rather eclectic, in other words, the matrix of principles constrains the choices by projecting the boundaries for decisional process.[10]

Legal discourse exhibits less determinacy than the penumbra of traditional legal theory has adumbrated for it. In fact it contains both determinacy and indeterminacy. Legal rules proffer automatic response to "plain, or paradigm, clear cases". But as Hart asserts "in every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by the authoritative standards".[11] The crux of the matter is the calibre and

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[8] "..... legal criticism is empty without objective description of the causes and consequences of legal decisions". F.S. Cohen, "Transcendental Nonsense and the Functional Approach", 35 *Col. L.Rev.*, (1935), p.809, at p.849

[9] K.L. Llewellyn, *The Common Law Tradition: Deciding Appeals,* (Boston, Little, Brown & Co., 1960), pp.302-303; M. Radin, "The Theory of Judicial Decision: Or How Judges Think", 11 *Am. Bar Assoc. J.*, (1925), p.357, at pp.358-362

[10] H.L.A. Hart, *The Concept of Law,* (Oxford, Clarendon Press, 1961), pp.132-137; hereinafter cited as *CL*; J. Rawls, *A Theory of Justice,* (Cambridge Mass., Harvard University Press, 1971), p.4, hereinafter cited as *TJ*; R. Dworkin, *Taking Rights Seriously,* (London, Duckworth, 1977), pp.81-137, hereinafter cited as *TRS*

[11] *CL,* pp.123,125,132; *TRS,* pp.83, 127

repercussions which the indeterminacy argument produces. Although it is not dismissed by "soft" positivists such as Hart, the consequences attributed thereto are minor and insignificant because the whole argument of indeterminacy is viewed as "peripheral". Eventually, he opts for certainty.[12]

Determinacy is viewed as a constraint to arbitrariness but its mechanical, non-contextual application might again result in arbitrariness.[13] Inferentially, the legal system is bifurcated. It includes both determinacy and indeterminacy, forging a compromise between the social needs for certainty and change.[14] In international law, rules may denote certainty but custom alludes to change. Additionally, the inclusion of elements such as "justice", "equity", "fairness" de-objectifies the application of "stabilised" rules. However, legal doctrine emphasises the determinacy of legal rules as a prerequisite for the rule of law. According to Dworkin: "..... a judicial decision is fairer if it represents the application of established standards rather than the imposition of new ones".[15] Dworkin contests the minimum degree of indeterminacy accepted by Hart because, according to him, the "best" interpretation of legal materials would procure determinate results.[16]

International law doctrine emphasises also determinacy as a means of clothing its science with legitimisation. The contention that it represents legalisation of politics is deeply ingrained and, thus, requires intellectual and argumentative bravura to discard it. Avoiding the quandary demands that international rules should be distinguished from politics and provide definite, detached answers to

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[12] A. Altman, "Legal Realism, Critical Legal Studies and Dworkin", 15 *Phil. & Pub. Aff.*, (1986), p.205, at p.207

[13] D. Kennedy, "Form and Substance in Private Law Adjudication", 89 *Harvard. L.Rev.*, (1976), p.1685, at p.1689: "..... rigid rules require the sacrifice of precision in the achievement of the objectives lying behind the rules". *CL*, pp.126-127: "We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims and which the open textured terms of our language would have allowed us to exclude had we left them less rigidly defined".

[14] *CL*, p.127

[15] *TRS*, p.5; *CL.*, pp.132-137; *TJ*, p.235: "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties".

[16] *TRS*, pp.14, 81-84

problems.[17] It is essential for the legal existence of international law to sustain this "mystified" belief. Therefore, the *CLS* by presenting international law as immersed into the broader ideological struggles of life contain a perennial danger, although they emancipate legal thinking towards more comprehensive modes.

**II.2** *The missing elements of determinacy in international law.* A legal rule should satisfy certain criteria in order to be determinate, such as comprehensiveness, consistency, directiveness and self-revision. A comprehensive legal system should cover all the factual situations. That being impossible, legal theory systematises instead principles intended to be generally applicable. International legal theory does not satisfy these two requirements for comprehensiveness. It is significantly less comprehensive than the domestic systems and has not invented, contrary to the theories of justice such as those of Rawls and Dworkin, a consistent standard of application.

Relating to the above is the lacunae in the law. How could legal reasoning, confronted with gaps, be determinate when it should eventually dismiss the case? How could such reasoning stand up admitting either the material incomprehensiveness of the legal system or the absence of a substantive evaluating principle or when it is finally compelled to resort to discretionary adjudication?[18]

Process cannot achieve determinacy because it is not neutral. Before the procedure, administrative or legislative, decides on the determinacy of certain value, political judgments are made concerning the function or character of this procedure. Thus, according to Critical Lawyers, rules or procedures fail on this matter.

**II.3** *The application of standards.* Determinate legal rules would require an automatic deduction. The recognition of the internal substantive inconsistency of the rules has led to their attribution with exceptions. Thus, the rule on the non-use of force is accompanied by the exception of self-defence. Because the

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[17] J. Boyle, "Ideals and Things: International Legal Scholarship and the Prison-house of Language", 26 *Harvard I.L.J.*, (1985), p.327, at pp.346-349

[18] L. Siorat, *Le problème des lacunes en droit international*, (Paris, R. Pichon & R. Durand-Anzias, 1958); J. Stone, "Non Liquet and the Function of Law in International Community", 35 *B.Y.B.I.L.*, (1959), p.124

line between the rule and the exception is abstruse and could be moved, we require a transcendental standard or a metatheory which would diminish the discretion. That metatheory would be at a high level of generalisation, abstraction and vagueness.[19] Hence, we use concepts such as sovereignty, self-determination, democracy, and freedom, which either reinforce, nullify or limit the attitudinal peregrination of certain rules. Those metatheories postulate contradiction and indeterminacy. Their mechanical application results in a logical antithesis because they cannot be simultaneously true. The principles of self-determination and sovereignty can be antagonistic, the application of either is contextual and corresponds to a plausible choice for achieving a justified solution. Additionally, rules and underlying principles are non-directive mainly because they are ambiguous[20] and their concrete exercitation requires interpretative evaluation. Consequently, they do not determine their scope of application adding thus to their non-direction.[21]

Finally, international law is deficient in the area of procedural revision. Self-revising techniques are fundamental in legal systems.[22] In international law reified concepts eviscerate the need for appropriate revision invoking the danger of opening Pandora's box. Consequently, the participants in a procedural rigidified system have more discretion to whimsically alter a rule under revised circumstances, affecting in this way rule determinacy. Humanitarian intervention is a prime example. Assuming that it is prohibited under the rule on the non-use of force (Article 2(4) of the U.N. Charter), we create a legal impasse. Article 2(4) has been disrespected and state practice has affirmed the right to humanitarian intervention. The need for procedural adaptation is refuted by the lack of structures. The impasse is resolved by consistent practice which

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[19] *TRS*, pp.24-31; D. Kennedy, "Form and Substance in Private Law Adjudication", 89 *Harvard. L.Rev.*, (1976), p.1685, at pp.1687-1689; O. Schachter, "International Law in Theory and Practice", 178 *R.C.*, (1982 V), p.9, pp.43, 74-82

[20] Sir H. Lauterpacht, *International Law*, Vol.1, "The General Works", E. Lauterpacht (ed.), (Cambridge, Cambridge University. Press, 1970), pp.25-28; J.J.A. Salmon, "Le fait dans l'application du droit international", 175 *R.C.*, (1982 II), p.257, pp.277-285; Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, (Paris, 1963), p.14

[21] H.G. Gadamer, *Philosophical Hermeneutics*, (Berkeley Calif., University of California Press, 1976), p.64: "We are always biased in our thinking and knowing by our linguistic interpretation of the world". P. Winch, *The Idea of a Social Science and its Relation to Philosophy*, (London, Routledge, 1958), p.15: "Our idea of what belongs to the realm of reality is given for us in the language we use". *CL*, pp. 126-127

[22] J.W. Singer, "Catcher in the Rye Jurisprudence", 35 *Rutgers L.Rev.*, (1983), p.275, at p.278

formulates criteria for accepted interventions, always running the risk of spurious interventions.

## III. OBJECTIVITY

**III.1** *The need for foundation.* Objectivity in legal theory implies the quest for a substantive, rational foundation of legal rules and institutions.[23] The substantive foundation is not a matter of conviction but of knowledge.[24] It refers to the discovery of first principles, of legal foundations, which would legitimise the legal system through their inherent validity. As such, they transgress the subjectivity of human disquisition and become interpersonal, intersubjective and even universal. In formalised terms it is what Kelsen calls the *Grundnorm*, Hart the Rule of Recognition and Rawls the "original position".

The criticism of that pre-established matrix is focused on the external aspects of that substantive foundation, in particular, on what is its rational ground and whether the latter is unquestionable. This external critique has in itself an internal and an external aspect.

The external manifestation is dependent on propositions which are themselves based on an external source.[25] Positivism and natural law theory correspond to that external source of justificatory theory. They adhere to an aprioristic assumption which involves cognition rather than judgement.[26] The positivist command theory relied on the sovereign for its legitimisation, whereas Kelsen relied on a deductive, logical procedure. Natural law requires rational reflection on human nature, that is, it relies on mental constructions or on divine providence.

Accordingly, law is a matter of perception. This anticipates certainty, a tenet of the liberal doctrine, as opposed to discretion. The unreflective acceptance of the

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[23] *TJ*, pp.516-517

[24] "Virtue is Knowledge", Plato, *Protagoras*, W. Guthrie tans., (Penguin, Harmondsworth, 1956), p.99

[25] M. Moore, "Moral Reality", *Wis. L.Rev.*, (1982), p.1061, at pp.1072-1075,1106-1116

[26] *TRS*, p.81: "It remains the judge's duty even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively". *CL*, pp.92-93

position that law or morality is a matter of discovered truth and not of individual preference or conviction transforms discretionary judgements arbitrarily into non-discretionary descriptions. The search for foundations in legal theories, positivist or naturalist, could be regressed *ad infinitum*. Consequently, it is accepted that there should be a certain basis; however, its selection is unavoidably subjective. Therefore, the external super-imposed source of legal argument lacks the necessary degree of neutrality.[27]

The second, internal, scheme for the pursuit of objectivity concerns the procedural theories. This method is deductive in its working. We assume the objectivity of a certain procedural process and we accept the outcomes. This scheme is more concerned with the method of achieving outcomes (legal reasoning), and not with the nature of those outcomes (legal rules).[28] It is admitted that disagreement on the results could originate even if we employ the same legal procedure. However, as Rawls explains, if everyone applied the method correctly then everyone would agree.[29] This is an implied acknowledgement of the possibility for predetermined, subjective results achieved through a "correct" employment of the method.

**III.2** *The use of procedure.* Legal reasoning tries to overcome the dichotomy of objectivity-subjectivity by liberating legal discourse from human intuitions. Legal rules should be grounded on a procedural decision disestablished from our intuitions. Legal reasoning is vying to create a perspective of impartiality for the consideration of all the relevant claims, which should be inter-subjective, as

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[27] R. Rorty, *Philosophy and the Mirror of Nature,* (Oxford, B. Blackwell, 1979), pp.334-335; R.M. Unger, *Social Theory: Its Situation and its Task. A Critical Introduction to Politics, a Work in Constructive Social Theory,* (Cambridge, Cambridge University Press, 1987), pp.80-81

[28] R.W. Newell, *Objectivity, Empiricism and Truth,* (London, 1986), pp.16-38: "On the other hand, it (objectivity), may also refer to the character of methods (absence of bias) in the process of knowledge production. A dispute about what one would have reason to believe tends to turn on this latter question. Here there is no question of the acceptance of "knowledge", only something that is "external". Objectivity now concerns the character of the common practices of production".

[29] *TJ*, p.21

with Rawls' "veil of ignorance"[30], Ackerman's "neutral dialogue"[31], or Dworkin's "equal concern and respect".[32]

The problem with the procedural theories is that they claim comparative supremacy over other relevant and competing procedures.[33] Bereft of any standard of adjudication, the solicitation of any procedure for objectivity is arbitrary and biased towards a particular procedure. Rival claims depart from a different procedural basis which they consider as appropriate and valid. In the end, accepting certain standards as points of reference or sources of purported results tends to integrate those standards in our interpretation of events, reproducing causative discourse. Human dignity as the major premise of the policy school is both ingrained into and a consequence of the procedure. Disagreement on the procedural theories culminates in disagreement upon the yielded principles and rules. The objectivity of the procedural techniques is reduced while rival procedures, by invoking comparative or absolute supremacy, reveal alternative concepts of moral reasonableness, impartial consideration of events and of the objectivity of particular results.

A congeneric problem with the procedural theories is their incompleteness, in the sense that they cannot be finite. They should produce a descriptive framework or an enumeration of elements for their employment in future events. New factors being unanticipated require either exception or new prescription. Therefore, enumeration is humanly impossible and the descriptive framework is incomplete and inadequate to deal with the complexities of human activity.[34]

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[30] *TJ*, pp.516-517

[31] B. Ackerman, *Social Justice in the Liberal State,* (New Haven, Yale University Press, 1980), p.11

[32] *TRS*, pp.234-238,275-278; H.L.A. Hart, "Between Utility and Rights", in A. Ryan (ed.), *The Idea of Freedom*, (Oxford, Oxford University. Press, 1979), pp.77-98

[33] J. Fiskin, "Liberal Theory and the Problem of Justification", *NOMOS* XXVIII, p.207, at p.216

[34] L. Husson. *Les transformations de la responsabilité. Etude sur la pensée juridique*, (Paris, PUF, 1947), p.515: "Les catégories juridiques, comme toutes les catégories logiques, ne sont jamais que des cadres imparfaits, susceptibles de s'ouvrir à des actes ou à des situations pour lesquels ils n'ont point été faits, ou au contraire d'exlure des actes et des situations auxquelles ils devraient convenir, selon que la définition logique s'en sera tenue aux caractères communs ou, au contraire, pour introduire plus de précision, en aura fait intervenir d'autres, qu'elle aura dû envisager dans leur détermination spécifique".

**III.3** *Rational consensus.* Finally, rational consensus is presented as a "procedural framework in order to achieve objectivity".[35] It underlines rational agreement on certain values among intelligent people.

Rational agreement could be described as the location of certain values which permeate human experience irrespective of derivation. Those non-inferential values are presented as objective. We could include in those objective precepts Hart's minimum content of natural law; Finnis' "basic values of human experience"; McDougal's human dignity or Rawls' principles of justice.

The consensus is the source of those values. Although it appears objective because it represents the views of a wider segment of a community and not of particular individuals, it is subjective because it reflects the view of a particular and unstable majority. As a decision process it is eventually subjective because it represents the combined and negotiated wishes and interests of the community.

Rational consensus is folded in internal contradictions. It embraces communitarian, consensual criteria for justification as well as individualistic and rational ones. The fundamental contradiction between consensus and reason is engulfed in the rational agreement. Consensus is the descriptive representation of a certain community. Reason is the rational decision on certain premises based on an imaginary consensus. Therefore, it hides subjectivity as to the facts and contradiction as to the choices.

## IV. THE FUNDAMENTAL CONTRADICTION IN LEGAL REASONING AND HUMANITARIAN INTERVENTION: INDIVIDUALISM VERSUS ALTRUISM

**IV.1** *The inherent contradiction in liberal legal theory.* One of the most prominent Critical Lawyers, Duncan Kennedy, pursued a project of exposing the indeterminacy and inherent tensions of the liberal legal argument in private law, which applies to international law as well. Legal reasoning is infused with

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[35] *TRS*, pp.125-130; *TJ*, pp.516-518

contradictory perspectives which "cancel and refute each other" because it endeavours to accommodate contradictory visions. Those visions, within a liberal society, mirror the tension between freedom and restraint: "..... an opposition between freedom, conceived as arbitrary and irrational, yet creative and dynamic, and restraint, conceived in similar stark terms, as rigid, principled in an absolutist way, yet necessary as the antidote to freedom".[36] That tension was later defined as the tension between altruism and individualism.[37]

Kennedy exposes the thrust of the internal liberal contradiction which is that of "a commitment to mechanically applicable rules as the appropriate form for resolving disputes ..... and a commitment to a situation - sensitive, ad hoc standards".[38] For Kennedy, legal argument is described then as a contradiction between rules and standards which advances to express itself in the conflict between individualism and altruism, this latter contradiction being transformed at a higher stage to the contradiction between liberalism and communitarism.[39]

The infested individualism of the rules produces more individualism, while altruism cannot reverse that inclination. "Individualism seems to harmonise with an insistence on rigid rules rigidly applied ..... altruist views on substantive private law issues lead to willingness to resort to standards in administration".[40] Those standards are the underlining values of a certain community and they involve "value judgements".[41] Standards are not determinate themselves because their application requires arbitrary choice in apprehending the values and purposes of a particular community.[42] The resulting indeterminacy in adjudication or decision-making is the core of the liberal argument which then is

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[36] Duncan Kennedy, "The Rise and Fall of Classical Legal Thought, 1850-1940", p.8, unpublished paper cited in N. Duxbury, *Patterns of American Jurisprudence,* (Oxford, Clarendon Press, 1995), p.458

[37] Duncan Kennedy, "Form and Substance in Private Law Adjudication", 89 *Harvard L.Rev.*, (1976), p.1685, hereinafter cited as *Form and Substance*

[38] M. Kelman, *A Guide to Critical Legal Studies,* (Cambridge Mass., Harvard University. Press, 1987), ch.1

[39] *Form and Substance*, p.1685, The dichotomies represent an absolutist view of liberalism. See N. MacCormick, "Reconstruction after Deconstruction: Closing In On Critique", in A. Norrie (ed.), *Closure or Critique: New Directions in Legal Theory,* (Edinburgh, Edinburgh University. Press, 1993), p.142, at p.145: "It takes a rule to make a standard legal; it may take a standard to make a rule satisfactorily workable".

[40] *Form and Substance*, p.1685

[41] *Form and Substance*, p.1752

[42] *Form and Substance*, p.1771: "the direct application of moral norms through judicial standards ..... leaves us far from anything worthy of the name of altruistic order".

paralysed between an individualistic and an altruistic vision. Indeterminacy is endemic in the absence of a metaprinciple which would assist objectively our preference for either a standard or a rule.[43] Again, the existence of the metaprinciple could not be proved capable of attributing determinacy due to its own ambiguity and conflict with confluent metaprinciples.

**IV.2** *Altruism versus individualism* The explication of the altruistic and individualistic premises[44] countenances the international law dichotomy of national egoism and communitarian morality. Individualism, identified with liberalism, insists on the regulatory function of rules which define autonomy and moderate activities located outside the spheres of individual liberty. Values are subjective and their postulation is an arbitrary exercise. Therefore, the role of the state is "facilitative" and there is a strong presumption against state intervention viewed as a constraint on individual self-interest and as a means of imposing communitarian values. In international law, it is evident that the individualistic premise is the prevalent presumption. Non-intervention affirms state autonomy, asserts that the interests of a particular state take precedence against the general interests of a community, and also avoids moral paternalism by extending certain values to non-consensual members.

The altruistic premises include a belief in shared values which are not arbitrary but the distillation of societal functions. These values are understood as being in a state of evolution towards the attainment of ideals of human affiliation. They attack individualism as a negative mentality. The rule obsession is identified with the regulation of the contact of the "bad" man.[45] The latter needs limitations on his antisocial inclinations. Also individualism is linked with a lack of concern for fellow human beings. In international law, the rule on non-intervention purports to accomplish the function of restraining unscrupulous states. Moreover, those rules which affirm state sovereignty and enhance state autonomy create a situation whereunder states function within autonomous clusters, alienated from other states and linked only horizontally for matters at

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[43] *Form and Substance*, p.1724; W.W. Bratton Jr., "Manners, Metaprinciples, Metapolitics and Kennedy's *Form and Substance*", 6 *Cardozo L.Rev.*, (1985), p.871, at pp.884-886

[44] *Form and Substance*, pp.1766-1777

[45] O.W. Holmes, "The Path of Law", 10 *Harvard L.Rev.*, (1897), p.457; T. Twining, "The Bad Man Revisited", 58 *Cornell L.Rev.*, (1973), p.275

their discretion. In such a state of affairs, they become oblivious to grievous conditions existing in neighbouring states. Hence individualism as expressed in Articles 2(4) and 2(7) on non-intervention does not define a value but interprets the value of autonomy and indifference.

On the other hand, altruism is identified with the "good" man who promotes community values. It disputes the main argument of individualism that rules achieve certainty. Only when the "good" man knows that the law would not criticise him when he acts in accordance with community expectations, is legal certainty secured. The use of force against individuals is not excluded but the aim is to transform that force into a moral one. In international law, Article 2(4) does not secure certainty because benevolent states which resort to force in order to restore humanity are victimised by that rule. In an altruistic environment, physical coercion is justified as promoting morality.

Altruism and individualism are the two poles of the fundamental contradiction. They concretise conflicting views concerning the organisation of society and they are the fountain of the contradictory arguments in the interpretation of events. Those attitudes are contained in all legal systems and the U.N. Charter is not an exception.

The fundamental contradiction is hence between individual and community. "The goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. ..... But at the same time that it forms and protects us, the universe of others ..... threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good".[46] Liberal theory is reproached for keeping a suspicious silence on the matter of contradiction or denying its existence.[47] Kennedy wants to liberate legal argument from its confinements and expose the encapsulated compromise between individual independence and communitarian restraint.[48]

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[46] Duncan Kennedy, "The Structure of Blackstone's Commentaries", 28 *Buffalo L.Rev.*, (1979), p.205, at pp.211-212

[47] M. Kelman, *A Guide to Critical Legal Studies*, (Cambridge Mass., Harvard University. Press, 1987), p.3: "..... a system of thought (liberalism) that is simultaneously beset by internal contradiction ..... and by systematic repression of the presence of these contradictions".

[48] *Ibid.*, p.217

Kennedy failed or simply was indifferent to suggesting a remedy or in articulating his vision of transcending that fundamental contradiction. However, his arguments concerning the irresolvable indeterminacy of private law apply in the field of international law and in particular humanitarian intervention expressed in the tensions between individualism and independence, altruism and communitarism, or rules and standards.

**IV.3** *The fundamental contradiction in international law: individualism/altruism; state/community.* In international law the fundamental contradiction is also evidenced in the tension between exclusivity and community.[49] States' socialisation, their participation in a community of states, amounts to affirmation of their individuality, but on the other hand also to a threat.[50] Collectivities impose upon their members constraints which restrict individual autonomy and it is only collective action which could transgress those constraints. The United Nations as a collective international legal order has imposed upon its members certain legal restraints, i.e. on the non-use of force, which serve multiple and rather irreconcilable purposes: confirm state identity, restrain state individuality and reaffirm state association. Only the collectivity can change that rule; for instance, when the United Nations Organisation initiates the use of force.

The contradiction appears in many forms which either reinforce or transform it. Hence, we experience in international legal discourse the tension between individualism/communitarism; individual will/communal will; independence/ equality.[51] The contradiction exists within and between layers, with the exception of the last pair which reaffirm each other. The independence of states presupposes their equality but reversing that argument it might appear inconsistent. Independence could not be illimitable because it is a threat to equality. The unrestrained authority to use force is an affirmation of individual state authority but precludes equality. Therefore, communitarian will supported by individual will has imposed structures towards that end. Those structures

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[49] David Kennedy, "Theses about International Legal Discourse", 23 *German Y.B.I.L.*, (1980), p.353, at pp.361-367, hereinafter cited as *Theses*

[50] *Theses*, p.361: "..... individual nations find in socialisation both the source of their identity and a threat to their existence".

[51] *Theses*, pp.364-366

reverse the argument. Whereas before the two first pairs were opposite and the last complimentary, now the latter is opposite and the other two are complimentary.

The interlocking arguments of Critical Lawyers prove the relevance of Voltaire's observations concerning international relations.[52] In common with writers of his era such as Wolff, Vattel and Grotius, state affairs are considered as a reflection of human relations. He maintains the antithetical instinctual influence of "amour-propre" and "bienveillance", of egoism and benevolence which translates into the fundamental contradiction between individualism and altruism. The destructive force of egoism is prevaricated by the instinct of compassion. Egoism directs human and state actions but the rule of forbearance which emanates from benevolence is stated in a negative form as equality and independence. The optimistic element is that altruism always fosters itself in the end and that nations which have attained a balance of egoistic and altruistic instincts should disperse benevolence.

**IV.4** *Humanitarian intervention.* In a nutshell, the fundamental contradiction can be described as that between individualism and communitarism. A factual situation of humanitarian intervention triggers arguments within that contradiction which support or negate the specific opposing pairs of arguments. Humanitarian intervention asserts communal values and supports the authority of the intervening state. It may also affirm the authority of the intervened state when it is accompanied by consent. On the other hand, humanitarian intervention may defeat the authority of the intervened state, overlook equality and mutual respect and endanger other communal values i.e. peace, which are also supported by communal will. In the opposition of individualism and altruism, humanitarian intervention reaffirms the latter but also the autonomy of the individual state which resorts to action. The dilemma appeals now to the method of choosing between individual particularism or communitarian altruism in a specific situation.

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[52] M.L. Perkins, "Voltaire's Concept of International Order", *Studies on Voltaire and the Eighteenth Century*, T. Besterman (ed.), vol. XXVI, (Genève, Institut et Musée Voltaire, Les Délices, 1963), p.1291. All references were made therefrom.

Humanitarian intervention exposes the failure of the traditional theories of either naturalism or positivism to predict and persuade because their arguments are circular. Separation of law and state action suffers from "the problem of normative source" that is, the inability to determine the content and the instances for the rule's application. On the other hand, fusion of law and practice suffers from "the problem of normative legitimacy". Deviant behaviour cannot be distinguished as either "contranormative" or "protonormative".[53] Article 2(4) on the non-use of force and in principle interdictory of humanitarian interventions, fused with state practice, does not allow us to distinguish whether humanitarian activities are mere violations of that rule or demonstration of a shifting state attitude. On the other hand, the same article being critical of abundant contrary state practice is reduced to irrelevance. Those arguments describe the main failures of positivism in international law.

On the naturalist side, general principles which express values and purposes in international law such as non-intervention and human rights try to control the decisions and exclude other solutions but they fail, because the choice between them is irresolvable and also because there are no secondary norms which would articulate their exercise in detail. Thus they are stated as mutually exclusive principles which apply, if need be, without determining the inferred results. These are, in a nutshell, the deficiencies of natural law.

As is evident from this exposition, the arguments could not solve the contradiction. We need the assistance of a metaprinciple which will neutralise the opposition to any particular argument by increasing the point of reference. In the particular case of humanitarian intervention, the metaprinciples that may apply are those of humanism or sovereignty. Choosing between them reveals the "right" argument but again the choice is arbitrary because there are no meta-metaprinciples which would assist us in that choice. The matter then is one of intuition.

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[53] David Kennedy, "Theses about International Legal Discourse", 23 *German Y.B.I.L.*, (1980), p.353, p.383

# V. TOWARDS A TENTATIVE CONCLUSION

The insistence by the Critical Legal Studies on deconstruction has infused legal thinking with a considerable degree of self-exploration and anticipation. On the other hand, it has procured intellectual or practical cynicism. Establishing the indeterminacy of the legal rules and arguments has released jurisprudence from the confines of formalism but also left it in the wilderness. A method which promotes indeterminacy could only be, for the sake of intellectual consistency, indeterminate itself and, thus, fall on its own sword.

Having said that, the *CLS* have exposed the multiplicity and conflicting character of the rules or principles which compete to prevail in the field of humanitarian intervention. It has also provoked us to contemplate the foundation or the substantial basis of these rules and principles. Altruism or egoism are human feelings which can describe different relations. Applied to the international argument concerning humanitarian intervention, they procure intervention or its opposite, non-intervention. The two principles and their pertinent outcomes are conflicting. One has to go beyond this in order to uncover indices, signals for further action. The *CLS* are quite unable to offer it. They are more concerned *about* the argument and not *for* the argument.

In the present work concerning humanitarian intervention, the method of presenting, explaining, and arguing within the major jurisprudential schools is followed closely. Eventually, a reconstruction shall be attempted: a new suggestion for legal explication of humanitarian actions. Before immersing in this ambitious project, it is first necessary to present and explicate those rules of international law which are relevant in the field of humanitarian intervention. This could be named as a lego-jurisprudential exercus. The author is of the opinion that, by placing the rules into the jurisprudential framework which has been presented above, a better understanding of the implied assumptions can be achieved. Following this, the author will proceed to develop a reconstruction.

# CHAPTER FIVE

# HUMANITARIAN INTERVENTION IN A LEGAL CONTEXT: THE PROHIBITION ON THE USE OF FORCE

*In this chapter as well as in the following, we shall apply the theory of international law developed heretofore to specific rules - the interpretations of Article 2(4) of the United Nations Charter shall be explored and also their significance according to the observations made in the previous four chapters - a sample of cases concerning humanitarian intervention and their legal interpretation shall be presented - finally, the fundamental contradictions which rules, and in particular Article 2(4) hide will be explored - these contradictions between sovereignty/human rights; peace/justice provoke conflictual legal argumentative outcomes - our purpose is, as stated at the beginning of this work, to present the sources of argumentative conflict and then to proceed with a reconstruction*

## I. THE LINK WITH THE PRECEDING CHAPTERS

**I.1** *The link.* In the previous chapters the philosophical foundations of humanitarian intervention were contemplated by demonstrating the relevance of legal philosophies to the articulation of this doctrine. In the following chapters we will deal with the legal arguments and demonstrate that their underpinnings are influenced by and adhere to the main philosophical tenets presented above.

A diachronic aspect of world community is its endeavour to regulate the use of force which always proved disruptive to its flourishing. Thus, at the aftermath of every war since the end of the eighteenth century - 1815; 1918; and again in 1945 - a conscious and concerted effort was made by States, each more radical than the previous one, to reform the international system in ways which were calculated as necessary for enabling them to avoid another conflict.

The United Nations is an undertaking, the most progressive and significant in this process, kindled by the horrific human devastation of World War II and the advent of the nuclear era. It incarnates the expectations for regulated state conduct and a reversal of the previous political and legal disarray. Those internal motivations, reasonable expectations and policy considerations evidenced in states' behavioural patterns and inherent in the foundation of the United Nations system as well as the pragmatics of their realisation could ingeniously be described in the dialogue between Gaston and the General in Jean Anouilh's Waltz of the Toreadors:

> "*General:* La vie est une longe déjeuner de famille - ennuyeux, comme tous les déjeuners de famille, mais nécessaire. D'abord, parce qu'il faut bien se nourir; ensuite, parce qu'il faut le faire, pour ne pas tomber au niveau des bêtes, suivant un cérémonial longuement éprouvé, avec des ronds de serviette à son chiffre, des dessous de plats à musique ..... . Mais attention! ce sont les apparences. C'est un jeu qu'on a décidé de jouer parce qu'une longue expérience a appris à des tas de gens qui n'étaient pas plus bêtes que vous et moi, que c'était le seule façon de s'en tirer. Il faut donc jouer le jeu, selon les régles, répondre aux questions des enfants, partager la tarte en parts égales, gronder le plus petit qui bave, plier convenablement sa serviette et la remettre dans son rond - jusqu'au café. Mais le café bu - ni vu ni connu je t'embrouille - c'est la loi de la jungle qui reprend ses droits."[1]

**I.2** *The dialectical method.* Having said that, the purpose of this Chapter is to examine humanitarian intervention within the legal regime of the United Nations Charter, in particular, under the prohibition of the use of force in Article 2(4) and the establishment of a collective security system. Our aim is also to make explicit the philosophical foundations of the different legal reasoning which the interpretation of the aforementioned article permits. The discussion will follow a dialectic method by contrasting the apparently antagonistic pairs of sovereignty and human rights, peace and justice. The conceptual and practical

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[1] J. Anouilh, *Pièces Grinçantes*, "La Valse des Toréadors". Act III, (Paris, Éditions de la Table Ronde, 1958), p.85, at pp.153-154

dilemma was highlighted by the former Secretary-General of the United Nations, Javier Pérez de Cuéllar:

> "The right to intervene has been given renewed relevance by recent political events. ..... We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents. ..... Does it not call into question one of the cardinal principles of international law, one diametrically opposed to it, namely the obligation of non interference in the internal affairs of States?" Finally, he proposed "a new concept, one which marries law and morality".[2]

The adopted method of dialogic approach towards humanitarian intervention corresponds to the need of accentuating our reasoning in order to apprehend those argumentative premises which are significant. That is, we try to explain that the legal argument is not a sterile exercise within a legal procedure which produces answers semi-automatically. Behind an apparently neutral, stabilised and even "clear" argument nest assumptions, beliefs, fears, hopes. By presenting the antithetical ideals which strive to delimit the argumentation which arises from Articles 2(4) and 51, we will be able to distinguish what is involved, what is the essence of the matter beyond a capricious legalistic logomachy. Eventually, we will able to present another ideal which may achieve results longed for.

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[2] "Secretary-General's Address at the University of Bordeaux", *UNDPI Press Release*, SG/SM/4560, (Apr.24, 1991)

## II. THE LEGAL PROHIBITION ON THE USE OF FORCE: ITS INTERPRETATION AND HUMANITARIAN INTERVENTION

**II.1** *The prohibition of force.* Article 2(4) of the United Nations Charter reads: *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*

The prohibition on the use of force as a legal imperative would ideally contain a clear and simple proposition. However, confluent as it is with moral and political considerations, it reveals perplexity. This is not peculiar or exceptional but humanly indispensable.[3] To argue that the United Nations Charter escapes the destiny of limited human intellectual resources is inane whilst it attributes an unwarranted quality of perfectionism to the "founding fathers" of the United Nations.[4] The relativity, on the other hand, of legal porisms should not be disregarded. What man sees depends both upon what he looks at and also upon what his visual - conceptual experience has taught him to see.[5]

Accordingly, the rendition of the prohibition contained in Article 2(4) has procured considerable dissension in legal literature and also scepticism associated with its normative integrity. The different constructions reveal the background theories which support them. There are mainly three lines of legal reasoning. According to the first, Article 2(4) envisages an absolute prohibition on the use of force, choosing thus normative purity, whereas the second divests Article 2(4) of legal absolutism by diluting its wording and also by contemplating wider moral interests. The third argumentative line borrows elements from the two others and presents a reconciliatory framework for legal evaluation.

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[3] Sir F. Pollock, *A First Book of Jurisprudence,* 2nd. ed., (London, Macmillan, 1904), p.3: "We find in all human sciences that those ideas which seem to be most simple are really the most difficult to grasp with certainty and express with accuracy".

[4] Cordell Hull characterised the United Nations Charter as "a human rather than a perfect instrument". *Charter of the United Nations. Hearings*, p.323

[5] T. Kuhn, *The Structure of Scientific Revolutions,* 2nd ed., (Chicago, University Press of Chicago, 1970), pp.113

Irrespective of the legal diversity those approaches attain, their point of departure is common. It is the lexical structure of Article 2(4) and the preponderant aim is to absolve force in international relations attained through different avenues. Be this as it may, the main arguments of the above schools will be presented concerning the exegesis of Article 2(4).

**II.2** *Absolute prohibition.* The advocates of an all-inclusive prohibition of the use of force maintain that the words "territorial integrity and political independence", strengthen the absolute prohibition because they epitomise the "total of legal rights" a state has.[6] The *travaux préparatoires*, it is argued, dispel any uncertainty concerning the exact function of those phrases because they were inserted upon the "insistent behest of small states" aiming at strengthening the guarantee against intervention rather than restricting its scope.[7] Additionally, the phrase "or in any other manner inconsistent with the purposes of the United Nations", considered under the same prism, purports to emphasise the absolute prohibition on the use of force "by insuring that there should be no loophole".[8] It has been described by Judge M. Lachs as a "residual 'catch - all' provision"[9] in the sense that it frustrates lesser uses of force.[10]

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[6] I. Brownlie, *International Law and the Use of Force by States,* (Oxford, Clarendon Press, 1963), p.268; P. De Visscher, "Cours général de droit international public", 136 *R.C,* (1972 II), p.7, at pp.19-20; M.S. McDougal, F. Feliciano, *Law and Minimum World Public Order,* (New Heaven, Yale University Press, 1961), p.177: "'Territorial integrity' and 'political independence' ..... are classical, technical terms embracing in summary reference the most important bases of state power, the values or interests whose impairment and destruction are sought to be prohibited and, correlatively, whose necessary protection by coercion is permitted".

[7] 6 U.N.C.I.O.D., pp.557,720; M.S. McDougal, F. Feliciano, "The Legal Regulation of Resort to International Coercion: Aggression and Self-defence in Policy Perspective", 68 *Yale L.J.*, (1958-1959), p.1057, at pp.1100-1101; E. Giraud, "L'interdiction du recours à la force. La théorie et la pratique des Nations Unies", 67 *R.G.D.I.P.*, (1963), p.501 at pp.512-513; L.M. Goodrich, E. Hambro, A.P. Simons, *Charter of the United Nations*, 3rd ed., (N.Y., Columbia University Press, 1969), pp.44-45: ".... was added merely to satisfy the small Powers who wished to see the guarantee of Article 10 of the Pact of the League of Nations restated in the Charter, and not to restrict the scope of the prohibition of recourse to force".

[8] 6 U.N.C.I.O.D., p.335; H. Wehberg, "L'interdiction du recours à la force. Le principe et les problèmes qui se posent", 78 *R.C.*, (1951 I), p.1, at p.70; R. Russell, J. Muther, *A History of the United Nations Charter,* (Washington, D.C., The Brookings Institution, 1958), p.456: "This was considered a strong pledge than the more conventional promise not to resort to violent means for the settlement of disputes".

[9] M. Lachs, "General Course in Public International Law", 169 *R.C.*, (1980 IV), p.9, at p.162; L. Henkin, "General Course In Public International Law", 216 *R.C.*, (1989 IV), p.10, at p.148: "..... it would seem to suggest that the only use of force between states whatsoever, if not prohibited by the first clause of Art. 2 (4), is prohibited by the last phrase".

[10] Y. Dinstein, *War, Aggression and* Self-defence,(Cambridge, Grotius Publications, 1988), p.85; O. Schachter, "The Enforcement of International Judicial and Arbitral Decisions", 54 *A.J.I.L.*, (1960), p.1, at pp.14-17

Article 2(3) which imposes an obligation upon the United Nations members to settle their disputes by peaceful means is viewed as another foundation for the absolute alignment of force.[11] The two articles appear interdependent imposing "une obligation de comportement" and "un résultat" thus amounting to "un corollaire logique de cette interdiction".[12] These stipulations highlight the contextualization of the enshrined principles with the instituted methods for the maintenance of peace. The frustration of this objective and its repercussions will be dealt with later but at this point the interrelated character of the United Nations provisions should be emphasised.

Concerning the initial assumptions, the advocates of a restrictive prohibition advocate a hierarchical realisation of the United Nations' purposes. They focus their attention on the maintenance of peace and security as envisaged in the Preamble and Article 1, proceeding hence in a rather ideologically selective enumeration of the United Nations' purposes.

In a nutshell, according to this line of reasoning, the abstention from the use of force is absolute, save in the circumstances pronounced in the United Nations Charter.[13] Consequently, humanitarian intervention is illegal, located outside the legal context of the Charter.

**II.3** *Preparatory work and the intention of the parties.* Advocates of an all inclusive prohibition assemble their arguments by elaborating the *travaux*

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[11] K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", in M. Sorensen (ed.), *Manual of Public International Law,* (London, Macmillan, 1968), p.739, at pp.745-746; J. Zourek, *L'Interdiction de l'Emploi de la Force en Droit International*, (Geneva, Institut H. Dunant, 1974), p.44

[12] J. Charpentier, "Article 2 paragraphe 3", in J.P. Cot, A. Pellet, *La Charte des Nations Unies,* (Paris, Economica, 1985), p.103, at pp.104,106; M. Virally, "Article 2 paragraphe 4" *ibid.*, p.113, at p.114; Goodrich and Hambro, *supra* note 7, p.41; Y. Dinstein, *supra* note 10, p.85

[13] See declaration of the U.S. Delegate at Committee I/1, 6 U.N.C.I.O.D., p.335; "..... the intention of the authors of the original text was to state in the broadest terms an absolute all - inclusive prohibition"; M. Akehurst, *A Modern Introduction to International Law,* 6th ed., (London, Allen & Unwin, 1971), p.261; J.L. Brierly, *The Law of Nations. An Introduction to the International Law of Peace,* 6th ed., Sir H. Waldock (ed.), (Oxford, Clarendon Press, 1963), p.415; Y. Dinstein, *supra* note 10, p.86; E. Giraud, *supra* note 7, pp.512-513; H. Kelsen, *Principles of International Law*, 2nd rev.ed. R.W. Tucker (ed.), (N.Y., Holt, Rinehart and Winston, 1966), p.45; L. Oppenheim, *International Law*, vol.II, "Disputes, War and Neutrality". 7th ed., H. Lauterpacht (ed.), (London, Longmans, 1952), p.154; A. von Verdross, "Idees directrices de l' Organisation des Nations Unies", 83 *R.C.*, (1953 II), p.1, at p.14; P. De Visscher, *supra* , note 6, p.19-20; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *R.C.*, (1952 II), p.455, at p.493; H. Wehberg, *supra,* note 8, p.70; Q. Wright, "The Legality of Intervention Under the United Nations Charter", 51 *Proc. A.S.I.L.*, (1957), p.79, at p.88

*préparatoires* .[14] It is submitted that resort to the preparatory work should not be unreserved and conclusive.

The initial Dumbarton Oaks proposal was: "[a]ll members of the Organisation shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organisation".[15] Proposals by Norway, Costa Rica and New Zealand which omitted the last part of the draft article "in order that the principle of abstention from the use of force may be absolute"[16] were rejected. Later, an Australian amendment inserted the phrase "territorial integrity and political independence" which was finally accepted.

The preparatory work is completely devoid of references to the doctrine of humanitarian intervention.[17] This is reasonable, since the drafters were concerned with setting forth the general framework. This omission induced the unverifiable contention that the aforementioned doctrine was a non-issue.[18] However, it could be maintained that the Charter may accommodate other uses of force such as humanitarian intervention because the prohibited type of force was not elucidated and its provisions are contextual. This was acknowledged by the Rapporteur of Subcommittee I/1/A: "[g]iven international conditions on the one hand, and the fluctuating nature of the evolving substance we have in Preamble, Purposes, and Principles, we cannot in our present situation seek to attain a complete amplification, clarification, and precision which may lead to undue rigidity. General terms do sometimes mean more than other terms, which though tending to be more ample and precise, lead in fact by further enumeration of things to leave unmentioned elements of the substance that, on account of their omission, seem to be waived away at the very time when they ought to be included".[19] Consequently, the indeterminacy of the *travaux*

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[14] H. Lauterpacht, 43 *Annuaire I D.I.*, (1950), p.397: "interpréter la Charte sans se référer aux vastes ressources qu'offrent les travaux précédant sa conclusion, équivaut à adopter la méthode de la "Begriffsjurisprudenz" dans son acceptation la plus discutable".

[15] 6 U.N.C.I.O.D., p.556

[16] *Ibid.*, p.560

[17] R.B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives", in J.N. Moore (ed.), *Law and Civil War in the Modern World*, (Princeton, Princeton University Press, 1974), p.229, at p.236. Also "Intervention to Protect Human Rights", 15 *McGill L.J.*, (1969), p.205, at p.210

[18] I. Brownlie, "Humanitarian Intervention", in J.N. Moore (ed.), *Law and Civil War in the Modern World*, (Princeton, Princeton University Press, 1974), p.217, at p.222

[19] 6 U.N.C.I.O.D., p.700; J.A. Delanis, "'Force' under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion", 12 *Vand. J.I.L.*, (1979), p.114

*préparatoires* eludes definite answers.[20] It is also maintained that the initial intention of the drafters corresponds to an absolute prohibition. The obvious predilections substantiated in this systematic and normative order incline more towards the maintenance of peace and the protection of the value of sovereignty.[21]

Our hesitation to place unreserved reliance to the preparatory work and the original intentions emanates from the understanding that the United Nations Charter should be interpreted organically, in accordance with the needs of the present international community. It should be submitted that a teleological approach concurs with the rules for treaty interpretation found in the Vienna Convention on the Law of Treaties. The United Nations engulfs the whole of international community and, therefore, our observation that it should be interpreted according to the perspectives of the present international community is not novel or radical. However, a more cautionary attitude springs from the vast area of participants or objectives which are included therein and, thus, should be anticipated. Whereas other treaties have a more limited objective, this should not impel us towards modest ways of interpretation.[22] A strictly legalistic dependence on the preparatory work is insufficient because it attempts to explain current phenomena in the light of the 1945 dispositions. No doubt, the changes are inexorable. Additionally, any intention cannot be ascertained or

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[20] E. Lauterpacht, "The Development of the Law of International Organizations by the Decisions of International Tribunals", 152 *R.C.*, (1976 IV), p.380 at p.440: "..... the preparatory work is frequently incomplete, inaccurate, ambivalent and even intentionally vague." Professor Verdross expressed the view that in a case of a very large international conference, where the texts debated in commissions are merely voted by the conference itself, the *travaux préparatoires* are either non existent or of a little use. 42 *Ann. I.D.I.*, (1952), p.377; Also see the Individual Opinion by Judge Alvarez, in *Conditions of Admission of a State to Membership in the Unites Nations, I.C.J. Rep.*, (1947-1948), p.56, at p.68: "the preparatory work on the constitution of the United Nations Organization is of but little value".

[21] T.J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention", in L.F. Damrosch, D.J. Scheffer (eds.), *Law and Force in the New International Order*, (Boulder, Westview, 1992), p.185, at p. 190: "..... the promotion of human rights ranked far bellow the protection of national sovereignty and the maintenance of peace as organisational goals." Also at p.191: "The nub of the matter, then, is that if one deems the original intention of the founding states to be controlling with respect to the legitimate occasions for the use of force, then humanitarian intervention is illegal." I. Brownlie, in J.N. Moore *supra*, note 18, p.219: "..... suspicion of unilateral action by states, coupled with certain faith in collective action".

[22] See Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, 8 *I.L.M.*, (1969), p.679; M.S. McDougal, H.D. Lasswell, J. Miller, *Interpretation of Agreements and World Public Order*, (New Haven, Yale University Press, 1967), pp.3-77

identified accurately and ignores subsequent membership changes.[23] The realities of international life frustrate any mechanical adherence to the preparatory work and the intention of the parties. It was acknowledged with hindsight by Judge Alvarez that "an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life".[24] The challenge facing our wisdom is the comprehension of the political, economic and social forces which strive to shape our time and their legal evaluation.[25] The *travaux préparatoires* and the intention of the parties are thus valuable as a starting point of reference but lack decisiveness. They represent the danger of restraining legal evolution. The subsequent practice and attitudes of states is important and this is more relevant in the area of the use of force.

On the other hand, General Assembly Resolutions, and in particular those on Friendly Relations[26] and Aggression,[27] could not arrogate decisively the arguments which aspire towards an absolute prohibition. The main reservation refers to their uncertain legal status and power to confer legal obligations[28] - other than those concerning the internal administration of the Organisation.

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[23] Professor Chaumont recognises it when he says that "..... dans un cas comme celui des Nation Unies, on ne peut se contenter d'une interprétation de la volonté des Ètats créateurs pour une organisation dont la composition s'est considerablement modifiée depuis sa fondation". 42 *Ann. I.D.I.*, (1952), p.59

[24] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), (Advisory Opinion of 21 June 1971), I.C.J. Rep.*, (1971), p.14, at p.31, para.53: "..... changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law."; Professor P. de la Pradelle said: "Pour interpréter convenablement des tels traités ( traités institutionels tels que la Charte des Nations Unies ), on ne peut se limiter à la recherche de l'intention des parties telle quelle resort des *travaux préparatoires* ." 44 *Ann. I.D.I.*, (1952), p.366

[25] C.W. Jenks, "Some Constitutional Problems of International Organizations", 22 *B.Y.B.I.L.*, (1945), p.11, at p.15

[26] *1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*. G.A. Res. 2625 (XXV), (October 24, 1970)

[27] *Resolution on the Definition of Aggression 1974*, G.A. Res. 3314 (XXIX), U.N. GAOR., 29th Sess., Supp.31, p.142

[28] O. Asomoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, (Den Haag, Martinus Nijhoff, 1966); J. Castaneda, *The Legal Effects of the United Nations Resolutions*, (New York, Columbia University Press, 1969); R.A. Falk. "On the Quasi-Legislative Competence of the General Assembly", 60 *A.J.I.L.*, (1966), p.782; D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", 32 *B.Y.B.I.L.*, (1955-56), p.97

During their long and laborious discussions, the doctrine of humanitarian intervention and protection of nationals was only marginally discussed. The opposition was not on the principle but on the political considerations of its instantiation. There was considerable support on the other hand for the proposition that the domestic jurisdiction limitation does not apply to human rights violations.[29]

**II.4** *Relative prohibition.* The opposite view embarks again on a literal interpretation of Article 2(4) and purporting to convey the full meaning of the words used, infers that the prohibition is qualified. The abstention from force concerns only three instances: (i) territorial integrity; (ii) political independence; (iii) inconsistency with the purposes of the United Nations.[30] Therefore, Article 2(4) does not forbid the threat or use of force "simpliciter" but these words, if they were not to be made redundant, must qualify the supposedly all inclusive prohibition.[31] Once these words were included, their meaning should be considered[32] but their historical evolution does not justify an extensive interpretative construction.[33] The plain meaning of the words "territorial integrity or political independence" does not mean territorial inviolability. A violation of Article 2(4) occurs only when a portion of state territory is annexed and political independence should be interpreted negatively as the absence of political subjugation and not of political coercion.[34] In subsequent years, an

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[29] The mood is best expressed by the Algerian statement: "If it was true that such jurisdiction [domestic] left States free to choose their own political, economic and social systems, it could not, even if exclusive, be regarded as arbitrary and absolute. ..... whenever it was a question of ensuring respect for and the integrity of the human person". 20 U.N. GAOR, 6th C/tee, 878 mtg., (1965), p.222, at para.6; *Ibid.,* 882d mtg., p.249, para.34; *Ibid.,* 888th mtg., p.294, para.92; *Ibid.,* 889th mtg., p.298, para.20. See also Statement by Mr. Jacovides, (Cyprus), 18 U.N GAOR, 6th C/tee, 834 mtg., (1963), pp.247-48, para.32; J-P.L. Fonteyne, "Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations", in R.B. Lillich (ed), *Humanitarian Intervention and the United Nations,* (Charlottesville, University Press of Virginia, 1973), p.197

[30] F.R. Tesón, *Humanitarian Intervention: An Inquiry Into Law And Morality,* (Dobbs Ferry, N.Y, Transnational Pub., 1988), p.131 (the second edition is due in 1996).

[31] O. Schachter, "The Right of States to Use Armed Force", 82 *Mich. L. Rev.*, (1984), p.1620, at p.1633; O. Schachter, *International Law in Theory and Practice,* (Dordrecht/Boston/London, Martinus Nijhoff Pub., 1991), p.112

[32] D.W. Bowett, Self-defence *in International Law,* (Manchester, Manchester University Press, 1958), p.152 I. Sinclair, *The Vienna Convention on the Law of Treaties,* 2nd ed.,(Manchester, Manchester University Press, 1984); M.K.Yassen, "L'interpretation des traités d'après la Convention de Vienne sur le Droit des Traités, 151 *R.C.*, (1976 III), p.20

[33] A.A. D'Amato, *International Law: Process and Prospect,* (New York, Transnational Pub. Inc., 1987), pp.57-73

[34] *Ibid,* pp.57-83; D.W. Bowett, *supra* note 32, p.152; J. Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons, 1954), p.234

extensive construction of Article 2(4) identifies or complements territorial integrity with territorial inviolability.[35] No territory is, however, immune from intrusion on a small or a larger scale.

An argument based on the limited effects of the pursued action was submitted by Sir Eric Beckett in the *Corfu Channel Case*: "[b]ut our action on the 12th/13th November threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence".[36] The findings of the Court are rather inconclusive on this subject because it neither pronounced specifically on this argument, nor on Article 2(4).[37] The I.C.J. in a different context said: "[b]etween independent States respect for territorial *sovereignty* is an essential foundation of international relations."[38] This statement addressed the British plea for intervention in order to put an end to a breach of general international law (the laying of mines) which interferes with third states' rights. The Court's allusion to sovereignty illustrates a consistent jurisprudential enterprise to reinforce the idioms of Article 2(4).[39] This attempt is erroneous because it entails normative obscurity and it is essentially superfluous.[40] If the protected value in Article 2(4) is sovereignty, there exists a fundamental contradiction. The same article champions sovereignty, whereas on the other hand modifies it by limiting the unbridled right to wage war, inherent in sovereignty.

The gist of the conditional reasoning is its attempt to overcome a procedural evaluation of events defined by the legal pillar of state sovereignty. Not all potential breaches of Article 2(4) are real breaches. Consequently, territorial or political impairment necessitated for the protection of higher values such as human rights in cases of egregious violations should not amount to a breach of this article. The premises of this reasoning are traced to a reluctance to condemn mechanically an act as abridgement of Article 2(4), failing to appraise its

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[35] G. Fischer, "Quelques problèmes juridiques découlant de l'affaire Tchecoslovaque", 14 *A.F.D.I.*, (1968), p.15, at p.18: "l'expression integrité territoriale signifie inviolabilité du territoire".

[36] *The Corfu Channel Case, I.C.J. Rep.*, (1950), "Pleadings, Oral Arguments, Documents", vol.III, p.296

[37] D.W. Bowett, *supra*, note 32, p. 151

[38] *The Corfu Channel Case, I.C.J. Rep.*, (1949), p.4, at p.35, hereinafter cited as *Corfu Channel Case*

[39] See Article 1 of the 1974 Definition of Aggression

[40] B. Broms, "The Definition of Aggression", 154 *R.C.*, (1977 I), p.299, at pp.342-343

motives or its effects. It fulfils the prospect of eschewing legal rigidity but it encounters the thrust of the prevailing positivist doctrine which concerns itself with the argument from within the legal framework.[41] Nevertheless, it is not redundant but intrinsic in current theories advancing human rights. The policy school, according to our preceding exposition, adopts a methodologically similar argument of instrumentality. The promotion of human dignity becomes the overlapping aim and criterion for state actions which eventually attaches legality thereto. According to Professor Reisman, the modern *jus ad bellum* is not value neutral: "[h]ence, appraisals of state resort to coercion can no longer simply condemn them by invoking Article 2(4), but must test permissibility or lawfulness by reference to a number of factors, including the objective and the contingency for which coercion is being applied".[42]

Article 2(4) encapsulates within its language the tension between minimisation and extension of values when it refers to the purposes of the Organisation. This article, by prohibiting the use of force, becomes the locomotive for ensuring peace which is one of the stated purposes. Human rights concerns are another stated purpose which may prompt forcible actions. How are they accommodated? The view from the Charter is that human rights are interconnected with the maintenance of peace contributing to the overlapping purpose of peace and security.[43] Thus, the dialectical posture between force and human rights has been solved by tipping the balance towards peace.

In the following sections we shall have the opportunity to elaborate more on this issue. At this point, we should submit that according to this line of argument, a literal approach to Article 2(4) supported by the inconclusiveness of the preparatory work and the intention of the parties, supports the view that the prohibition is not against the use of force *per se*. Since the use of force for

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[41] "La menace et l'emploi de la force sont proscrits, en eux mêmes et quels que puissent être leurs motifs". H. Wehberg, *supra* note 8, p.64

[42] W.M. Reisman, "Criteria for the Lawful Use of Force in International Law", 10 *Yale J.I.L.*, (1984-85), p.279, at p.281

[43] H. Lauterpacht, *International Law and Human Rights*, (London, Stevens & Sons, 1950), p.186: "The correlation between peace and observance of fundamental human rights is now a generally recognised fact". Clement Atlee: "In the Charter we reaffirm faith in fundamental human rights. We see the freedom of the individual in the State as an essential complement to the freedom of the State in the world community of nations. We stress, too, that social justice and the best possible standards of life for all are essential factors in promoting and maintaining the peace of the world". 1 U.N. GAOR (1946), p.24

humanitarian purposes may not impair the constitutive elements of the state and may also affirm the United Nations purposes, it escapes the prohibition of the first clause of Article 2(4).[44]

**II.5** *The reconciliation.* The reconciliatory reasoning interconnects the apposite poles of the above arguments by recognising a limited right of humanitarian intervention only when certain criteria are satisfied.

Both permissive and restrictive arguments have the potential of being misemployed or become absurd. Absolute prohibition reaches absurdity when it remains formalistic, rigid and indifferent to the plight of endangered humans. The permissive, on the other hand, may be exploited for ulterior, fraudulent purposes. Therefore, the articulated criteria purport to enhance the ability of the international community to evaluate the humanitarian character of interventions and could be categorised as substantive, procedural and preferential.[45] The first refers to the "quality and quantity" of the human rights violations. The deprivation should comprise of fundamental human rights and be substantial. The reaction should also satisfy the requirement of necessity and proportionality concerning the domestic structures of the receiving state. Nevertheless, it is admitted that humanitarian intervention is condoned in cases of genocidal regimes such as those in Uganda, Kampuchea or Bangladesh[46] where the incursion may have substantial effects on the authority structures of the state.

The procedural requirements contain criteria referring to the exhaustion of other available remedies, the reporting of the action to the Security Council

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[44] P. Jessup, *A Modern Law of Nations: An Introduction,* (New York, Macmillan, 1949), p.169; D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force*, (Dordrecht, M. Nitjhoff, 1986), p.39, at p.40; W.M. Reisman, M.S. McDougal, "Humanitarian Intervention to Protect the Ibos", in R.B Lillich (ed.), *Humanitarian Intervention*, *supra,* note 29, p.167, at p.177

[45] J-P.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter", 4 *Cal. W.I.L.J.*, (1974), p.203, at pp.258-268; T.E. Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey", 79 *Military L.Rev.*, (1978), p.157, at pp.186-188; R.B. Lillich, "Forcible Self - Help to Protect Human Rights", 53 *Iowa L.Rev.*, (1967), p.325, pp.347-351; J.N. Moore, "The Control of Foreign Intervention in Internal Conflict", 9 *Va. J.I.L.*, (1969), p.205, at p.264; T.J. Farer, "The Regulation of Foreign Intervention in Civil Armed Conflict", 142 *RC,* (1974 II), p.291, at p.394; R.B. Lillich, "Humanitarian Intervention through the United Nations: Towards the Development of Criteria", *ZaöRV,* (1993), p.557

[46] N.D. White, "Humanitarian Intervention", 1 *International Law and Armed Conflict Commentary*, (1994), p.13, at p.21

and, lastly, arithmetical and functional conditions are also included. Collective action is preferable under the presumption of relative disinterest, state authorisation is desirable as well as the disinterestedness of the intervenor.

These requirements could be described as a practical rule of thumb and, if followed, they may liberate states willing to activate humanitarian intervention from the burden of legal acrobatics when justifying their action. They also procure consistency. However, their status as legal rules or mere recommendations has not been clarified and both may create further problems. Although they may consist of an attempt to overcome the *ad hoc* evaluation of forceful actions implied in the permissive interpretation and the policy school, it is irrefutable that in the international arena each case has its own dynamic and special features.[47] Consequently, attempts to confine those dynamics into lofty rules may be counter-productive as the absolute interpretation indicates.

## III. THE COLLECTIVE SECURITY SYSTEM AND ITS CORRELATION WITH ARTICLE 2(4): THE REVIVAL OF THE CUSTOMARY LAW OF HUMANITARIAN INTERVENTION

**III.1** *Article 2(4) is conditioned on a collective security system.* The legal regime established by the United Nations Charter has its own logic and dynamic and therefore, instead of being compartmentalised by selecting particular rules, its overall intrinsic dynamic should be considered. The simple prohibition to intervene is not a panacea and is unable alone to cope with the problem of intervention.[48]

However, the existence of an organic connection between the unilateral abstention from the use of force and a collective security system has been

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[47] O. Schachter, "Remarks", 86 *Proc. A.S.I.L.*, (1992), p.320

[48] M. Bos, "Intervention and International Law II", 25 *International Spectator* (1971), p.69, at p.73; R.A. Falk, *Legal Order in a Violent World*, (Princeton, Princeton University Press, 1968). p.339; R.Y. Jennings, "General Course on Principles of International Law", 121 *R.C.*, (1967 II). p.325, at p.584: "..... the problem is not one of drafting legal precepts controlling the use of force but one of devising international institutions through which the use of force in international relationships can be legally ordered and controlled on an international instead sovereign basis".

denied.[49] It is at least simplistic to contend that the states have assumed solemn obligations, absolving their individual right to use force without providing a substitute. Historically, the use of force has been a means of vindicating rights and therefore any law "which prohibits resort to force without providing a legitimate claimant with adequate alternative means of obtaining redress, contains the seeds of trouble".[50]

The collective security system was the substitute for the non-use of unilateral force and hence the contingency of Article 2(4) therein is logically and politically defensible. Nevertheless, it has also been maintained that the obligation to restrain from the use of force was not intended to be conditioned on an *effective* collective mechanism.[51] If the intention was not to create an effective, that is, operational system, there would be no utilitarian justification for the existence of the system envisaged in Chapter VII. Consequently, states would not have agreed so easily to abstain from resorting to force.

The system in Chapter VII mirrors the precedent of the co-operation between the now permanent members during World War II. The voting procedure, namely the veto power of the permanent members, supports the view that the original scheme was to establish an effective system. It is an acknowledgement of the privileged status attributed to the permanent members in view of their participation in the effective dispensation of the United Nations purposes. In effect, it is a balance of interests. The interest in a functional system activated though the Security Council and the interest of the permanent members to have a say in the system: "ou bien les "Cinq Grands" sont d'accord et les Nations Unies disposent des pouvoirs très étendus, ou bien ils ne le sont pas et tout action devient impossible".[52]

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[49] N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity"*, (Dordrecht/Boston/Lancaster, M. Nijjoff, 1985), p.9; *Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Rep.*, (1986), p.14, at p.100, para. 188: "The principle of non-use of force ..... may be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, .....". Hereinafter cited as *Nicaragua Case*

[50] C.H.M. Waldock, *supra* note 13, p.490; P. Jessup, *A Modern Law of Nations, supra* note 44. pp.170-1

[51] O. Schachter, *International Law in Theory and Practice*, (Dordrecht/Boston/Lancaster, Martinus Nijhoff Pub., 1991), p.129

[52] P. Reuter, *Droit International Public*, (Paris, PUF, 1983), p.524

Moreover, the euphoria surrounding the negotiations and adoption of the Charter after a destructive war could only add weight to the argument that they were oriented towards an effective system and that Article 2(4) was part of a comprehensive agreement.

**III.2** *The Corfu and Nicaragua Cases imply a contextual character.* Thus, Article 2(4), instead of being an "independent imperative of pacifism",[53] was associated with a collective security system forming therewith a sliding scale. Output in one pole of the scale corresponds to input in the other. Due to chronic malfunction and distortion,[54] the effectiveness of the collective security system has been eroded and states have resorted to a process of partially returning to the so called Westphalia System,[55] that is, "the revival of a type of unilateral *jus ad bellum*".[56] It is maintained that the contingency of Article 2(4) with an effective collective security system was answered negatively in the *Corfu Channel Case*. The Court said that it "can only regard the alleged right of intervention as the manifestation of a policy of force ..... whatever be the present defects in international organisation ..... ".[57] This was said in order to rebut the British argument that their interventionist action was justified in order to secure the *corpora delicti* and submit them to an international tribunal. The decision is thus restricted only to the inefficiency of the international judicial system and the claim to exercise judicial action in the territory of another state whose

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[53] W.M. Reisman, "Coercion and Self Determination: Construing Charter Article 2(4)", 78 *A.J.I.L.*, (1984), p.642. "Réciproquement, cette règle (Article 2(4)), ne sera respectée et ne constituera une guarantie de la paix que si ses méchanismes fonctionnent de façon efficace ..... ." M. Virally, "Article 2 paragraphe 4", in J.P. Cot, A. Pellet, *La Charte des Nations Unies*, (Paris, Economica, 1985), p.113, at p.115

[54] Premier Rapport sur l'activité de l'Organisation par M. Pérez de Cuéllar, 7/9/1982: "c'est l'absence d'un système efficace de sécurité collective dans le cadre de la Société des Nations qui, entre autres facteurs, a amené la Seconde Guerre mondiale. La situation actuelle est certes entièrement différente, mais les gouvernements n'en ont pas moins besoin, et mêmes plus que jamais d'un système de securité collective dans lequel ils puissent avoir pleinement confience". A/37/1, 7 Sep. 1982

[55] L. Gros, "The Peace of Westphalia", 42 *A.J.I.L.*, (1948), p.20; A. Cassese, "Return to Westphalia? Considerations on the Gradual Erosion of the Charter System", in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force*, (Dordrecht, M. Nitjhoff, 1986), p.505; A. Cassese, *International Law in a Divided World*, (Oxford, Clarendon Press, 1986), pp.223; I. Claude Jr., *Swords into Plowshares*, 4th ed., (New York, Random Hause, 1971), chs.I,II; R.A. Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order", in R.A. Falk, C.E. Black (eds), *The Future of the International Legal Order*, vol.I, "Trends and Patterns", (Princeton, Princeton University Press, 1969), p.32

[56] W.M. Reisman, "Criteria for the Lawful Use of Force in International Law", 10 *Yale J.I.L.*, (1984-85), p.279, at p.281

[57] *The Corfu Channel Case, I.C.J. Rep.*, (1949), p.4, at p.35

authorities are incapable or unwilling to co-operate. In his dissenting opinion, Dr Eçer said that it was an intervention, not in the political but in the police or legal sense.[58]

According to one interpretation, the I.C.J. denied any interrelation in the *Nicaragua Case* where it said that "the principle of non-use of force ..... may be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter."[59] The Court's reasoning, by maximising the value of the rule against force and denying at the same time its adherence to a collective security system, rigidifies the United Nations' system and makes it intolerable to states. The domestic systems regulate and overcome the discrepancies between actual and normative behaviour through their established institutions: legislative and judicial. In the case of the international system, remedy is presented by the *status quo ante*, that is, the customary law. The Court alluded to this construction because, by freeing the customary rules on the use of force from the collective security system, it acknowledged inadvertently their independence from Charter constraints. The I.C.J. also seems to accept the more liberal character of customary law. It said in the *Nicaragua Case* that "on a number of points, the areas governed by the two sources of law (customary and treaty law) do not exactly overlap, and the substantive rules in which they are framed are not identical in content", that "the United Nations Charter ..... by no means covers the whole area of the regulation of the use of force in international relations" and that "customary international law continues to exist and apply, separately from international treaty law even where the two categories of law have an identical content".[60] Customary international law on the use of force is less restrictive than treaty law[61] and, although the I.C.J. did not determine the deviations, it allowed for multiple interpretations. Consequently, the line of argument which makes Article 2(4) dependent on the function of a collective security system and contemplates the breakdown of that system, recognises also a residue of the customary law of

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[58] *Ibid*, p.130
[59] *Nicaragua Case*, p.188
[60] *Ibid.*, pp.94,96, paras.175,176,179
[61] See on the relation of treaty and customary law the Dissenting Opinions of Judges Ago, Oda, Schwebel and Jennings. *Ibid*, pp.183-184, 215-217, 302-306, 530-534 respectively

self-help.[62] Therefore, a "second order" inquiry is needed in appraising the resort by states to the more permissive notions contained in customary international law. The essence of such an inquiry would be that Article 2(4) suppresses self-help insofar as the organisation can assume the role of enforcer. When it cannot, self-help prerogatives revive.[63] Humanitarian intervention has been assimilated into customary law. It is a self-help measure when human rights violations occur as it has been presented in the preceding chapters. There is thus ample room to retain the above doctrine when the old system revives.

**III.3** *A recapitulation.* It is essential to point out that all these interpretations: restrictive; permissive or reconciliatory vow, in different degrees, their respect to non-intervention. The restrictive upholds the rule against force irrespective of the subsequent developments which seem to have amplified it. The permissive and reconciliatory account on the other hand, acknowledge certain deficiencies and permit interventions under specified circumstances. The policy-school evades this construction by considering interventions *ad hoc* under certain criteria for appraisal which pursue the policy of promoting human dignity. We could characterise with a certain degree of simplification the restrictive position as hard, whereas the permissive and reconciliatory as soft positivism. The policy approach resembles more to a naturalist stance.

The discourse on article interpretation and the contextualization of the United Nations provisions is finally amplified by the actual course of events and, hence, the crucial point is to observe the evolution and *modus operandi* of the entire

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[62] That has provoked a learned author, Professor McDougal, who at earlier times resided within the absolutist camp, to suggest later that in the absence of collective machinery, an interpretation of Article 2(4) should honour self-help: "I am ashamed to confess that at one time I lent support to the suggestion that Article 2(4) and the related articles did preclude the use of self-help less than self-defence. On reflection, I think, this was a very grave mistake, that Article 2(4) and Article 51 must be interpreted differently. In the absence of collective machinery to protect against attack and deprivation, I would suggest that the principle of major purposes requires an interpretation which would honor self-help against prior unlawfulness. The principle of subsequent conduct certainly confirms this. Many states of the world have used force in situations short of the requirements of self-defence to protect their national interests." M.S. McDougal, "Authority to Use Force on the High Seas", 20 *N.W.C.Rev.*, (1967), p.19, at pp.28-29

[63] W.M. Reisman, *Nullity and Revision*, (New Haven, Yale University Press, 1971), p.850; B. Asrat, *Prohibition of Force under the U.N. Charter: A Study of Art. 2(4)*, (Uppsala, Justus Förlag, 1991), p.46; J. Combacau, "The Exception of Self-defence in the United Nations Practice", in Cassese (ed.), *The Current Legal Regulation of the Use of Force*, (Dordrecht, M. Nitjhoff, 1986), p.9, at pp.30; W.M. Reisman, "Article 2(4): The Use of Force in Contemporary International Law", 78 *Proc. A.S.I.L.*, (1984), p.74, at p.78; G. Schwarzenberger, "The Fundamental Principles of International Law", 87 *R.C.*, (1955 I), p.190, at p.338

law of the United Nations system, its actual formation by ensuing events, and the survival in this environment of humanitarian intervention.

## IV. STATE PRACTICE CONCERNING HUMANITARIAN INTERVENTION AND ITS JUSTIFICATION ACCORDING TO THE ABOVE REASONING

**IV.1** *Bangladesh, 1971.*[64] East Pakistan consisted the eastern province of Pakistan which emerged after the British withdrawal from the subcontinent. It was politically and economically dominated by West Pakistan although it was more populous and had a distinct ethnic, linguistic and cultural identity. In November 1970, the Awami League which supported a degree of autonomy for East Pakistan won a majority in the National Assembly.[65] In order to avoid any vociferous claim to autonomy, the central government annulled the convention of the new Parliament. This action was confronted with demonstrations and the leader of the League issued a "Declaration of Emancipation".[66] The central government sent the army on March 25, 1971 to quell the situation. Public order was imposed with mass killings, atrocities and terror.[67] The situation amounted to genocide and an estimated one million people died, while millions of terrorised Bengalis sought refuge in India.[68] On December 5, 1971, India intervened after seven months of persistent brutality. The next day Bangladesh

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[64] T.M. Franck, N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 *A.J.I.L.*, (1973), p.275

[65] "Documents: Civil War in East Pakistan", 4 *N.Y.U.J. Int'l L & Pol.*, (1971), p.524, at p.550

[66] *The Events in East Pakistan, 1971, A Legal Study by the Secretariat of the International Commission of Jurists*, (Geneva, 1972), pp.20-21

[67] "The principal features of this ruthless oppression were the indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of the Hindu population; ..... All this was done in a scale which is difficult to comprehend". *Ibid.*, pp.26-27; V.P. Nanda, "Self-Determination in International Law: The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)", 66 *A.J.I.L.*, (1972), p.321, at p.332

[68] *The Events in East Pakistan, 1971, A Legal Study by the Secretariat of the International Commission of Jurists*, (Geneva, 1972), pp.41-42; V.S. Mani, "The 1971 War on the Indian Subcontinent and International Law", 12 *Indian J.I.L.*, (1972), p.83, at p.85. The exact number of refugees is disputed between Pakistan's claim of 2,000,000 and India's 10,0000,000. See *Keesing's*, (1971), 24990; I. Ghandi, "India and the World", 51 *For. Aff.*, (1972), pp.70-71

was recognised as an independent state.[69] India offered a humanitarian justification for her action. During the debate of the situation in the Security Council, the Indian delegate said: "we are glad that we have in this particular occasion nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering".[70] The Indian representative also urged the Security Council members to acknowledge some "realities": "[r]efugees were a reality. Genocide and oppression were a reality. The extinction of all civil rights was a reality..... ."[71] It is surprising that the main line of argument was based on the right of self-defence[72] amid frequent references to humanitarian concerns. The representative of the Soviet Union, responding to China's claim of non-interference, charged the latter with trying "to divert attention from the main cause of the conflict in the Hindustan Peninsula, which was the monstrous and bloody repression of East Pakistan".[73]

In a nutshell, the reaction in the United Nations was muted and India was criticised mainly on political grounds irrelevant to the particular case.[74] The lack of any conspicuous condemnation of India's action as a violation of Article 2(4) shows the degree of acceptability the normative attenuation of its content has received. The rarity of criticism is coupled also by the passivity and inability of the United Nations to respond sufficiently. The systematic tension between ambitious pronouncements concerning humanitarianism and meagre activity

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[69] *The Events in East Pakistan, 1971, A Legal Study by the Secretariat of the International Commission of Jurists,* (Geneva, 1972), pp.43-44

[70] 26 U.N. SCOR, 1606th mtg, U.N. Doc. S/PV. 1606 (1971), p.18. "The reaction of the people of India to the massive killing of unarmed people by military force has been intense and sustained. The common bonds of race, religion, culture, history and geography of the people of East Pakistan with the neighbouring Indian state of West Bengal contribute powerfully to the feelings of the Indian people". U.N. GAOR, 2002nd mtg, U.N. Doc. A/PV. 2002 (1971), p.14

[71] 9 *United Nations Monthly Chronicle,* (1972), p.25

[72] It is maintained by Akehurst that the initial humanitarian arguments was later deleted from the official records and self-defence was inserted later. M. Akehurst, "Humanitarian Intervention", in H. Bull (ed.), *Intervention in World Politics,* (Oxford, Clarendon Press, 1984), p.95, at pp.96-7

[73] 9 *United Nations. Monthly Chronicle,* (1972), p.15

[74] Only China and Albania criticised India as aggressor. 26 U.N. GAOR, Plen. meetings, 2003nd mtg., (7 December 1971), para.311 (China); *ibid.*, para.112 (Albania). Other states emphasised the need for a political solution referring to the principle of sovereignty and also acknowledging the human dimension of the conflict. Thus, the U.S. Representative spoke of the "untold suffering" but also about "building a peaceful world". 26 U.N. SCOR, 1606th mtg., (4 December 1971), paras.187,194

towards this aim was encapsulated by the Indian delegate in the Security Council:

> "[I]n the face of a direct violation of the Universal Declaration of Human Rights and the provisions of Articles 55 and 56 of the Charter by Pakistan, the Security Council and the United Nations should have found themselves in a position to intervene and persuade Pakistan to return to reason. That did not happen. While developments proceeded on their inexorable course towards the present tragedy, the United Nations continued to be inhibited by considerations of domestic jurisdiction".[75]

**IV.2** *Kampuchea, 1978-79.*[76] The Khmer Rouge regime installed in 1975 was perverse and in its four years of terror one sixth of the entire population of six million was murdered. After a frontier incident, Vietnam invaded on Christmas Day, 1978 and by early January 1979, it had captured the capital. Vietnam maintained that it was acting in self-defence and that the overthrow of the Pol Pot government was the result of the civil war.[77]

The issue of humanitarian intervention was raised by Senator McGovern who wondered "..... under those circumstances if any thought is being given either by our Government or at the United Nations or anywhere in the international community of sending in a force to knock this Government out of power, just on humanitarian grounds."[78]

In the Security Council, the Vietnamese action was condemned and humanitarian intervention was not mentioned as a possible justification. Although any formal condemnation was avoided by the Soviet veto,[79] a resolution by China in which Vietnam was to be condemned as an "aggressor' did not acquire support. In the General Assembly, Vietnam's condemnation for encroaching the sovereignty of Kampuchea was more explicit. Thus, according to Greece, the human rights violations do not justify Vietnam's intervention.[80]

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[75] 9 *United Nations Monthly Chronicle,* (1972), p.29
[76] M.J. Bazyler, "Re-examining the Doctrine of Humanitarian Intervention in light of the Atrocities in Kampuchea and Ethiopia", 23 *Stanford J.I.L.*, (1987), p.547
[77] U.N. SCOR, 2108th mtg, (Jan. 11, 1979), p.34
[78] *Indochina: Hearings Before the Subcomm. on East-Asian and Pacific Affairs of the Senate Comm. on Foreign Relations,* 95th Cong., 2nd Sess. (1978), p.24
[79] U.N. SCOR, 2112th mtg., (Jan. 15, 1979), p.34
[80] 17 *United Nations Chronicle,* (1980), pp.39,41,44

The subsequent General Assembly Resolutions follow the pattern of condemning "foreign intervention" and requesting the withdrawal of "foreign troops'.[81]

Appraising this action according to the above-mentioned triple interpretation of the rule on the non-use of force, it seems that the world reaction conforms with the restrictionist interpretation of non-intervention. Moreover, the criteria for the reconciliatory approach are not met. Although the atrocities were considerable, the humanitarian purposes were not overriding in Vietnam's motive for intervention,[82] and also Vietnam remained in the country after the overthrow of the Pol Pot regime. According to the permissive interpretation, the initial action did not violate the territorial integrity, nor the political independence understood as deposing a barbaric regime. In addition, it supported the human rights purposes of the United Nations Charter because it had the effect of terminating the large scale affronts to human dignity. However, the Vietnamese remained in the country and this constitutes an infringement of political independence which, coupled with the bleak situation of human rights after the invasion, raises questions concerning the character of the action. Having said that, this case will again be dealt with in Chapter Nine where an alternative, reconstructive approach is offered. At this stage, the pursued appraisal of these instances aims at showing the incommensurability of the argument on the use of force when it is applied to specific cases.

**IV.3** *Uganda, 1979.* The relations between Tanzania and Uganda have always been strenuous and frontier incursions were frequent. Following the invasion of Ugandan troops into Tanzania in October 1978[83] and their retreat a month later, Tanzania decided to attack Uganda in January 1979. It declared that it had "no claim to an inch of Ugandan territory".[84] Three month later, on April 11, 1979 Ugandan exiles forming the Ugandan National Liberation Front (UNLF) with the help of Tanzanian military force entered the Ugandan capital Kampala and

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[81] G.A. Res. 34/22 (November 14, 1979); G.A. Res. 35/6 (October 22, 1980)
[82] According to the Lawyer's Committee for Human Rights: "The primary purpose of the [Vietnamese] invasion has been to bring about the replacement of Pol Pot's regime, which had been unremittingly violent in its hostility towards the Socialist republic of Vietnam (SRV) since 1977, by one that could be relied upon to be friendly to it". *Kampuchea: After the Worst,* (1985), p.17
[83] *Keesing's,* (1979), p.29669
[84] *Ibid.*, p.29670

toppled Idi Amin's regime. This regime was characterised by gruesome violations of human rights, perverseness and arbitrariness.[85] It is estimated that up to 300,000 citizens perished in those eight years.[86] The justifications offered by the Tanzanian government were mixed, containing the traditional arguments of self-defence with some reference to humanitarian considerations. The Foreign Minister declared that Amin's overthrow has been "..... a singular triumph for freedom, justice and human dignity".[87] When the matter was considered at the OAU meeting in Monrovia, on July 17, 1979, the official justification for that action was "..... the Ugandan army's aggression against Tanzania and Idi Amin's claim to have annexed part of Tanzanian territory. There [had been] no other cause for it".[88] However during the initial stages of the conflict when the OAU attempted to mediate, Nyerere, the President of Tanzania, criticised the organisation for protecting tyrants and said: "[t]here is a strange habit in Africa: an African leader, as long as he is African, can kill Africans just as he pleases".[89]

The reaction to this action was rather muted and it was not censured in the United Nations or the OAU although it had violated cardinal principles of their respective Charters.[90] Responding to some criticism at the OAU meeting, Professor Yusuk Lule, the new leader of Uganda, challenged them "..... not to hide behind the formula of non-intervention when human rights are blatantly violated".[91] An interesting point was the acknowledgement of the revival of self-help in cases of inaction. Nyerere responded to criticisms at the OAU meeting that: "[w]hat we did was exemplary at a time when the Organisation of African

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[85] "Since the present regime came to power in 1971 there has been a complete breakdown in the rule of law. Today, every Ugandan citizen is in daily fear of his or her own safety. Government security forces virtually control the country and have assumed practically unlimited powers to kill, torture, and harass innocent civilians. In fact, all of these practices have become routine occurrences". Statement of Michael H. Posner, *Uganda: The Human Rights Situation: Hearings Before the Subc/tee on Foreign Economic Policy of the Senate C/tee on Foreign Relations*, 95th Cong., 2nd Sess. 11, (1978)

[86] *Amnesty International, Annual Report*, (1980), p.38

[87] 16 *Africa Research Bull. - Political, Social and Cultural Series*, (1979), p.5223

[88] *Ibid., p.5224*

[89] 11 *Africa Contemporary Records*, (1978-79), p.394

[90] 16 *Africa Research Bull. - Political, Social and Cultural Series*, (1979), pp. 5154-5155; *Keesing's*, (1979), pp.29670-29761; I.J. Wani, "Humanitarian Intervention and the Tanzania-Uganda War", 3 *Horn of Africa*, (1980), p.18, at p.24: "The Tanzanian invasion came as some kind of blessing. Though it was charged as a violation of certain peremptory norms of international law, it was never seriously censored".

[91] *Keesing's*, (1979), pp.29840-29841

Unity found itself unable to condemn Amin. I think we have set a good precedent in as much as when African nations find themselves collectively incapable of punishing a single country, then each country has to look after itself".[92]

Concerning the legality of this action, the restrictive view of Article 2(4) would condemn it as a violation of sovereignty. This principle amounts to an incantation within the legal context of the United Nations but the lack of serious condemnation reveals the dilemma of positivists who should condemn in principle but accept in practice humanitarian intervention. Under the permissive view, this action was not an impairment of territorial integrity or political independence and additionally it affirmed the United Nations purpose of safeguarding human rights. The criteria for the reconciliatory approach are mainly satisfied because there were serious deprivations of human rights, and the prospect for international action was minimal. The requirement of proportionality was not met but it would be unimportant if we consider the effect of the action which was the restoration of a regime which vowed to respect human dignity. When the Tanzanian troops advanced and Ugandans welcomed them, Amin threatened to punish those supporting the enemy. Thus, withdrawal with Amin in power would have meant massive killings.[93]

**IV.4** *Central Africa, 1979.* "Emperor" Bokassa had imposed his loathsome regime in the Central African Republic which included killings and terror. Reports of killing some hundreds of demonstrators circulated in January 1979. The French Government refused to interfere reiterating respect for sovereignty.[94] The persistent pattern of human rights violations culminated with the killing of almost two hundred children, under the personal order of Bokassa, who refused to buy the government-mandated school uniforms.[95] Faced with this situation, France prompted the formation of a "commission d'enquête" composed of African jurists which would prepare a report on the massacre. The official line

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[92] *Ibid.*, p.29673

[93] I.J. Wani, :Humanitarian Intervention and the Tanzania-Uganda War", 3 *Horn of Africa*, (1980), p.18, at p.25

[94] "[La France] estime, en conséquence, que tout intervntion officielle de sa part auprès de ce Gouvernement au sujet de tels événements ne pourrait que constituer une immixtion dans le domaine de sa politique intérieure." Response of the Foreign Affairs Minister, no. 12545, *J.O. - A.N.*, 15 mars 1979

[95] *Keesing's*, (1979), p.29933

was that "avec efficacité et discrétion, respectueuse de la souveraineté de tous les Etats, [France] usera de l' influence dont elle dispose pour faire respecter les droits de l'homme" although this massacre "soulève l'indignation".[96] When the report directly implicated Bokassa, France responded with suspension of aid and finally his regime was toppled with French participation on September 21, 1979.[97] According to a communiqué published on the same day, France reacted "..... pour répondre aux menaces sur la sécurité des populations, compte tenu des graves atteintes aux droits de l' homme" and the French contingent "sera rappelé aussitôt que les autorités centrafricaines jugeront assurée la sécurité de la population".[98] During the debates in the National Assembly, the Foreign Minister, confronting the accusations by François Mitterrand of neo-colonialism, tried to reconcile non-intervention with respect of human rights: "[i]ntervenons- nous en Centrafrique? Alors nous sommes les gendarmes de cette Afrique, les néocolonislistes, ..... . Nous abstenons-nous d'intervenir? Alors nous soutenons des régimes tyranniques, nous laissons bafouer les droits de l' homme ....." .[99]

Appraising the French action according to the three aspects identified above, it satisfies the requirements for humanitarian intervention because it was a reaction to human rights violations, it was limited temporally and in its objectives, and it did not compromise the territorial integrity or political independence of the Central African Republic. The reaction to this action was scant and the humanitarian motives are evident in the speech of the Central African Ambassador to the United Nations:

> "I cannot conceal the bitter disappointment of my country over the culpable silence of the United Nations and of the Organisation of African Unity regarding the suffering of the people of the Central African Republic in face of massive and flagrant violations of human rights in the name of the sacred principle of non-intervention in the internal affairs of states. These institutions, whose basic principles depend on the protection

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[96] *J.O. - A.N.*, 17 mai 1979, p.3852, *ibid*, 24 mai 1979, p.4129
[97] 83 *R.G.D.I.P.*, (1979), p.1058; 25 *A.F.D.I.*, (1979), p.908
[98] *Le Monde*, 22 septembre 1979; Repeated by the Foreign Minister, *J.O. - A.N.*, 4 octobre 1979, p.7721; *Le Monde*, 14-15 octobre 1979
[99] *J.O. - A.N.*, 6 october 1979, p.7885

of human rights and freedoms ....., will never be able to do anything useful until they stop being a syndicate of dictatorial oppressive governments".[100]

However, the interpretation which sees in Article 2(4) an absolute prohibition would condemn this action to illegality because it encounters the constituent pillars of the article.

**IV.5** *Rwanda, 1994.* The ethnic violence[101] erupted on April 6th, 1994, with the crash of the presidential plane which was carrying Rwanda's President Habyarimana and the President of Burundi Ntaryamira. The aircraft was attacked by a rocket launched by the mainly Tutsi Rwanda Patriotic Front (F.P.R). Rwanda and the neighbouring Burundi are divided along ethnic lines and ethnic violence is entwined in their history. Rwanda's population is 90% Hutus and 10% Tutsis whereas in Burundi it is 83% Hutus and 16% Tutsis respectively.

The warring factions in Rwanda had concluded the year before the Arusha Peace Agreement (August 4, 1993), which established a transitional government and provided for democratic elections. Consequent to that agreement, a United Nations Force (UNAMIR I) was dispatched in the area to supervise its implementation.[102]

With the eruption of ethnic strife that force proved inadequate to handle the situation. The policy of France was neutral, "le role de la France n'est pas de retablir l'ordre par ses soldats sur l'ensemble du continent africain"[103] but with Belgian troops they evacuated 600 French nationals.[104] As the atrocities intensified, the Belgian and other national contingents were withdrawn from

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[100] 4 U.N. GAOR, U.N. Doc. A/34/PV 32, (1979), p.32

[101] *Rapport sur la situation des droits de l'homme au Rwanda, soumis par M. R. Degni-Ségui. Rapporteur special de la Commission des droits de l'homme, en application du paragraphe 20 de la résolution 1994 S-3/1 de la Commisssion, en date du 25 mai 1994,* E/CN.4/1995/7, 28 juin 1994

[102] S.C. Res. 872, U.N. SCOR, 3288th mtg., U.N. Doc. S/RES/872 (1993), *Rapport du Secrétaire général sur le Rwanda,* S/26488, (24 septembre 1993), p.14, para.66: "..... aurait pour mandat de contribuer à l'instauration et au maintien d'un climat propre à assurer la mise en place et le fonctionnement du Gouvernement de tansition".

[103] Interview of the French Foreign Minister, (11/4/1994), *PEF* (La Politique étrangère de la France), mars - avril, p.150

[104] *Ibid,* p.153; *The Economist,* 9-15.4.1994, p.63; *ibid.,* 16-22.4.1994, p.77

UNAMIR I which was reduced to 1,705 men.[105] The Security Council decided to modify its mandate.[106]

Faced with the gravity of the situation, the U.N. agreed to send a force of 5,500 men in a humanitarian mission (UNAMIR II).[107] That mission was faced with logistical delays; as the Secretary-General said: "[i]t is genocide which has been committed ..... and the international community is still discussing what ought to be done".[108]

Under those circumstances, disgruntled by the international torpor, the French decided to dispatch some 2,000 men in Rwanda on the 23rd of June in the "Opération Turquoise" and also to create a humanitarian safe area in the south-west. According to the official announcement:

> "La France souhaite que soit mise sur pied au Rwanda une opération internationale à but humanitaire destinée à sauver des vies humaines et à mettre fin aux massacres qui sont perpétrés dans ce pays. ..... Cette opération, dont le but est strictement humanitaire, sera menée sur la base d'un mandat qui sera demandé aux Nations Unies et en liaison avec toutes les organisations internationales et toutes les parties intéressées".[109]

The debates in the National Assembly reveal the purpose and the conditions attached to the "Opération Turquoise". According to the French Prime-Minister, the operation is "humanitaire destinée à sauver des populations menacées".[110] The operation was governed by some principles. The first was:

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[105] Letter of the Permanent Representative of Belgium to the President of the Security Council, S/1994/430, (13/04/1994)

[106] S.C. Res. 912, U.N. SCOR, 3368th mtg., U.N. Doc. S/RES/912 (1994). Its mandate was restricted: "(a) To act as an intermediary between the parties in an attempt to secure their agreement to a cease-fire; (b) To assist in the resumption of humanitarian relief operations to the extent feasible; and (c) To monitor and report on developments in Rwanda ..... ." For the role of the United Nations *see* F. Ouguergouz, " La tragédie Rwandaise du printemps 1994: quelques considérations sur les premiéres réactions de l'organisation des Nations Unies", 100 *R.G.D.I.P.*, (1996), p.149

[107] S.C. Res. 918, U.N. SCOR, 3377th mtg., U.N. Doc. S/RES/918 (1994); President Clinton said concerning those operations that they should go ahead when "..... humanitarian consequences of inaction by the international community have been weighed and are considered unacceptable". *The Economist,* (21-27.5.1994), p.16

[108] *The Economist,* (28.5-3.6.1994), p.66

[109] Communiqué conjoint du palais de l'Elysée et de l'hôtel Matignon, 18/06/1994, *PEF.* mai - juin, 1994, p.296

[110] *JO. AN. CR., (Journal officiel. Débats parlementaires - Assemblée Nationale - Compte rendus),* 23/06/1994, p.3339

"la France n'agira qu'avec un mandat du Conseil de Sécurité des Nations Unies. Le Gouvernement a considéré qu'une action de ce type, qui répond à un devoir humanitaire, devrait être, malgré l'urgence, autorisée par la communauté internationale".[111] One other principle was the purely humanitarian and disinterested character of the operation: "il s'agit d'une opération où il peut etre fait usage de la force, mais avec un objectif uniquement humanitaire, à savoir sauver des vies humaines et mettre à l'abri des enfants, des malades, des populations terrorisées. Cette force, je le redis très clairement, n'est pas une force d'interposition, mais une force qui doit protéger les populations civiles".[112] Finally, the operation should be limited temporally. The French troops remained in the area until August 22, 1994 after their mandate was prolonged by the Security Council.

"Opération Turquoise" was condoned by the Security Council.[113] In the preamble of Resolution 929, the Security Council defined the strictly humanitarian character of the operation prompted by the delays in the deployment of UNAMIR II, reiterated the urgency of the situation and, also, conferred part of UNAMIR I mandate thereto. The creation of a safety zone, though, was met with suspicion. According to the Belgian Defence Minister, "..... l'affaire devient trop politique et delicate", beyond the initial humanitarian character.[114] There was suspicion that the zone would serve as a sanctuary to the Hutu perpetrators of massacres. However, it was made clear by the French that "il n'est pas souhaitable que des responsables politiques rwandais s'introduisent dans cette zone, au risque de changer la nature de la zone qui a une vocation strictement humanitaire".[115] The F.P.R. condemned the safety zone as "un projet de néo - colonisation....., une forme de balkanisation du Rwanda sur un modèle ethniquement calculé....., une consolidation des bases armées de l'armée gouvernementale et des milices".[116] Examining the situation, the Security Council, through its President,

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[111] *Ibid.*
[112] Press conference of the French Foreign Minister, (5/07/1994), *PEF*, juillet - aout, p.30
[113] S.C. Res. 929, U.N. SCOR, 3393rd mtg., U.N. Doc. S/RES/929 (1994). China, Brazil, New-Zealand, Pakistan and Nigeria abstained
[114] *Le Monde*, 8.7.1994, p.3
[115] 98 *R.G.D.I.P.*, (1994), p.991
[116] *Le Monde*, 06/07/1994, declaration of the F.P.R representative in Europe

reaffirmed: "..... le caractère humanitaire de la zone sure au sud - ouest du Rwanda et exige que tous ceux que cela concerne respectent ce caractère".[117] With the victory of the F.P.R., France declared in the Security Council that "les autorités rwandaises sont par définition souveraines sur l'ensemble du territoire rwandais".[118] A factual evaluation of the French operation could be described as "L'opération Turquoise a été dictée par les événements. A vocation strictement humanitaire, elle a rempli ses objectifs: sauver des dizaines de milliers de vies; faire cesser les massacres; sécuriser les populations; mobiliser la communauté internationale pour qu'elle apporte son aide".[119]

**IV.6** *Preliminary legal evaluation.* This section includes a prefatory evaluation of the preceding cases which appeals to the traditional methods of legal appraisal. Consequently, the discussed actions will be considered under the argumentation identified above as restrictive, permissive, and reconciliatory. It should also be stressed that in the final chapter of this work, these actions will be elaborated under a new standard, that of human dignity.

Proceeding now with this preliminary evaluation, the French action in Rwanda and all the above instances could be legal or illegal according to the preferred reasoning. An absolute interdiction on the use of force and an absolute affirmation of sovereignty would render such actions illegal whilst they involve military force in a foreign state without the consent of the latter. Thus, they could be presented as a violation of Article 2(4). On the other hand, the limited nature and purpose of certain actions such as the Indian in Bangladesh and the French in Rwanda would legitimise them, considering the fact that there was no territorial impairment and the action was not against the purposes of the United Nations. *Au contraire*, they upheld central tenets of U.N. policy which is the protection of human rights. Consequently, under permissive reasoning, these actions are legitimate.

These actions are legal under the reconciliatory argument as well. The intervention in Rwanda or Bangladesh, though unilateral, was effectuated only

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[117] Declaration of the President of the Security Council, S/PRST/1994/34, (14/07/1994)
[118] Letter by the French Permanent Mission to the United Nations, 08/09/1994, S/1994/944
[119] Interview by the French Foreign Minister , 14/09/1994, *PEF*, septembre - octobre, p.91

when the international community showed restricted resolve in tackling the situation, and it was triggered by serious deprivations of human rights. Additionally, it satisfied the requirements of necessity and proportionality and had the blessing, even nominal, of the United Nations. In order to recapitulate, the Indian and French actions are legal under two lines of argumentation and appears illegal only by a strict adherence to legal formalism which sacrifices morality to arid texts.

Having said that, the Rwandan incident needs further scrutiny because the development of the case and the values or policies it sustained are helpful in understanding and bridging this section, which comprises of a rather traditional exposition, with the rest of this chapter, which presents and underlines the fundamental contradictions within the legal framework of the Charter. We elaborate later on the antithetical relation between order and peace/justice and also emphasise the contemporary trend of subsuming justice or human right observance to the purpose of preserving peace. Such an analysis is consistent with the approach of this study, that is, of unfolding the conflictual character of legal argument and then transgress it by presenting a new assumption.

The Rwanda case is quite paradigmatic in this field. As we have seen above, the French government invoked the authorisation of the Security Council as a prerequisite for its "Opération Turquoise". Initially, it would seem admissible to maintain that this operation is within the cadre of Chapter VII. However, the development of events which led to this action would disown any such conclusion. Military intervention on humanitarian grounds was mentioned by the French Government before Resolution 929 was adopted, on June 18.[120] Even before that date, according to a press release on June 15th: "..... je dis aujourd'hui - le gouvernement en a déliberé, nous en avons également parlé ce matin en Conseil restreint avec le Président de la République - que la France serait prête à monter, avec ses principaux partenaires européens et africains, une intervention sur le terrain visant à protéger les groupes menacés d'extermination".[121] When the U.N. Secretary-General showed his willingness

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[120] *A.F.D.I.*, (1994), p.1030

[121] Point de presse précité du M.A.E. le 15 juin 1994, *PEF*, p.271; Interview du M.A.E. le 27 juin 1994, *PEF*, mai-juin, p.342: " ..... j'ai proposé au Premier ministre, de prendre une initiative et d'intervenir".

to support such action,[122] France proposed a draft resolution before the Security Council.[123] The French proposal was adopted by the Security Council in Resolution 929 the next day. This Resolution is explicit in recognising the active role which the delegated state(s) will have in accomplishing its objectives. Accordingly, Resolution 929: "*Taking into account* the time needed to gather the necessary resources for the effective deployment of UNAMIR, *Noting* the offer by Member States, ..... *Determining* that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region, .... *Acting* under Chapter VII of the Charter of the United Nations, authorises the Member States ..... to conduct the operation ..... using all necessary means to achieve the humanitarian objectives ..... ."[124]

This wording reveals the true character of the operation which is conceived and executed nationally with the discreet imprimatur of the Security Council.[125] It would be hypocritical to consider the Security Council's *a posteriori* and supplementary authorisation as a fact of such legal significance that would place the action within the boundaries of Chapter VII. The realities of the situation were acknowledged by the Secretary-General who said: "[d]ès l'instant qu'ils utilisent des forces qui ne sont pas des forces onusiennes à proprement parler, je suis partisan de sous-traiter à des États membres les opérations de maintien de la paix impliquant l'emploi de la force".[126]

Another observation motivated by this action and Resolution 929 is the character of humanitarian considerations within the United Nations' system. In particular, whether human rights concerns constitute independent indices which prompt action under Chapter VII or are they considered to be complimentary indices in the evaluation of a situation as "a threat to or breach of peace". Resolution 929 characterises the situation in Rwanda as "threat to peace and

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[122] Letter Dated 19 June From the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1994/728, (20 June 1994)
[123] S/1994/737, (June 21, 1994)
[124] S.C. Res. 929, U.N. SCOR, 3393rd mtg., U.N. Doc. S/RES/929 (1994)
[125] J-D. Mouton, "La crise Rwandaise de 1994 et les Nations Unies", *A.F.D.I.*, (1994), p.214, at p.222: "Car il est claire que l'opération turquoise a été nationale de bout en bout et que de ce point de vue, le contrôle onusien a été réduit au strict minimum"
[126] *Le Monde*, 26/07/1994; "Croniques des faits internationaux", 98 *R.G.D.I.P.*, (1994), p.991, at p.992

security in the region" and it also states Chapter VII of the United Nations Charter as its legal basis.

This *modus operandi* is not novel although it has been more frequent the recent years. What has been more evident recently is a certain tendency that the "polymophe" conception of peace; that is, its "dimension structurelle" and "dimension sécuritaire" to be interlaced.[127] However, the results are modest because the humanitarian interests are merely included in a different interpretation of what constitutes a risk against peace. Whereas the traits of such procedural evolution go back to the reaction against the situation in Rhodesia and South African, it was more vigorously stated with Resolution 688 concerning the Kurds in Iraq[128] and Resolution 794 concerning Somalia.

In title V, we shall elaborate more on this issue but at this stage we should point out that the operation in Rwanda could not be considered as an institutional reaction to the events taking place in this country. It could be characterised as a unilateral action with an international flavour. This flavour is the Security Council's benison which confined the action normatively within its practice of subsuming humanitarian concerns to the overlapping aim of preserving peace.

## V. THE POSITIVIST FRAMEWORK: THE LEGAL VALIDITY OF ARTICLE 2(4) IN VIEW OF CONTRARY STATE PRACTICE

**V.1** *Law and force in the United Nations system.* In the previous chapters we have contemplated the different jurisprudential definitions of law. According to Oppenheim's definition, inspired by positivist jurisprudence, law is a body of rules for human conduct within a community which, by common consent of this community, shall be enforced by external power.[129] Professor McDougal refers

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[127] P-M. Dupuy, "Sécurité collective et organisation de la paix", 97 *R.G.D.I.P.*, (1993), p.617, at pp.622-627. "..... le Conseil de sécurité introduit cette dimension ample jusqu'au coeur du chapitre VII". *Ibid*, p.626

[128] S.C. Res. 688, U.N. SCOR, 2982nd mtg. (1991), reprinted in 30 *I.L.M.*, (1991), p.858; B. Simma (ed.), *The Charter of the United Nations: A Commentary*, (Oxford, Oxford University Press, 1994), "Article 39", pp.605-616; H. McCoubrey, N.D. White, *International Law and Armed Conflict*, (Aldershot, Dartmouth, 1992), p.129

[129] L. Oppenheim, *International Law*, 9th ed., Sir R.Y. Jennings, Sir A.Watts (eds), vol. I, "*Peace*", (London, Longmans, 1992), Part 1, p.9, para.3

to law as "a process of decision characterised both by expectations of authority and by effective control"[130]

The "founding fathers" of the United Nations, by transferring imports from domestic systems, drafted an organic framework where authority and control are invested in one organ, the Security Council. They intended to redeem the deficiencies of the old system by acceding to an institutionalised order whose main feature was the conditioning of power as a means for institutional or relational enforcement.[131] The whole structure contains the basic elements of a legal order reminiscent of domestic systems, in particular, authoritative decision, deference and limited discretion for individual actors. The function of authoritative decision and enforcement has been, however, performed by the Security Council selectively and deficiently.[132] It has been thus observed that the system is not only transposed but is deformed as well.[133]

The divergent state practice described above introduces the issue of effectiveness. The precise degree of effectiveness or control required for "law" - national or international - varies according to its institutional context. In the United Nations system, effectiveness is evidenced only at the fringes, in the procedures for reconciliation, condemnation and exhortation. It should be observed that the sanctioning process in international law differs considerably from national law. The element of systematisation which characterises the latter would impinge upon the legal quality of international law. Accordingly, theorists from legal positivism or realism have denied this quality to international law and also to Article 2(4). On the other hand, according to Kelsen, the international system is decentralised and, therefore, sanctions are

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[130] M.S. McDougal, H.D. Lasswell and W.M. Reisman, "The World Constitutive Process of Authoritative Decision", in M.S. McDougal, W.M. Reisman (eds.), *International Law Essays*, (New Haven, Yale University Press, 1981), pp.192-193

[131] R.J. Dupuy, "Communauté internationale et les disparités de developpment", 165 *R.C.*, (1979 IV), p.10, at p.55. "La mise en place d'une organisation aux finis de maintenir la paix entre Etats, suppose qu'une certaine force lui soit attribuée. Toutes les sociétés justifient ce que, Max Weber déffinissant comme le monopole de la violance légitime". *Ibid*, p.64

[132] A. Cassese, "Return to Westphalia? Considerations on the Gradual Erosion of the Charter System", in A. Cassese (ed.), *supra* note 55, p.505, at p.519: "The drafters were fairly sure that (the provisions of the Charter) would be fleshed out by a case law developed by the Security Council; this body was in effect designed as the agency responsible for implementing, clarifying and elaborating the legal dictates of the Charter".

[133] R.J. Dupuy, "The International Community, War and Peace", in A.Cassese (ed.), *supra* note 55, p.271, at p.277

indeterminate. Enforceability is effectuated "horizontally", involving measures of self-help.[134]

This approach reveals a wider issue concerning the role of force within legal systems. Force has been traditionally viewed as an instrument for law enforcement or as a source of law when it introduces a new relation or when it is the source of an institutional policy. The modern law has partially retained and recombined the two positions. Thus, force is the institutional origin of law in the case of Chapter VII as well as an enforcer of law when action is taken under the collective security system.[135] Humanitarian intervention may be an enforcer of institutional policy as a regulated measure under the United Nations; a unilateral - multilateral primitive enforcer of community policies or, in the case of being outlawed, it is a source of law. Force can mediate between sovereignty and international order and thus be reintegrated as instrument and authority. In particular, humanitarian intervention is not against sovereign authority in the sense that it re-establishes authority. It is only against states which have misused their authority that humanitarian intervention is used and consequently, it satisfies a certain purpose. As Stowell put it: "[w]hy ..... should the independence of a state be more sacred than the law which gives it that independence ..... the very principles which are declared to be the most worthy of respect of all?"[136] The re-inclusion of force as humanitarian intervention within a legal system of exclusion has been also recognised in the Dominican Republic case by the Legal Advisor to the U.S. State Department, Leonard Meeker.[137] He rejected a "reliance on absolutes for judging and evaluating the events of our time" because it is "artificial". Intervention is then recognised according to a substantive vision of international law defined by him as "practical idealism". In a nutshell, force has been excluded in the legal

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[134] See above, Chapters One, Two and Three. J. Austin, *The Province of Jurisprudence Determined,* (London, Weidenfeld & Nicolson, 1954), pp.127, 141-142, 200-201; J.L.Brierly, "Sanctions", 17 *Trans. Grotius S.I.L.*, (1931), p.67, at p.68; H.L.A. Hart, *The Concept of Law,* (Oxford, Clarendon Press, 1961), pp.208-231; G. Kennan, *American Diplomacy 1900-1950,* (Chicago, University of Chicago Press, 1951), pp.95-96; H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 6th ed., rev. by K.W. Thomson, (New York, A.A. Knoph, 1978), ch.18, p.293

[135] I. Brownlie, *Use of Force, supra* note 6, pp.342-46

[136] E.C. Stowell, *Intervention in International Law,* (Washington, Byrne, 1921), p.53

[137] L. Meeker, "The Dominican Situation in the Perspective of International Law", 53 *Dep't St. Bull.*, (1965), pp.60-65

framework of the Charter but this is porous. Thus, force is reintroduced as enforcer or as a source of law.

**V.2** *Observance.* The congruence between state practice and accepted law or the rectification of deviations are vital for attributing legal quality according to positivist jurisprudence. Thus, these theoretical underpinnings of positivism would rather deny legal quality to Article 2(4).[138] The renowned discrepancies evidenced in state action and the frustration caused by these exculpatory violations have contributed to the belief that Article 2(4) is null and void. The arguments which were presented to support this view reside themselves within positivist legalism and reaffirm the major premises of this theory. They are the principles of reciprocal observance; *rebus sic stantibus*; and the notion that violations are evidence of the changing norms regarding the use of force.[139]

The first principle is contained in Article 60 of the Vienna Convention on the Law of Treaties and involves suspension or refusal to perform obligations violated by the other party.[140] This argument is tenuous in the field of the use of force. It fails to determine the other party which may be either *ad hoc* or the society of states. It is also totally incapable of detecting the specific temporal point of breach. A similar argument was advanced by the U.S.A in the *Nicaragua Case,* but the I.C.J. was quick in rejecting it: "[i]n a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in the application of other rules, on other subjects, also included in the same treaty. ..... But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule".[141]

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[138] K.S. Carlston, *Law and Organisation in World Society*, (Urbana, University of Illinois Press, 1962), pp.64-123; O. Schachter, "Towards a Theory of International Obligation", 8 *Va. J.I.L.*, (1968), p.300

[139] O.Schachter, "In Defence of International Rules on the Use of Force", 53 *U. Chicago L.Rev.*, (1986), p.113, at pp.128-131

[140] See J. Kirkpatrick, "Law and Reciprocity", 72 *Proc. A.S.I.L.*, (1984), p.59, at p.67: "The first principle of the law is the equal application of the law. Unilateral compliance with the Charter's principles of non-intervention and non-use of force may make sense in some instances, but is hardly in itself a sound basis for either U.S policy or for international peace and stability. We cannot permit ourselves to feel bound to unilateral compliance with obligations which do in fact exist in the Charter, but are renounced by others".

[141] *Nicaragua Case*, p.95, para.178

The second contention refers to the principle of changing circumstances.[142] Although it is difficult to establish the degree of foreseeability,[143] it contains a certain veracity concerning the United Nations system. These circumstances refer mainly to the operation of an effective security system upon which Article 2(4) was conditioned and the ensuing revival of the customary law. The United Nations has not fulfilled its task of remedying human rights violations and this consists of altered circumstances which necessitate the recuperation of humanitarian intervention.[144] The *dictum* of the Court in the *Nicaragua Case* previously cited has wider implications for allowing the customary law of humanitarian intervention. The I.C.J. located the law concerning the use of force in the field of customary law and thus it was able to reject the argument that it is conditioned on an effective collective security system. In customary law, there is no such juxtaposition. However, its scope relating to force is more lax than Article 2(4). The customary law which consequently binds states allows for humanitarian intervention. Moreover, the Court treated customary and Charter law as having identical content,[145] notwithstanding pleas to the contrary. The absurdity and circularity of this position is revealed when someone argues from within the liberal customary law. It could hence be maintained that humanitarian intervention as customary/conventional rule may be practised even if Chapter VII works effectively. If this would not be unapt, the solution would require determining and differentiating the content of customary and Charter law and recognising the function of the collective security system in relation to the latter.

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[142] Article 62, 1969 Vienna Convention on the Law of Treaties; A. Vamvoukos, *Termination of Treaties in International Law; the doctrines of rebus sic stantibus and desuetude*, (Oxford, Clarendon Press, 1985),

[143] N. Ronzitti maintains that the failure of the collective security system was already evident towards the end of the war and it was easily foreseeable that it would be intensified when the hostilities had ended. *Supra* note 49, pp.9-10: T.J. Farer, "Foreign Intervention in Civil Armed Conflict", 142 *R.C.*, (1974 II), p.290, at p.390

[144] W.M. Reisman, "Coercion and Self-Determination: Construing Article 2(4)", 78 *A.J.I.L.*, (1984), p.642; F.R. Tesón, *Humanitarian Intervention: An Inquiry Into Law And Morality*, (Dobbs Ferry, N.Y, Transnational Pub., 1988), p.138

[145] *Nicaragua Case*, pp.106-107, para.202-204; B. Simma (ed.), *The Charter of the United Nations*, (Oxford, Oxford University Press, 1994), p.127: "..... but the Judgement does not indicate in any way that the Court might determine the scope of the customary prohibition of force and that of Art. 2(4) differently. Rather, in interpreting the customary rule, the Court adheres to the terms used in Art. 2(4) and refers explicitly to the wording of that provision. It follows that the Court, ..... tends to view the prohibition of force under general international law and the prohibition laid down in Art. 2(4) as being identical in content Both prior to and following the *Nicaragua* Judgement, it is right to say, therefore, that the prohibition of the use of force under customary international law has a much smaller scope than that laid down in the U.N. Charter".

This anticipates the third proposition which admits that the subsequent state conduct eroded or modified Article 2(4). Thus, the recognition and acceptance of the incurred modifications and qualifications should determine the scope of the customary or conventional use of force.[146]

The decision of the I.C.J. in the *Nicaragua Case* leans towards the opposite direction. The legal normativity of Article 2(4) was sustained although its permeability was also verbally conceded. It was stated therein:

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. ..... If a State acts in a way prima facie incompatible with the recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rile itself, then whether or not the states conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule".[147]

The decision of the Court incorporates the dilemmas of positivists in their endeavour to uphold the restrictive force of Article 2(4). For them, it is the crucial distinction between "ought" and "is". In its determination of customary law, the I.C.J. was mainly concerned with the *opinio juris* suppressing state practice, the second crucial element for the formation of custom. This position concedes an unnecessary over-legitimisation to governmental declarations and fails to apprehend the deeds. The I.C.J. also systematically avoided indicating the actual content of the rule on the use of force, albeit it pronounced the existence of the rule.[148] This decision may also be unfortunate for the formation of custom. The latter emerges initially as a counter-activity which may appear as violation of an established rule. If that incompatible behaviour is characterised

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[146] See Article 31(3)(b) of 1969 Vienna Convention; E.V. Rostow, "The Legality of the International Use of Force by and From States", 10 *Yale J.I.L.*, (1985), p.286: "A proposition in the form of a rule of law can be considered a legal norm even if it is not universally respected and enforced; but it cannot be characterised as a norm if respect and enforcement are the exceptions rather than the rule. By this standard, the status of Article 2(4) as law is now in doubt".

[147] *Nicaragua Case,* p.98, para.186

[148] A.A. D'Amato, "Trashing Customary International Law", 81 *A.J.I.L.*, (1987), p.101; F.L. Kirgis Jr, "Custom on a Sliding Scale", *ibid*, p.146; M.H. Mendelson, "The *Nicaragua Case* and Customary International Law", in W.E. Butler (ed.), *The Non-use of Force in International Law*, (Dordrecht/Boston/London, Martinus Nijhoff, 1989), p.85, at p.91

as a confirmation of a rule, then it seems that there is no room for the development of new customary rules and that the rules have been crystallised and petrified in the Charter. The gist of the decision is that it showed its preference towards the normative validity of the rule following Kelsen's distinction of the core meaning of a rule which remains unaffected by the practice. Concerning humanitarian intervention, the argument again becomes circular. By refusing to appreciate the content of the rule, the argument reverts back to the inseparability or not of the rule from the collective system[149] and the existence or not of a more liberal customary rule which revives.

**V.3** *Sovereignty and justice within the argument of observance.* In order to pre-empt the discussion which follows, we should consider what the interpretative constructions of Article 2(4) represent beyond a purely legalistic description. Thus, it should be submitted that they contain an inner core of antagonism and reconciliation which itself is located within the wider genre of tension between sovereignty and justice.[150] The latter two concepts produce in legal reasoning consensual (positivist) or extra-consensual (naturalist) arguments but the demarcation is not definite because the rhetoric can switch freely between the two poles. In particular, Article 2(4) invokes the consensual aspect of sovereignty, whereas the arguments which introduce modifications invoke extra-consensual aspects referring to changed circumstances or higher notions of justice and human rights. However, each argumentative line could easily be substituted with the other. Hence, those who adhere to Article 2(4) may invoke the justice of keeping promises or of world order which is procured by observing this article. On the other hand, the extra-consensualists resort to consensual arguments such as the liberty of each state to alleviate itself from obligations when the circumstance ceases to correspond. The rhetoric then discloses that the different genre of arguments are not mutually exclusive but

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[149] The Court noted the contextual character, although it did not observe it. *Nicaragua Case*, pp.95-96, para.178: "A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules". There is hence a strong argument to condition Article 2(4) on an effective security system.

[150] David Kennedy, *International Legal Structures*, (Baden-Baden, Nomos Verlagsgesellschaft, 1987), ch.1

recombine in order to accommodate the deficiencies of the other line of argument.

However, this does not conceal the fissure between a purely positivist and a naturalist position. As was said above, each position may reverse to the opposite one but this concerns only those aspects of the opposite argument which would eventually justify the initial position. Thus, the consensualist-positivist argument would state that Article 2(4) is binding as positive law above the justice of other considerations. Now this position may switch to the opposite extra-consensual-naturalist position referring to justice but as the justice of being bound by Article 2(4). The naturalist position contemplates the legal authority of Article 2(4) which is oppugned considering the numerous deviations. However, it reverts to consensualist arguments when it relies on state practice in order to verify this article's lack of authority or the emergence of a new practice.

Considering now more specifically the previous claim that the non-materialisation of a security system has relieved states from their obligation to abstain from force and also has reinvented the customary law on the matter, this involves a consensualist-positivist argument because it recognises the competence of each state to release itself from obligations. To put it differently, it is synonymous to sovereignty. It is admitted, hence, that the state has consented to certain matters and only itself, as the sole judge, could repeal its consent, had the circumstances arisen. On the other hand, there may be extraordinary circumstances which may cause hardship to a state and, therefore, elementary considerations of justice may require its release. Whereas both positions are for the benefit of the state, the emphasis is different. The first argument attributes absolute priority to the state and includes also an element of justice within this unambivalent statism. The second distances itself form the "romance of the state" and puts more emphasis on systematic consideration which exceptionally and for the justice of the system may admit revocation. Concerning the abstention from the use of force, the altered circumstances - deficiency of the collective security system - may prejudice victims of aggression or perpetuate violations of substantial rights if they remain unacknowledged. As presented above, some states and writers have claimed suspension and revival of a more generous customary right, whereas the Court

and other states have taken a negative view resorting either to the legal normativity of the rule or to systematic justice. The contradiction and reversibility of theoretical positions is that, when modification is refused, a consensual argument is advanced together with an extra-consensual. The consensual refers to the binding nature of the obligation, whereas the other to systematic considerations of order, peace, justice. This position, however, denies to members of the international system the consensual-sovereign competence of repealing any rule and also the restoration of the notion of justice which this would represent for the particular member. The solution then lies in making combinations among the two opposite positions excluding each time some elements. Otherwise the argument would be indeterminate.

## VI. THE FUNDAMENTAL CONTRADICTION AND INTERRELATION: SOVEREIGNTY / INTERVENTION; PEACE / JUSTICE

**VI.1** *Sovereignty and Intervention.* The above observations concern the interpretation of Article 2(4) and they share a common denominator. They are both confined within positivist legalism which is materialised either by construing Article 2(4) as an instant phenomenon of legal formation or as an amplified construction which preserves, nonetheless, its normative content. The different interpretations reveal also the constrictions of legal positivism when attempting to encompass the complex phenomena of international life. The more it is distanced from pertinent considerations of justice and human rights, the more rigidified and unrealistic it becomes. The prohibition on the use of force may be absolute on a theoretical level but that is not a satisfactory answer. On the other hand, when issues of justice and human rights are contemplated, a lukewarm rejection of purely normative positivism is witnessed. The interpretations of Article 2(4), restrictive, permissive or reconciliatory, demonstrate this multifaceted character of positivist thinking in international law. Thus, it is deemed necessary at this point, instead of presenting the merits of each argument, to demonstrate the substructure of those interpretations and

also to explore the possibility of a restatement. In particular, the contradictions inscribed in legal argument will be presented in pairs: peace/order - justice/ human rights; sovereignty/intervention.

Our discussion begins with the last pair. The notion of sovereignty is the acknowledgement in international law of the exclusive domestic order imposed by the state and non-intervention is its legal and factual substantiation. Sovereignty is idiosyncratic of natural law which deduced this principle from a human analogy of freedom and equality. The rights of individuals to autonomy, equality and respect have induced lawyers in the naturalist tradition, Grotius, Wolff, Pufendorf and partially Vattel, to deduce independence, sovereignty and non-intervention as principles for state relations. Positivism bequeathed the institutional and legal framework drawing inferences from the individualistic conception of autonomy. Henceforth, non-intervention is viewed functionally in the conceptual autonomy of sovereignty.

It was observed in the previous chapters that natural law engulfed contending and diverse illations concerning the quality and extent of sovereignty and non-intervention. The latter is ingrained in the notion of sovereignty. It is indispensable for the formation of sovereign societies and also it embodies a rule stemming from sovereignty. However, an absolute notion of sovereignty in a Hobbesian state of nature negates the existence of state society. Sovereignty could also be subordinated to the higher principles of natural law and become relative. For Grotius, the superseded precepts of natural law apply directly to individuals as subjects of international law, as well as to states.[151] Therefore, humanitarian intervention is permitted. The distinguishing trait with Vattel is that Grotius elicits the principles of sovereignty and (non)intervention from a theoretical-conceptual approach intersected with naturalist-humanist ideology which impels him to admit certain exceptions for humanitarian reasons. On the other hand, Vattel articulated the positivist notion of sovereignty and non-intervention based on state practice. This was tenuous because, as was shown above, when Vattel pronounced the principle of non-intervention, there was no

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[151] H. Bull, "The Grotian Conception of International Society" in H. Butterfield, M. Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics*, (London, Allen & Unwin, 1966), p.68; R.J. Vincent, *Nonintervention and International Order*, (Princeton, Princeton University Press, 1974), pp.23-24

correlation in state practice which would fortify this rule. On the contrary, practice was at considerable variance. Thus, Vattel pronounced a principle in the form of a verisimilitude, prognosticating the effect which the concepts of sovereignty and independence may procure on state relations. On this account, the difference with the Grotian conceptualisation of factual circumstances is diminished.[152]

Positivists respond to the question of identifying non-intervention as a rule by resorting to a mixture of formal sources, customary or promissory. The sources contain operational signs but also equivocal principles or assumptions such as equity, sovereignty, peace or order. Positivists recognise the functional value of these assumptions or principles in elucidating the content of rules and hence, they are applied *per se*. A confirmation of this approach is the decision of the I.C.J. in the *Corfu Channel Case* whereby non-intervention was interconnected to sovereignty and peace/order.[153] Moreover, the principle of non-intervention has been reiterated ceremonially within the United Nations framework. The relevant Resolutions evoke the impression of containing a consistent reaffirmation and reconfirmation of other concurrent norms such as equality and sovereignty. Although their normative coherence is indisputable, they are detached from the operational environment and thus fail to explain the content of the putative rule on non-intervention.[154] The other method employed is to subject competing rules to a process of verification through state reception. As a consequence, some may be rejected as moral incantations whereas others are admitted. An ample humanitarian constituent is usually rejected, whereas a particularised one which is also privileged with state consent, as it is in the outlawry of genocide, is accepted.

These two processes are not separate but converge in the following construction. If non-intervention is the principle which has been accepted formally by states, the alleged exemptions - humanitarian intervention included - should be

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[152] P.H. Winfield, "The History of Intervention in International Law", 3 *B.Y.B.I.L.*, (1922-23), p.130, at pp.133-4; A. Carty, *The Decay of International Law*, (Manchester, Manchester University Press, 1986), pp.89-90

[153] *Corfu Channel Case*, p.35

[154] V. Lowe, "The Principle of Non-Intervention: Use of Force", in V. Lowe, C. Warbrick (eds), *The United Nations and the Principles of International Law*, (London, Routledge, 1994), p.66, at p.73

subjected to rigorous tests in order to pass the threshold of legality. It is maintained that interventions are multi-faceted. Therefore, humanitarian intervention is illegal because it cannot be extracted as a crystallised segment of state practice. The practice of states, tacit or explicit, does not incorporate the sense of legal conviction *per se*. This becomes ascertainable inferentially, through a presupposed rule. If this presupposition aggregates into non-intervention, it could be claimed that a certain practice is not coupled with the legal conviction. The *Nicaragua Case* provides an illustration of this reasoning. The distinct state practice remained unaccountable because the presupposed legal conviction contained the rule of non-intervention. Humanitarian intervention is subjected to the same treatment. Brownlie anticipates that state practice should demonstrate a sheer humanitarian purpose and a sense of legal consciousness in order for humanitarian intervention to become law. Failing on these accounts, the action is condemned to illegality.[155] This claim is insufficient because it declines to apprehend the intrinsic values contained in the action and also pre-empts the value of non-intervention. If we cannot exclude intervention from interstate relations, we need at least to pontificate. Apprehension of the contending values, altruistic or individualistic, and explication of the action from a humanitarian viewpoint may justify any such action. This latter position, however, entails a conceptual contradiction. It admits universal and cosmopolitan values which transcend sovereignty and which are effectuated through intervention, whereas, on the other hand, the use of force is cursed as a source of suffering. The essence of the contradiction is thus that intervention promotes higher values but may simultaneously cause considerable destruction in other values. At this point, we reach the dilemma of choosing between the morality of non-intervention and that of intervention. The morality of non-intervention was exposed by John Stuart Mill who attached it to the right of self-determination but also admitted a residue of humanitarian intervention in cases of civil war.[156] The other ethical point for non-intervention is that it upsets

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[155] I. Brownlie, "Humanitarian Intervention", in J.N. Moore (ed.), *Law and Civil War in the Modern World*, (Princeton, Princeton University Press, 1974), p.217, at pp. 227-228

[156] J.S. Mill, "A Few Words on Non-Intervention", in J.S. Mill, *Dissertations: Political. Philosophical, and Historical*, vol.III, (London, Longmans, 1875), pp.153-178; R.J. Vincent, *supra* note 149, pp.54-56; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., (N.Y., HarperCollins, 1991), ch.6

international stability. A moment's reflection would suggest that there is a line to be drawn between the competing values.

In order to answer the question concerning the morality of intervention, we should retreat to the origins of intervention and invoke the domestic analogy. According to Locke, the protection of peoples' natural rights endows the state with the political right to sovereignty.[157] Therefore, the morality invested into sovereignty reflects the morality of the individual rights. Intervention partakes of a residue of morality if it is immersed into the legitimisation standards which include human rights as a compendium to sovereignty. The disjunction between human rights and legitimacy springs from an inadvertent interpretation of sovereignty as signifying absolute power. This opinion is based on a misreading of Bodin who spoke of the "potestas legibus soluta" not as the sign of evaluative authority but as the premise for the concentration of authority. For Bodin, this authority was circumvented by natural law but, eventually, such definition arrogated the misconception because it indicated power. In particular, if sovereignty contains the notion of "will", the conceptual confusion centres on locating the source of will, as we have seen above with Austin's theory. Additionally, it may also mean the indivisibility of will and consequently of sovereignty. The other confusion concerns the word "ultimate". This has two inter-related aspects. The first evolves from the casual meaning of the word which alludes to a regressive process whereby we reach the apex of the pyramid and may result into evocation of *a priori* norms. It is similar to Kelsen's presupposition of the Basic Norm. Accordingly, sovereignty becomes the controlling assumption and non-intervention its consummation. The other aspect is the conformity with certain procedural and institutional requirements which validate the rule. It is then similar to Hart's concept of law or to McDougal's definition of authoritative decision, with the naturalist addition that it should embody the value of human dignity.

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[157] J. Locke, *Two Treatises of Government*, M. Goldie (ed.), (London, Everyman, 1993), "The Second Treatise of Government", chs.2, 7 and 8; F.H. Hinsley, *Sovereignty*, 2nd ed., (Cambridge, Cambridge University Press, 1986), pp.146-149; I.M. Wilson, "The Influence of Hobbes and Locke in the Shaping of the Concept of Sovereignty in Eighteenth Century France", in T. Besterman (ed.), *Studies on Voltaire and the Eighteenth Century*, vol.CI, (Banbury, The Voltaire Foundation, 1973), in particular Chapter II, p.29

This train of thought may lead us back to the contractual discussion of humanitarian intervention, in particular, the extent of internal legitimacy which affords protection against intervention. Theoretical traces of the internal consequentiality with external intervention could be found in Vattel who acknowledges a right of intervention when the prince derogates from his duties towards his subjects.[158] The United Nations Charter would seem to legitimise itself and its principles by invoking the popular stamp in the words "[W]e the peoples of the United Nations". However, the absolute priority given to peace and security has neglected the issue of legitimacy and has congealed our perception of interventions. The legitimacy is founded on a "fit" between the people and the government but this should be also an expression of basic human rights. Otherwise, we may encounter the awkward situation of unscrupulous majorities in the Nazi mode which may claim "fit" with the population. If state legitimacy is viewed in contractual terminology as protecting the basic human rights to liberty and life of its citizens, then any aberration from this course may invite intervention because sovereignty is overridden through de-legitimisation.[159] Within the legalistic perspectives, the reconciliatory argument alludes to this notion when it refers to the criterion of substantive violations of human rights. Consequently, misfeasance or nonfeasance of sovereignty would legitimise intervention. As an illustration of this position we could take the cases of Bangladesh, Uganda and Kampuchea. Their governments were enjoying international legitimacy, in particular through the repetitious affirmation of their sovereignty in the United Nations. However, in reality, their violation of human rights has removed their legitimacy and consequently humanitarian intervention did not impinge on sovereignty. The Indian Foreign Minister endorsed this argument in the United Nations in relation to the situation in Bangladesh: "[i]nternational law recognises that where a mother state has irrevocably lost the

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[158] E. de Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, trans. Ch.G. Fenwick, in *Classics of International Law*, (Washington, Carnegie Institution of Washington, 1916), Liv.I, chs.I-IV; Liv.II, ch.IV, para.56

[159] G. Doppelt, "Walzer's Theory of Morality in Internaitonal Relations", 8 *Phil. & Pub. Affairs*, (1978-79), p.3; D. Luban, "Just War and Human Rights", 9 *Phil. & Pub. Affairs*, (1980), p.160; P. Montague, "Two Concepts of Rights", *ibid*, p.372; C.R. Beiz, "Nonintervention and Communal Integrity", *ibid*, p.385; G. Doppelt, "Statism without Foundations", *ibid*, p.398; M. Walzer, "The Moral Standing of States: A Response to Four Critics", *ibid*, p.209; M. Walzer, "The Theory of Aggression", in S. Luper-Foy, *Problems of International Justice*, (Boulder, Westview Press, 1988), p.151

allegiance of such a large section of its people ..... and cannot bring them under its sway, conditions for the separate existence of such a state comes into being".[160]

Unfortunately, international law has diminished the operation of this pattern and concerned itself mainly with *de facto* sovereignty which stabilised the international system of order and peace. The I.C.J., addressing the U.S. contention of human rights violations by Nicaragua, opted for sovereignty and respect for domestic jurisdiction and said "[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems".[161] Without passing judgement on the facts of the particular case, it appears that the Court's position is that sovereignty and non-intervention provide the ingredients for legitimisation irrespective of human rights considerations.[162] Although this could be attributed to an operational necessity, it does not reflect the initial presumptions of the United Nations Charter and in subsequent years there was an attempt to accommodate timidly the issue of legitimacy within the precept of peace.

**VI.2** *The United Nations expectations for Peace and Justice.* The United Nations Charter contains the two-fold purposes of peace and justice articulated in the Preamble and Article 1. The promotion of human rights was included as an aspect for realising international justice. The United Nations performance in subsequent years witnesses, however, the primordial role attributed to peace[163] which monopolised conceptual, political and legal reasoning. As a consequence, human rights violations may occur irredeemably, subordinated to the overriding purpose of maintaining peace.[164] Within this legal and political rationale, the

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[160] U.N. Doc. S/PV.1611, (Dec.12, 1971), p.62

[161] *Nicaragua Case,* p.131, para.258. See also pp. 133-135, paras.263, 266-268

[162] F.R. Tesón, "Le peuple, c'est moi! The World Court and Human Rights", 81 *A.J.I.L.*, (1987), p.173

[163] "The primary place ascribed to international peace and security is natural, since the fulfillment of the other purposes will be dependent upon the attainment of that basic condition." *Certain Expenses of the United Nations, (Advisory Opinion of 20 July 1962), I.C.J. Rep.*, (1962), p.150, at p.168; "La maintien de la paix est le but le plus primordial" D. Ceausu, "Quelques considérations relatives à l'interdiction de l'emploi de la force dans les relations internationales et le droit de la légitime défense", 15 *Rev. Romaine d'études internationales,* (1981), p.125; F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations Between States,* (1963), p.338: "The Charter was less interested in legal and just settlement; the great danger was war and any settlement was better than war."

[164] O.Schachter, "In Defence of International Rules on the Use of Force", 53 *U. Chicago L.Rev.*, (1986), p.113, at p.126-128; W.V. O'Brien, *The Conduct of Just and Limited War,* (N.Y., Praeger

inevitable dilemma between peace or justice arises. Although political expediency has neglected the utility of the conditions for justice, the last decades evidence a re-emphasis and resurgence of human rights. In particular, the functional description of the United Nations system reveals the dialectical operation between order/peace and justice/human rights. The association has been flexible and encountered divergent stages of disengagement and promotion of a singular pillar or symmetry and also appreciation of the other pillar as well. Actually, the United Nations recognises the instrumental relation[165] between order and justice as upholding each other, thus refuting the assumption that justice and order are mutually nugatory. Any action for the protection of people in immediate danger of extermination is not inconsistent with the overriding purposes of peace and justice because the minimum requirement of a public order is not only the elimination of the use of force, it encompasses also justice and respect for the human person.[166]

The intriguing aspect of this reasoning is that it precludes the autonomous realisation of justice/human rights which is eventually immersed in the other composite of order/peace. It is an approach whereby each pillar in the dialectical relation legitimises the other but order is prevalent. The recount is eventually tautological. Order as one aspect of the pillar legitimises order included in the other pillar which now contains an element of justice. Consequently, the United Nations operation in the field of maintaining order through its executive organ, the Security Council, has legitimised this order by appealing to the values of preserving peace and justice. This exposition concedes the internal relation of order and justice as ideological premises but also marks their identification in practice. Another aspect in this interrelation is their conceptual amalgamation in the comprehensive norm of order. The normative content of order evolves, then, into the concepts of state, sovereignty, peace, non-intervention. A consequence of the pre-eminence attributed to order as a normative premise and value is that it may singularize our perception and evaluation of events monolithically under

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Publ., 1981), p.23: "Modern international law has sacrificed justice in its attempt virtually to eliminate the competence of the state to engage in war unilaterally".

[165] M. Koskenniemi, "The Police in the Temple, Order, Justice and the U.N.: A Dialectical View", 6 *E.J.I.L.*, (1995), p.325

[166] J-P.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter", 4 *Cal. W.I.L.J.*, (1974) p.203, at p.269

the umbrella of peace. Additionally, in the instrumental relation of justice and order, the former may be reinterpreted wantonly in order to satisfy the latter. The Security Council's main task is to maintain or restore international peace. This is a political imperative and Article 39 does not mention justice or international law.[167] It would be a confusion of notions to equate the delivery of justice with the Security Council's function of maintaining or restoring peace, although it might be contained therein as will be presented subsequently.[168]

Consequently, it should be submitted that the prohibition on the use of force as a result of the prevalent aim to preserve peace has no absolute value in itself. It should be weighed against other values[169] which may eventually reverse the balance. Being preoccupied with maintaining peace, with "value conservation", against "value extension",[170] the peace we extricate is rather precarious. The situation in Kampuchea reveals the absurdity which the pursuit only of peace may cause. The Pol Pot regime was notorious; however, the Vietnamese action was condemned in the General Assembly as an affront to sovereignty, territorial integrity and the independence of Kampuchea.[171] Later, the General Assembly ritually asserted that non-intervention would facilitate: "just and lasting resolution of the Kampuchean problem".[172] It appears that peace, that is, non-intervention, may procure justice and respect for human rights. Commendable as it is, it did not facilitate human rights under the perverse Pol Pot regime. The lego-political schizophrenia reappears again in the issue of representation. The notorious Pol Pot regime was considered as the legitimate representative for United Nations purposes[173], although it lacked effective control of the country. The dilemma was between a "puppet" or a genocidal government and the prevalent wisdom accepted the latter. Thus, they reaffirmed the overlapping purpose of preserving peace which had been fractured by Vietnam's action. Concerning the question of representation, General Assembly Resolution 396

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[167] H. Kelsen, *The Law of the United Nations*, (N.Y., Praeger, 1964), p.15-16

[168] G.G. Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement", 19 *Modern L. Rev.*, (1966), p.1, at p.5

[169] R.B. Lillich, "Forcible Self-help under International Law", 22 *N.W.C. Rev.*, (1970), p.61, at p.65

[170] M.S. McDougal, *supra* note 6, pp.18-19

[171] G.A. Res. 34/22, (Nov. 14, 1979), in particular para. 9

[172] G.A. Res. 41/6, (Oct. 21, 1986)

[173] G.A. Res. 34/2 (22 September 1979); G.A. Res. 35/3 (13 October 1980); 25 *A.F.D.I.*, (1979), p.461; 26 *A.F.D.I.*, (1980), p.408; 27 *A.F.D.I.*, (1981), pp.400-401

provides for contending cases that "..... the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case".[174] It could be maintained that the introduction of a subjective element in the determination of representation would allude to the legitimisation standards and in particular the human rights considerations contained in the Charter. However, the answer to this problem conformed with the static international mode of peace and order. It is best captured by France's statement before the Security Council: "[t]he notion that because a regime is detestable, foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardise the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgement of their neighbours".[175]

This case reveals also that the interconnection between order, sovereignty and non-intervention is almost inextricable. Sovereignty stimulates non-intervention and order which, themselves, realise sovereignty. Within the United Nations Charter, the concept of sovereignty implements two functions which also reveal the conceptual foundations of the system. Non-intervention as a corollary of sovereignty signifies the absence of any superior authority imposed on states but also that in inter-state relations there should be a definite allocation of competence in order to preserve a rudimentary order. Thus, the purpose of the non-intervention principle is teleological. It correlates with the Hartian societal *telos* of survival which is the cardinal human aim. Survival is attained by rules which emanate from certain truisms, altruistic or individualistic, pertinent to human condition. Two of these essential truisms are forbearance and restriction of violence. In the international arena, survival could be interpreted as survival of the state system which, supposedly, procures order and peace, or it could be described as plain order. The truism which supports this aim is non-intervention. This finding is based on the presumption that order is the highest value and also

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[174] G.A. Res. 396(V), U.N. GAOR (1950), p.675. For a contrary view dismissing extraneous considerations see *Conditions of Admission of a State to Membership in the United Nations. I.C.J. Rep.*, (1947-48), p.57, at p.62

[175] 34 U.N. SCOR, 2109th mtg., (12 January 1979), para.36. See the official position of France, 26 *A.F.D.I.*, (1980), pp.888-889. The position of New Zealand was: "the misdeeds of one State do not ..... justify the invasion of its territory by another". U.N. Doc. S/PV. 2110. (13 January 1979), pp.23-25

on the classification of the international system as sovereign-oriented. Although it embodies current international property, it is inadequate because it disregards the emergence of new participants - individuals, NGOs etc. - who are antagonistic to sovereign states even if not on an equal footing. The maintenance of order through the negation of intervention is also oblivious to the quality which sovereignty should enjoy as the previous discussion of legitimacy revealed. Finally, it does not answer the crucial question of what happens to the system when the order within a state collapses. Sovereignty is instrumental in installing internal order within a state by institutionalising the basic Hartian truisms. The recognition in international law of sovereignty's stabilising function has facilitated in making this concept absolute. When the domestic order fails, what is the effect on sovereignty and what is the response of international law? The answer to this question is of particular interest to humanitarian intervention. The classical answer is that, in circumstances of internal disorder and mass killings as in Bangladesh, Uganda, Kampuchea, Rwanda, the attributes of sovereignty cease to function and this does not forestall intervention which is not in this case a technical breach of the rule of non-intervention.[176] The Operation "Restore Hope" in Somalia is more indicative. The internal situation characterised by human disaster warranted the humanitarian action but this was not caused by the politics of the government.

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[176] Concerning the changing attitudes regarding sovereignty and human rights, *see* Javier Perez de Cuellar: "It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. ..... The case for not impinging on the sovereignty, territorial integrity and political independence of States is by itself indubitably strong. But it could only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaings of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection. With the heightened international interest in universalising a regime of human rights, there is a marked and most welcome shift in public attitudes. To try to resist it would be politically as unwise as it is morally indefensible." *supra* note 2, p.12; *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 *I.L.M.*, (1990), p.1312: "..... where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include ..... the right of the individual to seek and receive assistance from others in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms; .....". *Charter of Paris for a New Europe*, 30 *I.L.M.*, (1991), p.190: "Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. ..... Their observance and full exercise are the foundation of freedom, justice and peace.". The United Nations Secretary-General Boutros Boutros-Ghali: "State sovereignty takes a new meaning in this context. Added to its dimension of rights is the dimension of responsibility, both internal and external. Violation of state sovereignty is and will remain an offence against the global order, but

On the contrary, it was the absence of government and the intertribal fight to control the government. Before Resolution 794 was adopted, the Secretary-General Boutros Boutros-Ghali in a letter addressed to the President of the Security Council urged the Council "..... to make a determination under Article 39 of the Charter that a threat to the peace exists, as a result of the repercussions of the Somali conflict on the entire region" because "[a]t present no government exists in Somalia".[177] Thus, we conclude that the argument of sovereignty and order is not a viable hindrance to humanitarian intervention.

**VI.3** *The prominence of order may contain peace - the analogy with property rights.* Peace and order (and sovereignty and non-intervention as its practical substantiation) function in international society as ordering devises. The best understanding of their interrelations could be achieved by analogising with property rights.[178] If order is defined as the existence of harmonious inter-social relations by abidance to certain rules of conduct, this definition does not encapsulate the essence of regularity and conformity observed in certain behaviour. It does not unveil the *merits* of such conformity beyond the formal acknowledgement of its factual existence. The valuation is achieved by reflecting on the Hartian truisms for social life, the indispensable and essential elements for the formation of societies. Abridgement of violence and protection of life, protection of property and deference to agreements are the elementary constituents for a society. The state as the institutionalisation of these societies should protect them in order to procure order. Other elements, ideological or social, may also be recognised in the evolution of the state but these elements

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its misuse also may undermine human rights and jeopardise a peaceful global life .....". *United Nations Security Council Summit Opening Address by Members,* VP -5-2, 3,4

[177] *Letter dated 29 November 1992 From the Secretary-General to the President of the Security Council,* U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992); N.S. Rodley, "Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework", in N.S. Rodley, *To Loose the Bands of Wickedness,* (London, Brassey's 1992), p.26

[178] F. Kratochwil, "Sovereignty as *Dominium:* Is There a Right of Humanitarian Intervention?", in G.M. Lyons, M. Mastanduno, *Beyond Westphalia? State Sovereignty and International Intervention,* (Baltimore, John Hopkins University Press, 1995), pp.21-42; H. Lauterpacht, *Private Law Sources and Analogies of International Law,* (London, Longmans, 1927), pp.95-96: "The reaction against patrimonial ideas cannot obliterate the fact that the two notions are essentially analogies on account of the exclusiveness of enjoyment and disposition which is in law the main formal characteristic of both private property and territorial sovereignty.".

transgress the fundamental requirements of a society, that is, the satisfaction of the indispensable truisms, and may in addition pose a threat to its integrity.

The society of states, consisting of autonomous units, does not reflect this pattern. Internal order within states is interpreted as external disorder in the relations among states. Attempts towards international order should therefore imitate the domestic paradigm and characterise the positivist conceptualisation of peace and order. The functions of protection of life, sanctity of contracts and protection of property are attributed to the states which are the personification of the internal order. For these reasons, states comply with certain rules of rudimentary conduct. The fundamental rule is the recognition of state sovereignty as the exclusive sphere of order within and among societies. Non-intervention becomes then the factual acknowledgement of separateness. The state as legal, political and judicial power stabilises domestic and international society.

Secondly, order requires the stability of possession which is the integrity - political or territorial - of states. Therefore, non-intervention is crucial. These observations are prevalent in the United Nations Charter which allocates the spheres of domestic and international order to states which are sovereign and are protected from intervention. The Charter acknowledges also that state autonomy varies in degree, in particular when the United Nations Organisation aspires towards a more centralised system and also when some considerations beyond the elementary ones, such as human rights, should be counted for order. Thus, the contradiction is between international order emanating from isolated state sovereignties, and interdependence - interrelation - institutionalisation, whereby non-intervention is diminished. As it was noted, the United Nations Charter contains a compromise by recognising sovereignty to such an extent that it does not threaten the order it implies. Chapter VII delimits sovereignty and non-intervention by admitting legalising intervention for the maintenance of peace and security.

The problem of the accommodation and function of the evaluative truisms which procure inter-societal order, in particular the protection of life or human rights, still remain irresolute. These aspects consist of values which transcend

the static concept of the state and are threatening the minimum order stabilised by the notion of non-intervention. The answer offered to this problem has two dimensions. The United Nations system sanctified statism through non-intervention and sovereignty but also recognised human rights concerns by introducing them to the delimitation of non-intervention and sovereignty contained in Chapter VII. This was effectuated by an expanded interpretation of what consists of a threat to the peace contained in Article 39.[179] Consequently, it accordingly characterised the human rights violations in South Rhodesia and South Africa.[180] Resolution 688[181] concerning the plight of Kurds in Iraq is a prime example. It characterised the persecution of Kurds as a threat to peace and security, that is, the two elements which sketch the limits of sovereignty and non-intervention. As such, it allowed for the collective intervention. Had they not amounted to a threat to the peace, had they not impinged upon the limits of sovereignty and non-intervention, then the static concept of international order would have prevailed. Another example is Resolution 794[182] concerning Somalia, whereby the internal situation again prompted external intervention in order to maintain peace. In this case, the clash between the prominent considerations within the United Nations is evident in the Memorandum of Understanding which eventually recognised "respect for the territorial integrity, the political independence and the principle of non-intervention".[183] The ritual repetition of these verbalistic idioms alludes to a tenuous hypocrisy.

In conclusion, concerning the dialectical relation of order and justice, we observed a modest transformation which, however, retains justice within the boundaries of order. The modification relates to the changing jurisdiction of the Security Council. The original instrument for order[184] is becoming the timid

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[179] Société Française pour le Droit International, *Le Chapitre VII de la Charte des Nations Unies*, Colloque de Rennes, (Paris, Pedone, 1995)
[180] S.C. Res. 253, 23 U.N. SCOR, 1428th mtg, U.N. Doc. S/RES/253 (1968), p.5 and S.C. Res. 418, 32 U.N. SCOR, 2046th mtg, U.N. Doc. S/RES/428 (1977), p.5 respectively
[181] S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991), p.2
[182] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992), p.7
[183] *Memorandum of Understanding signed on 18 April 1991*, 30 *I.L.M.*, (1991), p.860
[184] "It was to keep the peace, not to change the world order, that the Security Council was set up". Sir G. Fitzmaurice, Dissenting Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), (Advisory Opinion of 21 June 1971), I.C.J. Rep.*, (1971), p.14, at p.294, para.115; *Certain Expenses of the United Nations, (Advisory Opinion of 20 July 1962), I.C.J. Rep.*, (1962), p.150, at p.168

instrumentality of minimal justice as the above resolutions witness. The trend is irreversible as noted in the Summit Meeting: "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security".[185] This formula acknowledges the incorporation of evaluative truisms within the expanded jurisdiction of the Security Council but it does not emancipate justice from the constraints of order.

Returning now to the analogy between sovereignty and property rights,[186] the exclusivity which the arrangement of dominium has provided, similar to sovereignty, is not absolute but has been compromised in certain areas. Thus the right to property is restricted for the protection of the environment, or civil rights, or it becomes divisible as in corporations. If contemporary international law is supposed to be based on a concept of sovereign states, we need to observe intelligibly the contemporary law beyond the ritual pronouncements on sovereignty and non-intervention. We should therefore see what is sovereignty and non-intervention today with the development of international institutions and agencies, interdependence, and the resurgence of the individual as a measure in international law. The doctrine of sovereignty will be proved porous, victim in the first place of the effort to accommodate international law. The developments relating to the regulation of international violence constricted sovereignty. It was initially advanced as a state privilege where only the conduct of war was regulated, but in the process it admitted limitations on the decision to wage war. Then, matters considered as part of the domestic jurisdiction evoke international concern as human rights law evinces.[187] The United Nations Charter recognises fundamental rights as beholding to individuals which are

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[185] U.N. Doc. S/23500, (31/1/1992)

[186] H. Lauterpacht, *Private Law Sources and Analogies of International Law*, (London, Longmans, 1927), pp.95-96: "..... the two notions are essentially analogous on account of the exclusiveness of enjoyment and disposition which is in law the main formal characteristic of both private property and territorial sovereignty".

[187] *Nationality Decrees issued in Tunis and Morocco, P.C.I.J. Rep.*, Series B, No.4, (1923), p.27: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations .....". See also the cases of Rhodesia, South Africa, Iraq, Somalia. B.G. Ramcharan, "The Security Council: Maturing of International Protection of Human Rights", 48 *Rev. I.C.J..*, (1992), p.24

beyond the jurisdictional competence of the states and rather resembles the Grotian recognition that individuals derive rights directly from international law. The other aspect is the consensual acceptance by states of the instruments which contain human rights. This development has shifted the demarcation between the exclusivity of state jurisdiction and the meagre competence of international law concerning human rights protection. It eventually reconciles the positivist, naturalist and policy school arguments. The humanitarian precepts derive from a naturalist perception of inalienable rights which, however, become enforceable through the consensual practice of states. Positivists are thus relieved from the awkward position of recognising humanitarian intervention in state practice while in theory they hold its illegality. This is the "double level approach" referred to in chapter one. It consists of recognising humanitarian intervention as a measure of last resort which, although it is a formal breach of Article 2(4) and endangers the primary goal of maintaining peace, it is condoned in practice. This acceptance combines a positivist and naturalist element. It implies transcending moral requirements which prompt humanitarian actions in certain circumstances coupled with state consent through the lack of adverse reaction or passivity.[188] The misleading advantage of this position is that it fuses also two aspects of positivism; the one relating to norms and the other which is concerned with state practice. Thus, the normative purity of the envisaged United Nations system is maintained and also the practice is not frowned upon. However, this practice does not amount to law because it does not share the Hartian "internal point", being mere acceptance. In conclusion, beyond the deceitful allusion to practice, the argument retreats to the normative validity of the rule on the non-use of force.[189]

**VI.4** *Towards a contemporary elucidation of Article 2(4) as promoting human rights.* The United Nations Charter is not a static, arid construction. Its vitality

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[188] E.C. Stowell, *Intervention in International Law,* (Washington, Byrne, 1921), p.59, n.13: "..... deny the legality of humanitarian intervention in law, but who condone it to a greater or less degree in practice". See also statements by I. Brownlie, R.B. Lillich, in J.N. Moore, *supra* note 18, pp.223,225,249-250 and T.M. Franck, Frey-Wouters, W. Friedmann, J.N. Moore, in R.B. Lillich, *supra* note 29, pp.64,107-8, 114,120-121

[189] I. Brownlie, "Thoughts on Kind-Hearted Gunmen", R.B. Lillich (ed), *Humanitarian Intervention and the United Nations,* (Charlottesville, University Press of Virginia, 1973), p.139, at p.146: "Moderation in application does not necessarily display a legislative intent to cancel the principle so applied".

springs from the interaction between members, organs and the influences of the ideological environment. Evolution is a common phenomenon in every system of law. In domestic legal systems, the normative perimeter of law expands gradually in order to encompass new developments and adapt to changing circumstances. This process contributes to the authority of the legal system, because it is not viewed as obsolete, irrelevant and a deterrent to development. If this observation has verity in domestic legal systems where the comprising elements of the structure demonstrate a degree of cohesion, integration and homogeneity, it would be self-evident in a multi-ethical system, as the United Nations, where the cultural, political and economical compartmentalisation is unavoidable. The United Nations Charter is not a self-sufficient, insular and closed text. It is evolving because the Charter is "a means and not an end".[190]

The generality of the language used in this instrument entails a certain dynamism. It endows the United Nations Organisation with elasticity and flexibility. The evolution of the United Nations is necessary for its durability and perhaps its existence as a reliable instrument at the centre of international politics. On the other hand, clinging to a legalistic approach and ignoring or denying the inexorably altered circumstances (or indeed reading the United Nations Charter in isolation of the actual world) is unrealistic. As it was observed: "[t]reaties - especially multipartite treaties of a constitutional or legislative character - cannot have an absolute immutable character".[191] The United Nations Charter has constantly reacted to the changing relations among its constituents. This process has not always been propitious. It experienced drawbacks because the United Nations offers the legal framework whereunder state or other actors interact. It would be illusory to maintain that this interplay has left the United Nations immune and innocuous. Legal propositions are overlaid with new insights when they are interpreted and applied which may alter considerably their initial content. The United Nations Charter, in the words

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[190] *Competence of the G.A. for the Admission of a State to the United Nations, I.C.J., Rep.*, (1950), p.4, at p.23

[191] Judge Jessup, in *South West Africa Cases, I.C.J. Rep.*, (1966), p.5, at p.439; Judge Sir P. Spender, in *Certain Expenses of the United Nations, (Advisory Opinion of 20 July 1962), I.C.J. Rep.*, (1962), p.150, at p.186: "..... does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject - matters as were within the minds of the framers of the Charter ..... No comparable human instrument in 1945 or today provide against all the contingencies that the future should hold".

of Judge Alvarez, once established, must develop in accordance with the requirements of international life.[192]

Even a strict adherence to a normative analysis fails to uphold its position when wars of national liberation, self-determination or apartheid are concerned. The incontrovertible fact is that these concepts were accepted because the norms have experienced a considerable elasticity in their limits, bringing the new phenomena within the law of the United Nations. Probably the process was unavoidable, but at least it did not estrange a considerable number of states.

Similarly, Article 2(4) does not exist in a vacuum but there exists a reciprocal fertilisation between Article 2(4) and the operative environment. If we deny the received modifications and adjustments, we inhibit the potential of every legal rule for evolution.[193] What is needed is a reorientation of the research guided by the new paradigms. Lacking the talents of Hercules Poirot, it would be unnecessary to indulge ourselves in the pursuit of the villain(s) who killed Article 2(4)[194] but we should try to ferret out the contemporary meaning of Article 2(4), avoiding manichaeist tendencies of vilifying or sanctifying it. The distinction made between the normative and the interpretative operation of Article 2(4) involves subtle conceptual acrobatics and, eventually, it cannot assure the maintenance of the purported impermeability of this article. It has been maintained that the core meaning of Article 2(4) is uninhibited by deliberate attempts to manipulate its application to specific events.[195] How do we determine the core meaning without sacrificing flexibility and relevance? The frequency and legal-political reception of supposedly contrary actions in the field of non-intervention, prominent among them humanitarian intervention,

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[192] Individual Opinion by Judge Alvarez in *Conditions of Admission of a State to Membership in the Unites Nations, I.C.J. Rep.*, (1947-1948), p.56, at p.68; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), (Advisory Opinion of 21 June 1971), I.C.J. Rep.*, (1971), p.14, at p.31, para.53: "..... an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation". J.L. Brierly, "The Covenant and the Charter", 22 *B.Y.B.I.L.*, (1946), p.83, at p.83

[193] W. Friedman, *The Changing Structure of International Law*, (London, Stevens & Sons, 1964), p.70: "The changes in the dimensions of international law require a corresponding reorientation of its study ..... ".

[194] T.M. Franck, "Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States", 64 *A.J.I.L.*, (1970), p.809; L. Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated", 65 *A.J.I.L.*, (1971), p.544

[195] E. Gordon, "Article 2(4) in Historical Context", 10 *Yale J.I.L.*, (1984-85), p.271, at p.273

cannot but impinge upon the normative level.[196] In essence, the various possible interpretations of the relevant Charter provisions and state practice tend to crystallise in the normative level.[197] We should therefore acknowledge those crystallised practices not just for enumerative purposes, but for a better understanding of the law.

This dynamic approach should not stop at that level, but also lead to the regeneration of the Organisation, through the recognition of phenomena which attach to human dignity. Today the soil is fertile to accept those phenomena because the over-politicizing caused by the ideological rivalries has been soothed, leaving a sense of bitterness for the cynical crushing of human expectations by an unnecessary confrontation. An invigorating approach to the United Nations Charter is justified not only by the social, moral and political evolution in the subsequent years. It vindicates as well the hopes and expectations of the founders and of people at large. The process is beneficial while it brings within the boundaries of the system current phenomena by attempting to regulate them. The remark made by the French Delegate at the San Francisco Conference M. G. Bidault is an unfading warning: "nothing could be more deadly than to built in uncertainty a castle of texts which did not correspond to reality".[198]

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[196] U.N. Secretary-General Boutros Boutros-Ghali stated: "It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. ..... The case for not impinging on the sovereignty, territorial integrity and political independence of States is by itself indubitably strong. But it could only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection". *Report of the Secretary-General on the Work of the Organisation*, U.N. GAOR, 46th Sess., Supp. No.1, p.5, U.N. Doc. A/RES/46/1/ (1991)

[197] A. Cassese, "Return to Westphalia?", *supra* note 55, p.514

[198] Doc. 46, P/11, (May 1, 1945), 1 U.N.C.I.O., p.437

## VII. TOWARDS A TENTATIVE CONCLUSION

This Chapter served a double purpose. Firstly, we presented the legal argument concerning humanitarian intervention as it exists and is realised under a triple heading. In order to accomplish this, the rule on intervention, that is, Article 2(4) of the U.N. Charter was analysed and, additionally, cases of intervention have been elaborated within this framework. Secondly, the theoretical foundations which underpin the different interpretative lines have been scrutinised. The inquiry into the jurisprudence of international law which has been pursued in the previous Chapters has shown that legal theory influences legal reasoning and is responsible for the latter's oscillation. Legal argument is a distillation but not an hermetic one of these jurisprudential bases. The interpretative articulations of Article 2(4) affirm the intermingling of theoretical and legal positions. By presenting the background deliberations, the uneasy truce between these arguments is revealed. What is more striking is that any action could be justified or condemned according to the adopted initial position. Consequently, the subjectivity of legal argument emanating from personal predilections becomes apparent, although it is presented in an objectified manner by extricating non-legal elements. Concerning legal discourse, a hermetic adherence to one argumentative line may have the result of obstructing any chance for reconciliation, whereas, on the other hand, reversibility of arguments is also an option. Thus, the rule on non-intervention can be supported by positivist arguments referring to sovereignty, order and consent or naturalist referring to equality, peace or justice. Legal arguments fail, though, to demonstrate their internal tensions and their theoretical foundations.

Consequently, the reasoning concerning humanitarian intervention has been explored not only legally but also theoretically. The theoretical underpinnings of each legal position have been presented and also the produced compromises. Accordingly, the dialectical relation between the ideals of peace and justice has evolved from one which signalled exclusion and prominence of peace towards acknowledgement and inclusion of justice.

The same argumentation will be followed in the next Chapter dealing with the protection of nationals abroad. This issue is considered less controversial than

humanitarian intervention as such. It has been justified and explained under the doctrine of self-defence. Therefore, it is not controversial because it is included in the traditional and accepted mode of statism. If it is an act of self-defence, it is a state decision and action therefore it seems to be justified in a state-oriented law. However, it does not escape contradictions and we will proceed with them immediately.

# CHAPTER SIX

# THE PROTECTION OF NATIONALS AS A CUSTOMARY SELF-DEFENCE MEASURE OR AS HUMANITARIAN ACTION

*Analysis of the concept of protecting nationals abroad under the heading of self-defence - the customary law of self-defence- the U.N. Charter law; Article 51 - the underpinnings of the self-defence approach: state sovereignty - the proposed human rights approach - protection of nationals as a form of humanitarian intervention - the fundamental contradiction between sovereignty/human rights*

## I. THE LINK WITH THE PREVIOUS CHAPTERS

**I.1** *The link.* In this Chapter, the issue of protecting nationals abroad will be dealt with under the heading of humanitarian intervention *lato sensu* and the grounds for such an approach will also be elucidated. In order to summarise the reasons which induce a humanitarian approach, one should refer primarily to the fundamental contradiction identified previously between sovereignty and human rights. The protection of nationals has traditionally been treated as a measure of self-defence. It appears, therefore, that the legal thesis' label is stabilised and definite. Concerning the ingredients of the label, one can trace issues of disagreement which affect the hard core of the self-defence label. These refer to disagreement on what constitutes an armed attack and what Article 51 of the U.N. Charter really means. As has already been explained in the previous Chapter concerning Article 2(4), legal argument endeavours to address the issue of discord from within a legalistic framework. It, thus, succeeded in accommodating the protection of nationals within the matrix of Article 51 by using interpretative disguises. Consequently, if Article 51 does not refer to the customary right of self-defence, the latter may have been revived as a consequence of the system's malfunction. If both argumentative lines are

rejected by strict and rigorous formalists, then, the act of protecting nationals is self-defence because an attack on a national is an attack on the state. One can also trace a subconscious fear of de-legitimisation or destabilisation if the protection of nationals is to be included in an all-inclusive concept of humanitarian intervention. The latter invokes wider issues than a state-attached concept such as the protection of nationals as self-defence does.[1]

Thus, discontentment arises from the understanding that the legal argument on this issue is equally unsettled and indeterminate. Self-defence has transgressed the dichotomy of legal and political signification. The tension between hortatory norms, international reality and the value judgment s of inter-actors, observers and legislators is highlighted in its interpretative perplexities. Secondly, we consider as inappropriate the conceptual treatment reserved to individuals which are viewed as objects of an omnipotent and omnipresent state. If the injury to a national is by legal fiction attributed to his national state, then individuals are presented as depsychologised, unemotional and impotent creatures who submit their existence to the will of their own state. Under this reasoning, the opposite view of non-interference within domestic jurisdiction is also justified because the state as the omnipotent organisation can treat its nationals at its discretion.

On the other hand, the protection afforded to nationals is not presented as a measure which is motivated from a feeling of revulsion towards the maltreatment. It springs from a sense of statist pride which, hence, justifies the self-defence argument. Otherwise it could be treated as humanitarian intervention because, since Grotius, a permanent characteristic of such actions is the sense of revulsion.

As a final remark, it should be emphasised that both protection of nationals and humanitarian intervention *stricto sensu* have an important common denominator: they describe attempts to save the lives or personal dignity of people. What is condemnable is the discrimination which the concept of protecting nationals invokes and there will be an attempt in the course of this exposition to revoke it. In this Chapter, we present cases where the danger for

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[1] D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in A. Cassese, *The Current Legal Regulation of the Use of Force*, (Dordrecht/Boston/Lancaster, M. Nijhoff, 1986), p.39, at pp.49-51

nationals and non nationals was equally imminent. The surgical extrication of nationals neglects the rest of the endangered population condemning it to threatening circumstances.

**I.2** *The discretionary nature of protection of nationals.* Having said that, one may invoke a reticent utilitarian argument that in circumstances of chaos or great and imminent danger it is better to save some people than none. This does not address the issue. Discrimination resides in the sheer foundation of the notion; it is conceptual not circumstantial. Protection in this case concerns *ab initio* the safety only of nationals and not that of people in general. Therefore, we believe that a utilitarian argument is discarded on its foundations.

However, self-defence reasoning is not redundant. The previous section has dealt with the issue from the perspective of the intervening state. Here, the perspectives of the perpetrators of the attack should be considered. One should, consequently, distinguish those acts which endanger people indistinguishably, and those acts which are directed towards certain people for certain reasons. We may refer thus to acts of terrorism or hostage-taking. In such cases, individual nationals of a particular state are treated as instruments by the attackers in order to promote specific aims which refer to/affect not these people but their state. In such cases, for example the Entebbe case, the argument of self-defence revives.

It should thus be submitted that the argument of human rights protection and that of self-defence are interlaced on the issue of protecting nationals because of a certain statist conception and a certain disregard of human personality by both poles of the pursued action: the national state or the perpetrators. Individual nationals are caught in the middle, mute observants of actions which relate to them but which they do not control.

In this Chapter, both aspects of the argument will be addressed. The self-defence argument could not be ignored because it provides the most compelling argument in state practice and legal theory for rescue operations and also because we have traced a modicum of truth therein. Before our human rights approach is discussed, we shall explain whether the customary concept of self-defence has been attenuated by Article 51 of the U.N. Charter. Also, the *Nicaragua Case* and the theoretical perspectives which underpin this judgment

on the issue of self-defence will be contemplated. Finally, after a presentation of the relevant practice in this field, the contradiction between sovereignty and human rights in the formula of identifying personal injuries to an attack on the national state will be considered and whether human rights' protection propositions offer a commendable justification.

## II. SELF-DEFENCE: THE CUSTOMARY LAW AND ARTICLE 51 OF THE U.N. CHARTER

**II.1** *Self-defence in a historical perspective: from naturalism to positivism.* The concept of self-defence is established in individual and state practice because it is associated with a psychological element attributed to intuition in the form of an instantaneous reaction to injury. Legal systems, structuring behavioural patterns, condoned self-defence and embarked on determining its scope. The latitude in the exercise of self-defence measures which the legal system endows eventually to individuals or states is conterminous with the elaboration, development and effectiveness of this legal system. However, even the most advanced social arrangements are still defective in areas of law enforcement, imputed perhaps to a delay in societal authoritative interposition. The interplay of individual self-defence and societal disposition towards enforcement functions justify the sustentation of self-defence as a legal instrument within a societal organisation when the collective response malfunctions. The international community, disjunctive, disorganised and endowed with a low level of centralisation, has conceded to a concept of self-defence evolving from morality and ethics to a legal proposition.

In ancient times, some features of war have been strongly denigrated but war in self-defence has been exonerated. Plato, who preaches in his *Laws* peace and goodwill, justifies wars in self-defence, although he berates statesmen "unless (they) legislate for war as a means to peace rather than for peace as a means of

war".[2] The defence of the honour and security were perceived by Cicero as legitimate causes of war.[3]

At the intersection of the ancient and modern worlds, naturalism was prevalent in the thinking of earlier writers who encountered the crucial theme of warfare. Self-defence is admitted as a just cause for war. Those early writers transfer the institution of self-defence, accepted in domestic jurisdictions, to the law of nations. Gentili wrote that

> "[e]ven the brutes are given the right of defence by nature, and we are persuaded and convinced of this right not by argument but by some innate power. And it is a necessary right; for what can be done against violence, says Cicero, without resort to violence? This is the most generally accepted of all rights. All laws and all codes allow the repelling of force by force. There is one rule which endures for ever, to maintain one's safety by any and every means. Every method of securing safety is honourable. This has been taught to philosophers by reason, to barbarians by necessity, to the nations by custom, to wild animals by Nature itself. This law is not written but inborn".[4]

Grotius in his work *De Jure Belli ac Pacis* argues on almost the same line that "This right of self-defence, it should be observed, has its origin directly and chiefly, in the fact that nature commits to each his own protection, .....".[5]

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[2] Plato, *The Laws*, A. Taylor (trans.), Bk.I, (London, J.M. Dent & Sons, 1960), p.5; C. Phillipson, *The International law and Custom of Ancient Greece and Rome,* (London, Macmillan & Co., 1911)

[3] Cicero, *On the Commonwealth,* (Sabine and Smith, 1929), c.23, p.195, in M. Weightman, "Self-defence in International Law", 37 *Va. L.Rev.*, (1951), p.1095, at p.1095; C. Phillipson, *supra* note 2, vol.II, pp.182, 315-348

[4] A. Gentili, *De Jure Belli Libri Tres,* (1588-89), J.B. Scott (ed.), *The Classics of International Law*, vol.II, (Oxford, Clarendon Press, 1933), Bk.1, ch.XIII, p.59

[5] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres,* in *The Classics of International Law*, J.B. Scott (ed.), vol.II, (Washington, Carnegie Endowment for International Peace, 1995), Bk.II, ch.I, s.iii, p.172; F. Suarez, *De Triplici Virtute Theologica, Fide, Spe, et Charitate (1621),* in J.B. Scott (ed.), *The Classics of International Law*, (Oxford, Clarendon Press, 1933), "Disputation XIII: On Charity", sec.1, para.4, pp.802-803: "Defensive war not only it is permitted but sometimes even commended ..... . The reason supporting it is that the right of self-defence is natural and necessary". F. de Vittoria, *De Indis et de Jure Belli Relectiones,* J.B. Scott (ed.), *The Classics of International Law*, (Oxford, Clarendon Press, 1933), "De Indis Relectio Posterior Sive De Jure Belli Hispanorum in Babados", p.168, para.424.5: "But defence can be resorted to at the very moment of the danger ..... and so when the necessity of defence has passed there is an end to the lawfulness of war".

Self-defence in the period prior to the U.N. Charter was intermixed conceptually with other congeneric notions such as self-preservation or self-help. It acquired a concrete legal context when war was outlawed and indeed it was understood as an intrinsic exemption to any renunciation of war.[6] Moreover, forcible measures for the protection of nationals in the inter-war period were exonerated as an aspect of self-defence.

**II.2** *The impact of the U.N. Charter.* At this point, the impact of the U.N. Charter on the traditional right of self-defence will be considered. The only reference to this right in the Charter is Article 51 which reads: "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence, if an armed attack occurs ..... ". Disagreement over the exact interpretation is attributed to the inept draftsmanship of the article[7] or it is extrapolated from the exigencies of contemporary international order. The opinions of writers and governments are dichotomised between the restrictive literal interpretation of Article 51, underlying the assumption that, in a war-torn world, peace could be preserved only if the legal imperatives to forcible actions are absolutely prohibitive.[8] On the other hand, the traditional or contextual exegesis preserves a wider initiative for states whenever the international structure malfunctions. The policy ramification beholds to a balancing of the

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[6] *The General Pact for the Renunciation of War: Text of the Pact as Signed, Notes and Other Papers*, (Washington, Government Printing Office, 1928). Also the note by Poland: "..... the pact does not affect in any way the right of legitimate defence inherent in each state" and that of South Africa: "It is not intended to deprive any party to the proposed treaty of any of its natural rights of legitimate self-defence".

[7] M.S. McDougal, F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (New Haven, Yale University Press, 1961), p.237; G. Schwarzenberger, "The Fundamental Principles of International Law", 87 *R.C.*, (1955 I), p.190, at p.337

[8] J.L. Kunz, "Individual and Collective Self-defence in Article 51 of the Charter of the United Nations", 41 *A.J.I.L.*, (1947), p.877; N.Q. Dinh, "La légitime défense d'après la Charte des Nations Unies", XIX *R.G.D.I.P.*, (1948), p.223, at p.240; H. Kelsen, "Collective Security and Collective Self-defence under the Charter of the United Nations", 42 *A.J.I.L.*, (1948), p.783, at pp.791-792; P.C. Jessup, *A Modern Law of Nations: An Introduction*, (New York, Macmillan, 1948), p.165; H. Kelsen, *The Law of the United Nations*, (London, Stevens & Sons, 1950), pp.269, 797-798; H. Wehberg, "L'interdiction du recours à la force: le principe et les problèmes qui se posent", 78 *R.C.*, (1951 I), p.1, at p.81; L. Henkin, "Force, Intervention, and Neutrality in Contemporary International Law", 57 *Proc. A.S.I.L.*, (1963), pp.148-173; I. Brownlie, *International Law and the Use of Force by States*, (Oxford, Clarendon Press, 1963), pp.271-275; J. Delivanis, *La Légitime Défense en Droit International Public Moderne*, (Paris, Librairie de Droit et de Jurisprudence, 1971), p.49; J. Zourek, *L'Interdiction de l'Emploi de la Force en Droit International*, (Leiden, A.W. Sijhoff, 1974), p.96; L. Henkin, *How Nations Behave. Law and Foreign Policy*, 2nd ed., (New York, Columbia University Press, 1979), ch.7, pp.140-143; A. Cassese, *International Law in a Divided World*, (Oxford, Clarendon Press, 1986), p.230

interests of peace and justice.[9] The legal and conceptual discord is reminiscent of the interpretative peccadilloes concerning Article 2(4), in particular, the restrictive or permissive construction. The legal arguments concentrate on the wording of Article 51 and in particular the words "inherent right" and "if an armed attack occurs". The last phrase neutralises the prefigurement which an inherent right to self-defence may forge. If "inherent" is a natural and inseparable attribute,[10] then self-defence is intertwined with statehood and armed attack describes one instance of encroaching the constitutive elements of that statehood. If inherent connotes the customary right,[11] its articulation has not been confined solely to armed attack.

The drafting of this article and the intention of the parties as a tool for exegesis are deemed inconclusive, because Article 51 was inserted at a later stage and deliberation of its meaning was inadequate. Attached to this are the reservations expressed above concerning the authoritative standing of these interpretative tools. However, the underlying theme during the framing of the use of force was, interestingly, that self-defence is a self-evident and an automatic exemption to the prohibition on the use of force. The scant references made to self-defence when the prohibition on the use of force was contemplated avow a certitude concerning its validity. When the Norwegian delegation proposed an amendment to Article 2(4) that "[n]o force at all should be used if not approved by the Security Council", the Subcommittee took the view that "the sense of approval might mean approval before or after the use of force. It might thus

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[9] C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *R.C.*, (1952 II), p.455, at pp.495-505 and "General Course on Public International Law", 106 *R.C.*, (1962 II), p.1, at pp.234-240; J. Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons, 1954), p.243 and in *Aggression and World Order: A Critique of the United Nations Theories of Aggression,* (London, Stevens & Sons, 1958), pp.43-44; L.C. Green, "Armed Conflict, War and Self-defence", 6 *Achiv des Völkerrechts*, (1956-57), p.387, at p.432; D.W. Bowett, *Self-defence in International Law,* (Manchester, Manchester University Press, 1958), ch.IX, p.182; M.S. McDougal, F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (New Haven, Yale University Press, 1961) p.232; J.L. Brierly, *The Law of Nations. An Introduction to the International Law of Peace*, 6th ed., H. Waldock (ed), (Oxford, Clarendon Press, 1963), p.416; D.P. O'Connell, *International Law,* 2nd ed., (London, Stevens & Sons, 1970), vol.I, pp.316; S.M. Schwebel, "Aggression, Intervention and Self-defence", 136 *R.C.*, (1972 II), p.411, at pp.479-483

[10] *The Shorter Oxford Dictionary*, vol.1, (Oxford, Clarendon Press, 1933), p.1006

[11] *Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Rep.*, (1986), p.14, at p.94, para.176, hereinafter cited as *Nicaragua Case*; R.L. Bindschedler, "La délimitation des compétences des Nations Unies", 108 *R.C.*, (1963 I), p.307, at p.397: "La Charte ne fait que reconnaître le droit de défense existant et défini par le droit international général".

curtail the right of states to use force in legitimate self-defence, while it was clear to the subcommittee that the right of self-defence against aggression should not be impaired or diminished".[12] Committee 1/I in its report to Commission I stated that "the unilateral use of force or similar coercive measures is not authorised or admitted. The use of arms in legitimate self-defence remains admitted and unimpaired".[13]

The paucity of references to self-defence disclose a certain disquietude shared by some states which preferred a formal articulation generated from a subconscious apprehension that lucidity would eventually serve the United Nations Organisation better. The Turkish delegation thus stated that "the proposals do not contain any provision on the subject of legitimate defence. Although this right is of an obvious nature, it would be useful to insert in the Charter a provision justifying legitimate defence against a surprise attack by another state".[14] In addition, the American Secretary of State Stettinius, in a memorandum wrote that

> "[l]e délégué chinois semblait satisfait de l'explication que, excepté en cas de légitime défense, on ne pouvait employer la force de façon unilatérale sans l'approbation du Conseil de Sécurité. A cet égard, Victor Hoo, Conseiller d'Etat aux Affaires Étrangères, voulait être explicitement assuré du fait que l'emploi de la force en cas de légitime défense ne serait pas consideré comme contradictoire avec les buts de l'Organisation".[15]

It is apparent from these references that self-defence followed the pre-Charter trend of being considered an obvious, natural right which admits certain procedural constrictions.

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[12] Doc. 793; I/1/A/19(a), 6 U.N.C.I.O p.720

[13] Report of the Rapporteur of C/tee 1 to C/sion I as adopted by C/tee 1/I, Doc.944, I/1/34(i), 6 U.N.C.I.O., (1945), Doc.446, p.459

[14] Doc.2; G/14(c), "Suggestions of the Turkish Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four Power Conference at Dumbarton Oaks", 3 U.N.C.I.O., p.480, at p.483

[15] *Foreign Relations of the United States, Diplomatic Papers*, vol.I, (Washington, Government Printing Office, 1944), p.862 cited by A. Cassese, "Article 51", in J.P. Cot, A. Pellet, *La Charte des Nations Unies*, (Paris, Economica, 1985), p.769, at p.772

The inclusion of an article on self-defence in the U.N. Charter purported to accommodate existing regional arrangements: the Act of Chapultepec,[16] the Arab League,[17] and certain European arrangements and aspirations.[18] Latin American states were the most optative in maintaining a degree of autonomous action under the new system when the Security Council is paralysed. They were determined to withhold their consent unless their regional arrangements were adequately accommodated in the new system.[19] A proposal was put forward by the U.S. delegation that

> "should the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member state, such member states possess the inherent right to take such measures for self-defence. The right to take such measures for self-defence against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an armed attack against any one of them as an attack against all of them".[20]

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[16] *Treaty of Reciprocal Assistance and American Solidarity*, (March 8, 1945). U.S.. Dep't of State, *Treaties and Other International Agreements of the United States of America 1776-1949*, vol.3, "Multilateral 1931-1945", p.1024

[17] See opinion of the Egyptian delegation, 12 U.N.C.I.O., p.682; Doc.2; G/7 (q), (1), 3 U.N.C.I.O., p.453, at pp.460-461

[18] See the opinion of the Czechoslovakian delegation, "Observations of the Czechoslovak Government on the Dumbarton Oaks Proposals", Doc.2; G/14(b), 3 U.N.C.I.O., p.282, at p.470 and of Turkey, Doc.2, G/14(c), 3 U.N.C.I.O., p.480, at p.483. Also "Suggestions of the Belgian Government Concerning the Proposals for the Maintenance of Peace and Security formulated at the Four Power Conference held at Dumbarton Oaks and Published on October 9, 1944", *Ibid.*, Doc.2; G/7(k), p.331, at p.334: "In the case where immediate action might be necessary, the application of coercive measures provided for by the special regional arrangements should not be held in abeyance pending the Security Council's authorization; it would of course, behove the S.C to retain control at all times of the action undertaken, and it would have the right to suspend execution of such action". Also "Amendments Proposed by the French Government to the Proposals Relative to the Establishment of a General International Organisation", *Ibid.*, Doc.2; G/7(o), p.383, at p.387. Also "Amendments to the Dumbarton Oaks Proposals, Submitted by the Delegation of the Soviet Union", *Ibid.*, Doc. 2; G/14(w)(1), p.601:"..... no coercive measures may be taken under regional agreements without the authorization of the Security Council, excepting measures which are provided for in the regional agreements and directed against renewal of a policy of aggression on the part of the aggressor states in the war".

[19] Senator Vandenberg, who is considered to be the author of Article 51 said: "To make a long story short, Latin America rebelled - and so did we. If the omission (of the right of collective self-defence), had not been rectified, there would have been no Charter. It was rectified, finally, after infinite travail, by agreement upon Article 51 of the Charter. Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance". 95 *Cong. Rec.* 8892 (1949)

[20] R. Russell, J.E. Muther, *A History of the United Nations Charter. The Role of the United States 1940-1945*, (Washington, The Brookings Institution, 1958), p.698

Such an assertion was intended to reflect the Latin American system. Respectively, Part I of the Act of Chapultepec maintains that "every attack of a state against the sovereignty or political independence of an American state, shall ..... be considered as an act of aggression against the other states which sign this Act". What is interesting in these statements is that "armed attack" and "aggression" define two different circumstances. The latter is linked to what is called individual self-defence, whereas "armed attack" to that of collective self-defence. As a matter of political logic, this is justifiable because armed attack amounts to the external manifestation of the incident which may trigger a defensive reaction by a third party.

A British proposal to that effect omitting express reference to regional arrangements but containing the term collective self-defence was not well received by the Latin American states, suspicious that their organisation might become invalid. They agreed to the final draft only when assurances to the contrary were given by the United States.[21] The United States issued a statement that Article 51 "recognised the inherent right of self-defence but left unaffected the ultimate authority of the Security Council as the paramount organ in world enforcement action".[22] In this statement, we can easily notice the interrelation of a natural truism within a positivist-consensual articulation.

**II.3** *Customary individual and contractual collective self-defence.* Initially, Article 51 was included in Chapter VIII dealing with regional arrangements. It was finally removed because of the Security Council's preponderant authority in the allocation of power under this Chapter and because, as the Committee of Jurists explained, it might " ..... have the effect of limiting the right of self-defence only to regional arrangements, thus depriving a state which was not a party to such arrangements of that right. Such conclusion was not to be permitted".[23]

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[21] *Ibid.*, pp.699-700

[22] *Secretary of State, Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the U.S. Delegation, the Secretary of State*, p.14

[23] Doc. WD 435, Co/199, "Summary Report of the Fifty Fifth Meeting of the Coordination C/tee", 17 U.N.C.I.O., p.276, at p.287; Dean Acheson noted that the provisions of Article 51 had been removed from the portion of the Charter dealing with regional arrangements so that "the inherent right of individual and collective self-defence should not be associated with any other idea whatever; it is a complete, absolute right ..... ". *North Atlantic Treaty: Hearings Before the Senate C/tee on Foreign Relations*, 81st Cong., 1st Sess. (1949), p.17, in M.M. Whiteman,

Consequently, Article 51, by recognising individual self-defence and by allowing for collective self-defence systems, reconciled the exigencies of the participating nations with the priorities of the new organisation. As it was put forward by the U.S. Secretary of State Stettinius, " ..... in thus recognising the paramount authority of the world organisation in enforcement actions as well as the inherent right of self-defence ..... this article ..... makes possible a useful and effective integration of regional systems of co-operation with the world system of international security".[24]

According to the above analysis, it is suggested that Article 51 effectually contains two norms, one for individual and one for collective self-defence. This interpretation takes cognizance of the two orientations prevailing during the drafting of this article. The first concerns the need by some parties for an explicit affirmation and acknowledgement that individual self-defence as an exemption to the prohibition of force is not abridged. The other orientation concerns the accommodation of collective self-defence systems. These predilections were finally awkwardly merged into a single article. Hence, Article 51 recognises individual self-defence as forming an integral part of customary law and, on the other hand, articulates collective self-defence. The latter, *au contraire*, forfeits the quality of inherence. Under the ordinary meaning of the word "inherent", it is not possible to assimilate the individualistic, intrinsic and spontaneous reaction to an injury with the reaction of a third party not itself victim of an attack. Coalitions or defensive arrangements are founded on political calculations or on an apprehension of common dangers but have heterogeneous motives from those the word "inherent" denotes. If the word inherent points to the customary law, as the *I.C.J.* observed in the *Nicaragua Case*[25], collective self-defence has not been positively established therein, and thus Article 51 seems to expand the notion of self-defence by "introducing a novel concept".[26]

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*Digest of International Law*, vol.12, (Washington D.C., Dept. of State Publication 8586, 1971), p.95

[24] *Secretary of State, Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the U.S. Delegation, the Secretary of State*, p.108

[25] *Nicaragua Case*, p.94, para.176

[26] *Nicaragua Case*, dissenting opinion of Judge Jennings, *ibid.*, pp.530-531; dissenting opinion of Judge Oda, *ibid.*, pp.256-258; L. Oppenheim, *International Law. A Treatise*, vol.II, "Disputes, War and Neutrality", H. Lauterpacht (ed.), (London, Longmans, 1958), p.155; J. Delbrück,

The phrase "armed attack" used in Article 51, the flagship of those who maintain that individual or collective self-defence in customary law is reduced solely to such an event, did not provoke much deliberation during the drafting of Article 51. It merely reveals the influence of the Act of Chapultepec, which refers to "armed attack".[27] The U.S. proposal discussed above is consistent with this contention. The word "aggression" is used for individual self-defence, whereas "armed attack" is used to describe the circumstances whereunder collective self-defence is exercised. The French text, which is also an authoritative interpretation, employs the word "agression armée", whereas the appropriate term would have been "attaque armée". There is, in addition, no attempt to reconcile the discrepancies in the two texts, although interpretational peccadilloes have not passed unattended and have raised discussions in other instances.[28] Thus, in the opinion of some writers, the phrase "if an armed attack occurs" and in French "dans un cas" are only indicative of a particular instance when self-defence is exercised and was "used to express an hypothesis rather than a condition - which is of course, one of the natural uses of 'if'.....".[29]

In order to recapitulate on the issue of whether the Charter has modified the right of individual self-defence, it is submitted that the comportment of states at San Francisco and their subsequent practice suggests that in the first part of Article 51, they declared the customary law on self-defence as they were acquainted therewith. In the *Nicaragua Case* the *I.C.J.* admitted the customary

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"Collective Self-defence", in *E.P.I.L.*, vol.3, "The Use of Force; War and Neutrality; Peace Treaties", (Amsterdam/New York/Oxford, North-Holland Pub.Co., 1982), pp.114-117; Statement of J.F. Dulles: "At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defence, enlarged at Chapultepec to be a doctrine of collective self-defence, could stand unimpaired and could function without the approval of the Security Council". *The Charter of the United Nations: Hearing before the Senate C/tee on Foreign Relations*, U.S. Senate, 79th Cong. 1st Sess. 349-350 (1945), in M.M. Whiteman, *Digest of International Law*, vol.12, (Washington D.C., Dept. of State Publication 8586, 1971), p.85; J. Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons, 1954), p.245; N.Q. Dinh, "La légitime défense d'après la Charte des Nations Unies", XIX *R.G.D.I.P.*, (1948), p.244

[27] O. Schachter, "The Right of States to Use Armed Force", 82 *Mich. L.Rev.*, (1984), p.1620, at p.1634: "The link with the Chapultepec Treaty provides a reason for the inclusion of the words "if an armed attack occurs" and explains why it was not said that self-defence is limited to cases of armed attack".

[28] Doc.784; I/1/27, "Summary Report of the Eleventh Meeting of C/tee I/1", 6 U.N.C.I.O., p.331. at p.335; Doc. WD 424; CO/188, "Summary Report of the Twenty Fourth Meeting of Coordination C/tee", 17 U.N.C.I.O., p.162, at pp.164-165

[29] H.C.M. Waldock, "General Course on Public International Law", 106 *R.C.*, (1962 II), p.1, at p.235

character of the rules on the use of force by acknowledging that not all its aspects are regulated by the Charter and that the requirements of proportionality and necessity are conditioned in customary law.[30] Those criteria are interwoven with the exercise of self-defence. However, Article 51 ignores them. The omission of those conditions supports the view that Article 51 mirrors the customary law in the inclusive phrase "inherent right". If Article 51 was meant to be itself the source of this right, the limitations of proportionality and necessity should, as a logical consequence, figure in the article, along with the inserted limitation of an armed attack. Otherwise, the non-incorporation of these elements intimates a less restricted right which contradicts the inserted limitation of armed attack. Inferentially, Article 51 alludes to the customary law in its full extent, notwithstanding the perceived limitations stated in the *Nicaragua Case*.

## III. THE *NICARAGUA CASE* AND SELF-DEFENCE: THE THEORETICAL CONSTRUCTION OF THE DECISION AND ITS DECONSTRUCTION

**III.1** *The irrelevance of practice for the formation of custom.* The judgment of the *I.C.J.* in the *Nicaragua Case*[31] pronounced on the subject of self-defence, individual or collective, that it should be preceded by an armed attack and that armed attack is a *sine qua non* condition for self-defence.[32] The ascribed

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[30] *Nicaragua Case*, p.103, para.194

[31] For a version of this section see N. Tsagourias, "The Nicaragua Case and the Use of Force: The Theoretical Construction of the Decision and Its Deconstruction", 1 *J. Armed Conflict Law*, (1996), p.81; M.H. Mendelson, "The *Nicaragua Case* and Customary International Law", in W.E. Butler, (ed.), *The Non - Use of Force in International Law*, (Dordrecht/Boston/London, M. Nijhoff, 1989), p.85; H.W. Briggs, "The International Court of Justice Lives Up to its Name", 81 *A.J.I.L.*, (1987), p.78; G.A. Christenson, "The World Court and Jus Cogens", *ibid.*, p.93; A.A. D'Amato, "Thrashing Customary International Law", *ibid.*, p.101; J.L. Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-defence", *ibid.*, p.135; F.L. Kirgis Jr, "Custom on a Sliding Scale", *ibid.*, p.146; F.L. Morrison, "Legal Issues in the Nicaragua Opinion", *ibid.*, p.160; J. Verhoven, "Le droit, le Juge et la violence. Les arrêts Nicaragua c. Etats-Unis", 91 *R.G.D.I.P.*, (1987), p.1159

[32] *Nicaragua Case,* paras.195, 237, pp.103,122. Concerning the concept of anticipatory self-defence, the Court said "..... the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly, the Court expresses no view on that issue". *Ibid.*, p.103, para.194. This may leave the concept of anticipatory self-defence open to any interpretation, nevertheless, considering the emphatic repetition of the "armed attack'

circumscription of self-defence necessitates explication and full understanding of the values, policies and ideological motivations behind the decision[33] instead of merely inviting reproaches and condemnations.

The structural affiliations of the Court delineate its initial assumptions and delimit the potentiality for discretionary jurisdiction. The *I.C.J.* is an organ of the U.N. Charter which regulates aspects of the use of force and adumbrates its main purpose of preserving peace. Consequently, a restrictive view of Article 2(4) coincides with diminishing the threshold for self-defence, containing it to an armed attack narrowly defined. The President of the Court in his Opinion was unequivocal: "[t]he Court as the principal judicial organ of the United Nations has to promote peace and cannot refrain from moving in that direction".[34] It would be inconceivable for the Court to deviate remarkably from the ideological premises of its formative instrument. The main task of the World Court is consequently to restrict the use of force in international relations by legal means whereas the U.N. serves this purpose politically.

The *I.C.J.*, as part of the U.N. system, endeavoured in this case to coalesce customary international law and the Charter provisions in order to avoid peregrination into the nebulous corpus of customary law. It determined that customary and U.N. Charter law, even if identical in content, have separate existence.[35] However, in ascertaining the content of customary law through practice and *opinio juris*, the *I.C.J.* proceeds in a siccative evaluation of the Charter's norms divested from the fluctuations of international practice. Thus, the Court gives the impression that it is the Charter rules as such which are pronounced upon.[36] The *I.C.J.* isolates the rules on the use of force contained in

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requirement, it could not be interpreted as for this case as being sympathetic to anticipatory self defence.

[33] J.B. White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life", 52 *U. Chi. L.Rev.*, (1985), p.684, at pp.696-98: "Any decision of law cannot be scientifically pure but within lies probably unconscious judgment as to the preferable policy, therefore it cannot be treated as neutral but one beyond the words used can fathom the policies or values intrinsic in the words". A.C. Hutchison and P.J. Monaham, "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought", 36 *Stan. L.Rev.*, (1984), p.199; D. Kairys, "Law and Politics", 52 *Ga. L.Rev.*, (1984), p.243; J. Boyle, "Ideals and Things: International Legal Scholarship and the Prison-House of Language", 26 *Harv. I.L.J.*, (1985), p.327

[34] Separate Opinion of the President of the Court Nagendra Singh, *Nicaragua Case*, p.153

[35] *Nicaragua Case*, p.95, para.178

[36] *Nicaragua Case*, Dissenting Opinion of Judge Ago, pp.183-184 and Judge Jennings, *ibid.*, p.532. This contradicts a previous judgment concerning the role of the multilateral treaties and customary law: "It is of course axiomatic that the material of customary international law is to be

the Charter from their functional environment and records their normative validity in abstract. This is similar to the distinction between "Soll-Geltung" and "Seins-Wirksamkeit" initiated by Kelsen, which will be dealt with subsequently.

At this point, the onerous task facing the Court should be acknowledged. A foray into reconstructing the prohibition on the use of force would cause a floodgate of particular claims. By admitting the fallibility of the rule or a particular exemption, the problem of accommodating divergent claims emerges. On the other hand, it would be hypocritical to maintain that the rules are impermeable. State practice is an adamant witness of a liberal construction of the rule on the use of force. The *I.C.J.*, faced with this dilemma, cautiously affirmed the validity of the rule on the non-use of force amidst widespread contravention.[37] It embraced normative integrity at the expense of normative relevance, leaving the law as nebulous as it was before. It failed to fulfil the expectations of Elihu Root, who advised in the case of beclouded or complicated issues that: "[t]here is but one way to make general judgment possible in such cases. That is by bringing them to the decision of a competent court which will strip away the irrelevant, reject the false, and declare what the law requires or prohibits in the particular case".[38]

The Court should have questioned the juridical acceptance of the principle on the non-use of force by examining the frequent and contrary practice of the U.S.A, one of the contending parties whose conduct in Nicaragua, the *I.C.J.* deemed within its jurisdiction.[39] Also, it should have questioned the extent of self-defence. It should be admitted that in many instances the *opinio juris* underlying these practices remains cryptic; nonetheless, it has reduced the certainty of *opinio juris* pertaining to the contrary rule.[40] The *I.C.J.* befuddled the process for the development of customary international law by axiomatically

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looked for primarily in the actual practice and *opinio juris* of states even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them ". *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Rep.*, (1985), p.13, at pp.29-30, para.27

[37] *Nicaragua Case*, p.98, para.186

[38] E. Root, "The Outlook for International Law", *Proc. Fifth Nat'l Conf. Am. Soc'y for Jud. Settlement of Int'l Disputes*, (1916), p.30, at p.33

[39] *Nicaragua Case*, p.109, para.207

[40] A.A. D'Amato, *The Concept of Custom in International Law*, (Ithaca, Cornell University Press, 1971), p.74: "Well-established rules of custom, almost by definition, are not the subject of a dispute".

pronouncing on the illicitness of contrary practice and its accompanying *opinio juris*. Accumulation of "illegal" precedents contains the germ of a new customary rule. Had the *I.C.J.* examined thoroughly state practice, its conclusion could safely be controverted in view of the numerous manifestations of forcible measures under the umbrella of self-defence. By overshadowing state practice, the *I.C.J.* seems to occupy itself with reaffirming the existence of the rule - customary or conventional - on the non-use of force, absolving itself from the demanding task of determining its content.[41] A rigorous stand procures certainty and clarity, whilst it minimizes any interpretative allusions. In a nutshell, the decision is a poetic lecture on the prevalent spirit and ideal of the Charter; nevertheless, it cannot escape the impression of being surrealistic and irresponsive to pertinent moral and legal issues.

**III.2** *Tracing customary law.* The Court confined self-defence to an armed attack by a deficient extrapolation of customary law. It reiterates dutifully the identifying method for customary law which comprises of state practice and *opinio juris* according to its previous jurisprudence.[42] However, the *I.C.J.*, probing these two elements, satisfies itself with only the *opinio juris* from which it deducts the conformity of state practice.[43]

As the Court has observed, customary law has a dualistic conception. It has a corpus, the *repetitio facti* and *animus*, the *opinio juris* which is merely a psychological element. The two elements are not in fact separate, but it is the acts "qui doivent temoigner, par leur nature ou la manière dont ils ont accomplis de l'existence de l'*opinio juris*".[44] Thus, the *opinio juris* is inducted from the state practice or the mode of behavioural patterns, whereas state practice could not be deduced from the *opinio juris*.[45] The analysis of *opinio juris* involves

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[41] P.M. Eisemann, "L'arrêt de la C.I.J du 27 juin 1986 (fond), dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci", 32 *A.F.D.I.*, (1986), p.153, at pp.173-174

[42] *Nicaragua Case,* pp.97-98, paras.183,184; *Asylum Case, I.C.J. Rep.*, (1950), p.265, at pp.276-277; *Case Concerning Rights of Nationals of the United States of America in Morocco, I.C.J. Rep.*,(1952), p.176, at p.200; *Case Concerning Right of Passage Over Indian Territory, I.C.J. Rep.*, (1960), p.4, at pp.40,43; *North Sea Continental Shelf Cases, I.C.J. Rep.*, (1969), p.3, at pp.43-44, paras.74,77

[43] *Nicaragua Case,* p.98, para.186

[44] L. Condorelli, "La coutume", in M. Bedjaoui (réd. gén.), *Droit International. Bilan et perspectives*, tome 1, (Paris, Editions Pedone, 1991), ch.VII, p.187, at p.197

[45] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Rep.*, (1984), p.244, at p.299, para.111: "..... together with a set of customary rules whose

psychological considerations in order to discern the motives behind state practice, whereas an accumulation of a particular state pattern could reveal a consolidated sentiment towards that pattern.[46] In the *Nicaragua Case*, the *I.C.J.* muddled the issue. It stated vaguely that practice is not in absolutely rigorous conformity with the rule, but the "Court deems it sufficient that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule".[47]

The rule is the abstention from the use of force, and the breaches involve resort to force. Logically, when there is an interdiction, the practice should be null and therefore the emphasis is on the animus, "for only if abstention has based on their being conscious of a duty to abstain would it be possible to speak of an international custom".[48] The existence of practice contrary to the alleged prohibition should have generated a different reaction. This practice is accommodated in other rules, in particular Article 51, which defies the *I.C.J.*'s perceived context of this rule. The *I.C.J.* declined to detect this and confirmed the existence of a customary prohibition by conceding unnecessary preponderance to the *opinio juris*. It treated state practice as jurisdictionally non-existent by effacing any contrary *opinio juris* evidenced in the incontestable contrary practice. In its effort to eschew practice, it appears content with General Assembly Resolutions and mainly with that on Friendly Relations.[49] If someone could extract the customary law through voting patterns in the General Assembly, then tracing custom would be less laborious. The Court also refers to acceptance of the relevant resolutions which is not necessarily invested with *opinio juris*, or the psychological conviction. As Hart explains, people or, in this correlation, states accept a rule either because they will experience criticism and

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presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice and not by deduction from preconceived ideas".

[46] M. Sorensen, *Les sources du droit international*, (Copenhague, E. Munksgaard, 1946), p.85; M. Virally, "The Sources of International Law", in M. Sorensen (ed.), *Manual of Public International Law*, (London, Macmillan, 1968), p.116, at pp.134-135; H. Lauterpacht, *The Development of the International Law by the International Court*, (London, Stevens & Sons, 1958), p.380; P. Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique et la Cour Internationale", 90 *R.G.D.I.P.*, (1986), p.5, at p.177. Also the dissenting opinions of Judge Tanaka and Sorensen in the *North Sea Continental Shelf Cases*, *I.C.J. Rep.*, (1969), p.3, pp.175-176, 243-247

[47] *Nicaragua Case*, p.98, para.186

[48] *The Case of the S.S Lotus*, *P.C.I.J.*, Series A., No.10, p.4, at p.28

[49] *Nicaragua Case*, pp.99-100, para.188

pressure if they do not, or because it is not mandatory. This, however, does not amount to a feeling, coupled with the volition for conformity, which springs only from the internal reflective attitude towards the rule.[50] The General Assembly Resolutions, apart from their precarious legal status, are always the outcome of bargaining and compromises, and political considerations are not irrelevant. In a previous judgment , the *I.C.J.* has discarded a certain practice because it has been "so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence".[51] Although the *I.C.J.* side-stepped an examination of state practice (and especially that of the U.S.A) the fact that certain states behave contrary to what they declare their obligations to be in the General Assembly is evidence that the *opinio juris* is in default. In the General Assembly, states often vote on what the law *ought to* be and not on what the law actually *is*. Therefore, no definitive rules could be extracted concerning the actual state of the law[52], albeit the fact that this juristic disjunction coincides with the Court's jurisprudential stance of preserving the normative purity of the law.

The *I.C.J.* can recite the U.N. Charter and record the General Assembly Resolutions, but in order to extrapolate "légiferation", it should appraise the

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[50] H.L.A. Hart, *The Concept of Law,* (Oxford, Clarendon Press, 1961), p.56: "There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion". Hereinafter referred to as *CL*

[51] *Asylum Case, I.C.J. Rep.,* (1950), p.265, at p.277; *Nicaragua Case*, Separate Opinion of Judge Ago, p.184 and Judge Jennings, pp.531-533. Also Separate Opinion of Judge Read in *Anglo Norwegian Fisheries Case, I.C.J. Rep,* (1951), p.3, at p.191

[52] G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", 137 *R.C.*, (1972 III), p.418, at pp.471-486: "What would matter ..... is not whether Assembly members felt legally bound to vote for the declaratory resolution but, whether they felt legally bound by the rules they proclaimed .....". "But the really decisive element will mostly come from elsewhere, it will come from the practice of states prior to, concomitant with or following the United Nations recommendatory process". *ibid.*, pp.278,279. R. Higgins, "The Role of the Resolutions of International Organisations in the Process of Creating Norms in the International System", in W.E. Butler (ed.), *International Law and the International System,* (Dordrecht/Boston/Lancaster, M. Nijhoff, 1987), p.21; C.C. Joyner, "U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation", 11 *Ca. W.I.L.J.*, (1981), p.445, S. Schwebel, "The Effect of Resolutions of the United Nations General Assembly on Customary International Law", *73 Proc. A.S.I.L.*, (1979), p.380; R. Higgins, The United Nations and Law Making: The Political Organs", 64 *Proc. A.S.I.L.*, (1970), pp.37-48; D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", 32 *B.Y.B.I.L.*, (1955-56), p.97; F.A. Vallat, "The General Assembly and the Security Council of the United Nations", 29 *B.Y.B.I.L.*, (1952), p.96;

effects these rules have on state practice, that is, show how reflective they are as originative of state behaviour. The *I.C.J.* deliberately eschews such an exercise because it is an external observer of the international interaction and, thus, insufficiently equipped to apprehend the so called "internal aspects of rules".[53] It is at this point that Hart's discussion of "internal point" should be elaborated and also the jurisprudential premises of the decision. Hart introduces a certain psychological attitude towards the rules in order to differentiate them from Austinian habits, or Kelsen's disassociation of "is" and "ought". Voting in the General Assembly may have different significance for the participant and the external observer. The latter cannot apprehend the particular patterns of thought which induces the externally observable act of voting. According to Hart, there is a need for an internal point of view which should be shared by all the members in a pre-legal society such as exists in the international society.[54] This attitude is evidenced in criticisms and demands for conformity[55], which would reveal acceptance of the rule as a matter of volition and not due to other reasons.[56] The circularity of this argument is solved by reference to a rule. Criticism towards forceful actions depends on a certain attitude towards these actions, which manifests itself through the criticism but presupposes a norm or a rule. Therefore, the *I.C.J.* should have investigated the attitude towards certain practices and *the practice* in order to extrapolate the rule on self-defence or the use of force. Declining to establish this, the Court reverts to Kelsenite normativity.

**III.3** *The jurisprudential premises of the decision.* The *I.C.J.* in this case appears deferential to Kelsen's legal theory. Kelsen's view on the normativity of jurisprudence was presented previously, that is, his contention that it is concerned with norms, the "ought" propositions. Norms are valid because they exist and not because they are efficacious. These two qualities are distinct and the validity of a norm does not necessarily depend upon its efficacy, although an efficacious legal system accounts in general for the validity of individual norms. Consequently, if a system is efficacious but a certain norm lacks efficacy, it is

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[53] *CL*, p.55
[54] N. MacCormick, *H.L.A. Hart*, (Stanford, Stanford University Press, 1981), pp.25, 30-31
[55] *CL*, p.56
[56] MacCormick, *supra*, note 54, p.32

not divested from validity.[57] In the jurisprudence of the Court, it is rephrased in the assertion which envisages the normative validity of the rule concerning the prohibition on the use of force or self-defence, amidst the frequency of infractions. A further point relates to the criticism voiced above concerning the failure of the Court to consider the concretization of the rule in state practice. For the Court, the validity of the rule on the use of force or self-defence requires attestation of its existence and not of its controlling authority. In accordance with this legal position, the *I.C.J.* should only scrutinise the sources which will assist in verifying the existence of the rule and consequently establish its normativity. Pursuant to this theoretical position, the Court justifiably engages in ascertaining only the validity of the rules, instead of their efficacy. Although, this is presented as a juristic exercise, it is not devoid of ideological content. The Court, hence, traces the existence of Articles 2(4) and 51 in various texts which embodies their efficacy and contributes to their validity.

Normativity, according to Kelsen, contains an internal and an external aspect.[58] The former entails the categorisation of behaviour as lawful or unlawful. It encompasses a certain point of view which, nevertheless, is dissimilar to the naturalist conception of good or bad. The distinction is cognitive not evaluative and also disassociated from the facts. It presupposes in fact, the existence of a norm. The second aspect then comes into play, which is the descriptive normativity. It is presented as the result of the previous normative aspect and takes the form of a legal proposition. As an example, the abstract norm concerning the unlawfulness of coercion is concretised in the descriptive norm of Articles 2(4) and 51 which postulate that coercion should not be used and that if there is an attack, self-defence should apply. At this stage, the problem of identifying the normative-prescriptive and the propositional-descriptive "ought" is confronted. Kelsen maintains that the distinction is abandoned once the prescription is embodied in the description.[59] This may have the result of reconciling the realist position of incorporating the "ought" into "is" with that of Kelsen's, presuming that the "ought" contained in the proposition is an

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[57] H. Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", 55 *Harvard L.Rev.*, (1941), p.44, at pp.50-57

[58] N. Bobbio, "'Sein' and 'Sollen' in Legal Science", LVI *Archiv. für Rechts - und Sozialphilosophie*, (1970), pp.7-30

[59] H. Kelsen, *Reine Rechtslehre*, 2nd ed., (Wien, Denlicke, 1960), p.77

ascertainment of a fact. Thus, the prescription of self-defence in the form of Article 51 would be inferred from the abstract notion of self-defence which materialises in the norm from the fact of exercising self-defence only when an attack occurs. However, Kelsen disproves any causality and adheres to "legal necessity" instead of "natural necessity" which means as a consequence the assimilation of the descriptive with the prescriptive.

The theoretical quandary springs from the fundamental contradiction within the concept of sovereignty, which aggravates the tension between theory and practice, normative source and normative legitimacy.[60] The inconsistency experienced in sovereignty as equality or autonomy creates at a theoretical level the tension between a position which views international law as *separate from and critical of* state behaviour and another, according to which international law is *grounded in and fused with* state behaviour. A behavioural approach faces the problem of an independent index in order to characterise an act. This is the problem of normative legitimacy because any activity appears as indicative of a new consensus. On the other hand, preserving the normative legitimacy creates the problem of normative source. A norm could not acquire a context because it does not apply to factual situations. In the *Nicaragua Case*[61] the dilemma of choosing between these contradictory aspects emerged, but the Court set off towards normative legitimacy. The reaffirmation of the norms on non-intervention or self-defence is an ideological exercise because it lacks substance. Nevertheless, the opposite view of state conduct is unsatisfactory, because no action could be evaluated as intervention or self-defence unless there exists an independent norm. Otherwise, any action may be presented as a ratification of any norm. An osmosis between normative legitimacy and normative source would provide a potential satisfactory solution.

However, the *I.C.J.*, having misconstrued the realities of customary rules and choosing normative clarity, developed a restrictive view of customary law on self-defence, not concurrent with the state practice because the latter, in its jurisdiction, has lost its autonomy and determinative force. It was pulverised in

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[60] D. Kennedy, "Theses about International Law Discourse", 23 *German Y.B.I.L.*, (1980), p.353, at p.383

[61] "Applying the Critical Jurisprudence of International Law to the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*", "Note", 71 *Va. L.Rev.*, (1985), p.1183

an *ex cathedra* presumption that the prohibition on force is the law and the only derogation is self-defence under armed attack.

Having said that, the identification of self-defence with customary law implies that it must satisfy the customary requirements as they have been stated in the famous Caroline incident[62], those requirements being proportionality and necessity. Concerning the protection of nationals in particular, there must be (i) an imminent threat of injury to nationals; (ii) a failure or inability on the part of the territorial sovereign to protect them and (iii) measures of protection strictly confined to the object of protecting them against injury.[63]

## IV. STATE ACTIVITY CONCERNING THE PROTECTION OF NATIONALS: A PRELIMINARY EVALUATION

**IV.1** *State practice as self-defence-humanitarian intervention.* The bulk of the relevant practice relating to the protection of nationals renders necessary only a siccative presentation. This will cover certain typical instances, whereas their evaluation under the next title will demonstrate their factual, theoretical and legal dimensions. Consequently, the practice will be presented according to our previous classification of the argument describing the protection of nationals as either self-defence or humanitarian action. Both elements or justifications may be interweaved in the same action but we shall demonstrate their distinct utilisation. In addition, the identified interpretative guises of the self-defence argument *proper sensu* will be considered.

It is admittedly the U.S.A which has most frequently exercised this right of protection. The Solicitor for the Department of State acknowledged in 1912 that "no nation it would seem, has with more frequency than has this government used its military forces for the purpose of occupying temporarily parts of foreign countries in order to secure adequate safety and protection for its citizens and

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[62] 29 *British and Foreign State Papers*, (1840-1841), p.1129, at p.1138: "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation".
[63] C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *R.C.*, (1952 II), p.455, p.467

their property".[64] Milton Offutt writing in 1928 counted more than one hundred occasions within a hundred and fifteen years period.[65] The policy of the U.S. Government could be adumbrated in the statement made by the Acting Secretary of State Hill in 1900: "I am not designed to forgo the right which this government has always held and which on occasion it has exercised ..... to land forces and adopt all necessary measures to protect the life and property of our citizens whenever menaced by lawless acts, which the general or local authority is unwilling or impotent to prevent".[66] This statement established its validity through repetitious practice and coincides with the identified edicts of customary law for the exercise of this right.

The major cases which will be discussed in this section are the Dominican Republic (1965);[67] Grenada (1983); and Liberia (1990, 1996), but references will also be made to other cases. We shall first start with two cases, Entebbe[68] and Iran[69] which are reckoned to be justifiable under the rubric of self-defence *stricto sensu*. It should be emphasised at the outset that the aforementioned cases share analogies with cases of the same genre discussed subsequently. However, they are signled out because the self-defence argument was put forward vigorously and credibly. There is also a certain acquiescence by other states due to the fact that the initial action was apparently impinging on what is considered to be, in a state-oriented law, the attributes of a sovereign state. Having said that, we proceed in identifying these cases.

**IV.2** *Entebbe (1976) and Iran (1980): self-defence action with humanitarian dimensions.* In these cases, the danger faced by nationals of the intervening state was due to political enmity towards their respective countries. They were used as a means towards further political objectives which encroached upon the

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[64] J.R. Clark Jr., *Right to Protect Citizens in Foreign Countries by Landing Forces, Memorandum of the Solicitor for the Dept. of State, October 5, 1912*, 2nd rev.ed., (Washington, U.S. Government Printing Office, 1929), p. 32, hereinafter cited as *Memorandum*

[65] M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States*, (Baltimore, The John Hopkins Press, 1928) p.1

[66] J.B. Moore, *A Digest of International Law*, vol.II, (Washington, Government Printing Office, 1906), pp.401-402

[67] A.J. Thomas, A.V.W. Thomas, *The Dominican Republic Crisis 1965*, (Dobbs Ferry, N.Y., Oceana Publication Inc., 1967)

[68] M. Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action", 12 *J. Int'l L & Economics*, (1977), p.57

[69] J.R. D'Angelo, "Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law", 21 *Va. J.I.L.*, (1981), p.485

exercise of authority by their national states. On those grounds, the respective actions are considered to be defensive but we should not overlook the humanitarian element. Although the nationals of these states were targeted selectively in order to impel their national governments towards a dictated course of action, the life-threatening circumstances were genuine and the rescuing operation also addressed this element. In fact, the two aspects - defensive and humanitarian - are intermingled because it is the threat of annihilation which makes the demands imperative and compelling, impinging upon the state's compass of political independence which eventually triggers the defensive action. If there is no such imperious situation, the intrusion into the exercise of authority is reduced and the demands or the pursued action adopt a different allure. In a nutshell, the humanitarian motive is present and plays an incisive role, although discounted in the political hubbub.

Thus, the Palestinians who hijacked the Air France plane on route to Paris on June 27, 1976 demanded the release of Palestinians imprisoned in other countries. The Palestinians released some hostages and, finally, only Israeli nationals and people with Jewish sounding names remained aboard. Israeli commandos raided Entebbe airport on July 4, 1976 in order to release the Israeli hostages. During the operation 20 Ugandan soldiers were killed and military aircraft in the airport were destroyed. The government of Uganda was accused of complicity with the Palestinians.[70] The incident was discussed within the Security Council where clear statements supporting the action as a measure of self-defence were made. The Israeli Ambassador justified the decision "to take military action to protect its nationals in mortal danger' as an instance of self-defence.[71] The U.S.A equivocally supported a right, well established "to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the

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[70] U.N. SCOR, 1939th mtg., U.N. Doc. S/PV. 1939 (1976), paras.44-45,
[71] U.N. SCOR, 1939th mtg., U.N. Doc. S/PV. 1939, (9/7/1976), p.57, at pp.59-60,

right of self-defence, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury".[72]

The Iranian incident shares a common property with the previous one, that is, they are both politically motivated in their inception and the sought after results. This incident started when, amid the revolutionary fervour which overwhelmed Iran, "Muslim Students" invaded the American Embassy on November 4, 1979 and detained as hostages 48 members of the U.S. diplomatic personnel and 2 private citizens until January 20, 1981. That day, a settlement was agreed whereupon they were released.[73] The Security Council discussed the incident first on December 5, 1979 and requested the release of all hostages. When Iran did not comply, the Security Council occupied itself again with the issue on December 31, 1979 by requesting the release of hostages.[74] The Security Council was again convened to discuss the imposition of sanctions due to Iran's failure to comply with the previous resolutions but a resolution to this effect was blocked by the Soviet Union. In the meantime, the U.S.A requested interim measures on November 30, 1979. The *I.C.J.*, in its order of December 15, 1979, called for the hostages to be released and for the parties to exercise restraint in order not to aggravate the tension.[75]

The military option as a measure of last resort was not excluded when all the other options failed. President Carter said: "If this additional set of sanctions that I've described to you today, and the concerted action of our allies, is not successful then the only next step available that I can see would be some sort of military action which is the prerogative and the right of the United States under these circumstances".[76] Finally, the military operation to rescue the hostages was launched on April 24-25 1980, but it was abortive. In his message to the Congress, President Carter stated: "In carrying out this operation, the United States is acting wholly within its right in accordance with Article 51 of the

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[72] U.N. SCOR, 1941st mtg., U.N. Doc. S/PV. 1941, (12/7/1976), pp.31-32; *Memorandum by the Legal Adviser to the State Department, M. Leigh, to Secretary of State Kissinger*, 73 *A.J.I.L.*, (1979), p.122

[73] *The Hostage Settlement Agreement*, 20 *I.L.M.*, (1981), p.223

[74] S.C. Res. 475 and 461, in 80 *Dep't State Bull.*, (1980), No.2034, pp.51-52 and No.2035, p.68

[75] *Case Concerning United States Diplomatic and Consular Staff in Tehran, Order of 15 December 1979, I.C.J. Rep.* (1979), p.21

[76] *The New York Times*, (April 20, 1980), A 14

United Nations charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them".[77] In its letter to the Security Council, the U.S.A claimed that the action was taken "..... in exercise of its inherent right to self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our embassy".[78]

**IV.3** *The circumstances which justify the protective action.* In the majority of cases, such action was prompted by precarious circumstances, when revolution, insurrection or any other unstable situation rendered the functions of government ineffective and endangered the lives of foreign nationals. In the cases which will be contemplated immediately, there was a degree of consultation between the representatives of the state whose nationals were endangered and the local authorities before the landing. However, such consultation is insufficient because of the tumultuous situation which prevails.

The intervention in Mexico (1861) provides an instance where France advanced this argument. The French Foreign Minister wrote in a communication to the French Emissary in Washington that "[a]près une série d'inutiles réclamations, nous devions demander des guaranties contre le retour des violences dont nos nationaux avaient si cruellement souffert, et ces garanties, nous ne pouvions les attendre d'un Gouvernement dont nous avions constaté en tant de circonstances, la mauvaise foi."[79] During an uprising on the island of Cuba (1912), the American Minister in Cuba was instructed to inform the Cuban President that "in the event of its inability or failure to protect the lives and property of American citizens ..... the Government of the U.S., pursuant to its usual custom in such cases, would land forces to accord the necessary protection and that such action does not constitute intervention".[80] When the Cuban President Gomez expressed his reservations, Secretary of State Knox replied that his government "didn't undertake first to consult the Cuban Government if a crisis arose

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[77] 80 *Dep't State Bull.*, (1980), No.2039, pp.42-43; *Case Concerning United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran). Pleadings.* pp.484-489

[78] U.N. Doc. S/13908, April 25, 1980

[79] A-C. Kiss, *Répertoire de la Pratique Française en Matière de Droit International Public*, vol.II, no.198, (Paris, Editions du Centre National de la Récherche Scientifique, 1962)

[80] *U.S. For. Rel.*, (1912), p.246

requiring a temporary landing somewhere to protect life and property on the broad principles of international practice".[81]

One of the legal justifications put forward by Japan for its action in Manchuria (1931)[82] was the protection of its nationals.[83] The Japanese action was met with caution in the corridors of the League of Nations. Viscount Cecil wrote that there was no doubt that the Chinese, after their manner, had enormously exaggerated what had been happening.[84] The Council, in a unanimous Resolution on September 30, 1931, took cognizance of the assurances offered by the Chinese government that it would safeguard the lives of Japanese nationals and also that of the Japanese Government, according to which Japanese troops would withdraw gradually in proportion to the protection afforded.[85] Moreover, the President of the Council, Briand, requested the Chinese Government to take measures to ensure the safety of the lives and property of the Japanese subjects in the evacuated area. On December 10th, the Council adopted another resolution calling the parties to refrain from any initiative which may lead to further fighting and loss of life.[86] The representative of Japan, commenting on this resolution, stated that he accepted it

> "[o]n the understanding that it was not intended to preclude the Japanese forces from taking such action as it might be rendered necessary to provide directly for the protection of the lives and property of Japanese

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[81] *Ibid.*, pp.246,250

[82] Q. Wright, " Some Legal Aspects of the Far Eastern Situation", 27 *A.J.I.L.*, (1933), p.509; H. Lauterpacht, "Resort to War and the Interpretation of the Covenant during the Manchurian Dispute", 28 *A.J.I.L.*, (1934), p.43; S.N. Ogata, *Defiance in Manchuria: The Making of Japanese Foreign Policy, 1931-1932,* (Cambridge, Cambridge University Press, 1964)

[83] *L.N.O.J.*, (1931), pp.2267, 2289-90, 2345

[84] Cecil to Noel-Baker, 25 Sept. 1931, in *Cecil Papers*, Add.51107, cited in C. Thorne, *The Limits of Foreign Policy: The West, The League and the Far Eastern Crisis of 1931-1933* (London, Hamilton, 1972), p.135

[85] It stated inter alia that it: "Notes the Japanese representative's statement that his Government will continue ..... the withdrawal of its troops, which has already begun in the railway zone in proportion as the safety of the lives and property of Japanese nationals is effectively assured ..... Notes the Chinese representative's statement that his Government will assume responsibility for the safety of the lives and property of Japanese nationals ..... as the withdrawal of the Japanese continues and the Chinese local authorities and police are re-established". *L.N.O.J.*, (1931), p.2307

[86] Article 2, Resolution of December 10th, 1931, 27 *A.J.I.L.*, (1933 Suppl.), p.127

subjects against the activities of bandits and lawless elements rampant in various parts of Manchuria".[87]

In the discussions before the Council, the Chinese representative said "..... it is a dangerous principle to assert that, in order to protect nationals and their property in a foreign country, a large number of troops may occupy so many places, destroy so much property and kill so many innocent people .....".[88] This passage affirms the right of a government to protect its nationals in conditions of uncertainty but disputes its limits.

Considering now some modern incidents, American forces landed in Grenada on October 25, 1983, as part of an OECS action, following internal turmoil caused by the power struggle within the ruling People's Revolutionary Government. According to a U.S. Government publication it was stated that: "..... American lives were in jeopardy and that a peaceful orderly evacuation would not be possible".[89] The Grenadan government, on the other hand, offered assurances that "..... the lives, well-being and property of every American and other foreign citizen residing in Grenada are fully protected and guaranteed by our government.".[90] However, the U.S. government was concerned about the safe transportation of the U.S. students. According to the Secretary of Defence Caspar Weinberger, "[a]ttempts were made to get Americans out; however, the Military Council failed to live up to its assurances that the airport would be opened on October 24 and foreigners would be free to leave. Therefore, the U.S. was unable to get any Americans out on charter flights prior to the U.S. invasion".[91]

One justification for this action as proclaimed by President Reagan and Secretary of State Schultz, was the protection of nationals.[92] The Deputy

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[87] Report on the Sino-Japanese Dispute, adopted by the Assembly on February 29, 1933 in 27 *A.J.I.L.*, (1933 Suppl.), p.119, at p.128; *L.N.O.J.*, (1933), Spec. Suppl., no.112, pp.22,72

[88] *L.N.O.J.*, (1931), pp.2283-84

[89] *Grenada: A Preliminary Report*, (Washington D.C., United States Information Agency, 1983), p.3

[90] *International Law and The United States Action in Grenada: A Report*, 18 *Int'l Law.*, (1984), p.331, at p.339

[91] *Situation in Lebanon and Grenada: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th *Cong.*, 1st Sess., (1983), p.58

[92] *Grenada: Collective Action by the Caribbean Peace Force*, Dep't. St. Bull., (Dec. 1983), pp.67,69; See letter by D.R. Robinson, The Legal Adviser, United States Department of State, 18 *Int'l Law.*, (1984), p.381, at p.385

Secretary of State Kenneth W. Dam in his testimony before the Senate said that this "..... U.S. action to secure and evacuate endangered U.S. citizens on the island was undertaken in accordance with well-established principles of international law regarding the protection of one's nationals.".[93] The British Foreign Secretary Sir Geoffrey Howe declared in the House of Commons that "[w]e would not dispute that a state has the right in international law to take appropriate action to safeguard the lives of its citizens where there has been a breakdown of law and order .....".[94]

In the Dominican Republic (1965), United States forces landed in Santo Domingo amid conditions of anarchy on April 28, 1965 and withdrew gradually in 1966. The rationale for the U.S. intervention was explained by the U.S. Representative to the Security Council Adlai Stevenson:

> "[i]n the absence of any governmental authority, Dominican law authority enforcement and military officials informed our Embassy that the situation was completely out of control, that the police and the Government could no longer give any guarantee concerning the safety of Americans or of any foreign nationals, and that only an immediate landing of United States forces could safeguard and protect the lives of thousands of Americans and thousands of citizens of some thirty other counties".[95]

The conflict in Liberia had more protracted effects and it is still unresolved. It started on December 24, 1989 with the invasion of a group numbering no more than 100 men from the neighbouring Ivory Coast under the leadership of Charles Taylor.[96] The rebels called themselves the National Patriotic Front of Liberia (NPFL) and they fought against President Doe who seized power in 1980 by a *coup d'état*. The causes of the civil war are of a tribal nature. Doe relied on his Krahn tribe and suppressed the Gio and Mano tribes.[97] Thus, he eroded the political establishment in this country, dominated since independence

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[93] 78 *A.J.I.L.*, (1984), p.203

[94] 47 *Hansard*, H.C. Deb., (1983), col.332: "..... We took a different view of all the circumstances that apply in this case".

[95] 20 U.N. SCOR, 1196th mtg, (3/5/1965), para.67, p.14

[96] W. O'Neill, "Liberia - An Avoidable Tragedy, Current History", 113 *U.S. News and World Report*, no.20, (23 November 1992), pp.54-56; 36 *Keesing's*, (1990), p.37174; *The Economist*, (1 September 1990), p.39

[97] 36 *Keesing's*, (1990), p.37174; 3805 *West Africa*, (30 July - 5 August 1990), p.2200; 3808 *West Africa*, (20 - 26 August 1990), p.2314

in 1847 by the Americo-Liberians, descendants of free American slaves.[98] The NPFL forces soon reduced Doe's power to the capital Monrovia,[99] but the rebels split, with Prince Johnson establishing the Independent National Patriotic Front of Liberia (INPFL) and concentrating his efforts on frustrating Taylor's victory.[100]

The civil war in Liberia soon acquired savage and atrocious dimensions. The killing and maiming of members belonging to the infighting tribes was widespread. President Doe reacted to the initial incursion with attacks on the Mano and Gio tribes suspected of being sympathetic to the rebels, whereas the latter retaliated with attacks on Doe's Krahn tribe.[101] The Secretary-General of ECOWAS, Jawara, described the situation in Liberia as a "slaughterhouse".[102] Africa Watch, a human rights group, said that the army responded to initial incursion by "indiscriminately killing unarmed civilians, raping women, burning villages and looting".[103] A widely reported incident was the massacre of 500 civilians, mostly of the Mano and Gio tribes, in a church, which was attributed to the Doe's government.[104] Under those onerous circumstances, thousands of Liberians fled the country and poured into neighbouring states. According to the UNCHR, by August 1990, 300,000 refuges had fled to Guinea, 120,000 to Côte d'Ivoire and 80,000 to Sierra Leone, whereas of those who stayed 5,000 were killed and 1,000,000 were internally displaced. The reaction of the United Nations was contemptible. The United Nations Secretary-General Javier Pérez de Guéllar ordered the withdrawal of all U.N. Staff members from the country, an action which terrified Liberians from the Gio and Mano tribes. Also, a United Nations food distribution program for more than 30,000 displaced people in Monrovia was cancelled.[105] Amid such circumstances, foreign nationals were caught in the infighting and their life was threatened for political purposes. Johnson, one of the rebel leaders had threatened to arrest and kill foreign

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[98] J.S. Guannu, *A Short History of the First Liberian Republic*, (Pompanu Beach, 1985)
[99] 36 *Keesing's*, (1990), p.37644
[100] 36 *Keesing's*, (1990), p.37601
[101] *U.S. Department of State Country Reports on Human Rights Practices for 1990*, S.Prt.5, 102nd Congress, 1st Sess., (1990), p.192
[102] 3852 *West Africa*, (8-4 July 1991), p.1123
[103] *The Newsweek*, (4 June 1990), p.29
[104] 36 *Keesing's*, (1990), p.37601
[105] *The Newsweek*, 11 June 1990, p.29

citizens living in Monrovia, targeting in particular U.S. citizens.[106] Consequently, a contingent of six U.S. warships was stationed off the coast of Liberia to rescue and safeguard U.S. citizens.[107]

**IV.4** *Request by the government or the endangered people.* In some instances, there is a request for such landings. In the pre-Charter period there exist cases where the local government invited foreign troops, acknowledging the loss of its authority.[108] In other cases, it is the American representative who has advised such action, with the Dominican Republic cases of 1916-1925 and 1965 as the most indicative. In the former, as we shall see subsequently, the action's aims delineated by the American Minister were beyond any required for protective action. In the latter case, the U.S. Embassy was instrumental in orchestrating the intervention, by exaggerating the danger to American nationals. This intervention prevented, eventually, the adverse political power from gaining control of the government.[109] In Grenada, the U.S. diplomats who visited the island on October 22, 1983 confirmed the existing risk to the U.S. nationals and, thus, galvanised the interventionist mood.[110] This case has also another intriguing dimension which will be dealt with *en passant* because it may derail our current discussion. One of the justifications offered by the American government for this action is a request by the government of Grenada.[111] This invitation, however, was not limited to the protection of American nationals and it was highly disputed whether there was such request, whether the supposed request was made before or after the decision to intervene and, finally, whether the Governor-General, Sir Paul Scoon, had the authority under the Grenadan Constitution to make such a request.[112]

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[106] W. O'Neill, "Liberia - An Avoidable Tragedy, Current History", 113 *U.S. News and World Report*, no.20, (23 November 1992), p.216; *The Newsweek*, (13 August 1990), p.28

[107] 36 *Keesing's*, (1990), p.37601

[108] Panama (1856) and Uruguay (1858) in M. Offut, *supra*, note 65, pp.37,39

[109] Ambassador Bennet in a cable recommended that Washington should give serious thought to "armed intervention which goes beyond the more protection of Americans" and not only seek to establish order but to prevent "another Cuba", if, as seems likely, the junta should collapse". A. Chayes, T. Ehrlich, A.F. Lowenfeld, *International Legal Process*, vol.2, (Boston, Little Brown & Co., 1968), p.1152, at p.1158

[110] W.C. Gilmore, *The Grenada Intervention*, (London, Mansell Publishing Ltd., 1984), p.35

[111] *Grenada: Collective Action by the Caribbean Peace Force*, Dep't. St. Bull., (Dec. 1983), p.80; See letter from D.R. Robinson, The Legal Adviser, United States Department of State, 18 *Int'l Law.*, (1984), p.381, at p.382

[112] See letter by Sir Paul Scoon to Tom Adams, Prime-Minister of Barabados: "You are aware that there is a vacuum of authority in Grenada following the killing of the Prime-Minister and

In other cases, it is the foreign or American citizens in despair who plead for such action. According to the State Department, the action in Nicaragua (1926) was taken in response to "appeals for protection being received from American citizens".[113] In recent cases, it is doubtful whether there existed a genuine request by the U.S. medical students in Grenada, but the pleas of foreigners to be evacuated from Liberia are more genuine. With the atrocities in full progress and the U.N. abdicating its responsibility, the foreigners and native Liberians turned to the U.S.A for help. It was reported that Liberian refugees and the relief agency MSF "were virtually begging Washington to send the Marines in to stop the war".[114]

A case with remote similarities to a request by the government is that which unfolded in Larnaca, Cyprus (1978).[115] Egyptian commandos opened fire on an aeroplane in which the participants of the Afro-Asian Peoples Solidarity Organisation were hostages. The Cypriot authorities had successfully concluded the negotiations for their release before the Egyptian raid which was met with force by the Cypriot National Guard. As a result, the hostages were freed but some Egyptians were killed. Cyprus claimed that, although it gave its permission for the landing of the Egyptian plane carrying the commandos, it excluded any action and, therefore, the raid was a violation of its sovereignty.

**IV.5** *The duration and purposes of the action.* Another important issue is the temporal duration of the action. The foreign troops should withdraw immediately after their mandate is accomplished but the duration of the operation is dependent upon the circumstances which determine the pursued action. The sooner they achieve their stated purpose, the earlier their evacuation. It took the Israelis 90 minutes to accomplish their mission of liberating hostages

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the subsequent serious violations of human rights and bloodshed. ..... Consequently I am requesting your help to assist me in stabilising this grave and dangerous situation", in W.C. Gilmore, *The Grenada Intervention,* (London, Mansell Publishing Ltd., 1984), Appendix No.7, p.95 and pp.64-73; S. Davidson, *Grenada,* (Aldershot, Avebury, 1987), pp.91-101V.P. Nanda, "The United States Armed Intervention in Grenada - Impact on World Order", 14 *Cal. W. I.L.J.*, (1984), p.395, at p.414

[113] M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States,* (Baltimore, The John Hopkins Press, 1928) p.138

[114] *The Newsweek*, (27 August 1990), p.36; Mayor Johnson of Monrovia pleaded with the Bush Administration "not to shrink the humanitarian responsibility of protecting civilian lives by refusing to intervene in the Liberian conflict ..... " reminding them of the historic ties between both countries.

[115] 36 *Keesing's,* (1990), p.29035

at Entebbe, whereas American troops prolonged their stay in the Dominican Republic (1965) in order to achieve their political ends. The number of American troops increased to 20,000 and stayed on the island until September 1966. Thus, the U.S. action was not temporarily limited and there existed a hiatus between the stated and achieved purposes. American troops remained in Grenada (1983) longer than a strict rescue operation would permit and this incident resembles the previous Dominican incident where the protection of nationals is only collateral to the political purposes of the action. In these cases, it is possible to distinguish two stages in the pursued action. The first could be designated as a simple protection of nationals, whereas in the second stage the troops remained serving ulterior aims.

Consequently, claims of altruism and clarity of intention were often fraudulent. Once involved, foreign troops could not always confine their actions to the protection of their nationals. The contemplated cases illustrate the transformation and diversification of their activities and the achieved outcome. In some cases they managed to retain their neutrality towards the contending factions, or the action was purely protective, as in Entebbe or Liberia. In other cases, they participated actively in the internal strife, assisting one or the other side. Consequently, their stated purpose, that of protection, appears only incidental.[116] Bonfils, commenting on the joint action by France, Great Britain and Spain in Mexico (1861) said: "[b]ut this action lost its primitive character [intervention for the protection of nationals] when England and Spain retired from the alliance. Napoleon tried to replace the republic by the empire of Maximilian of Austria. Intervention was then flagrant."[117] Another country where Europeans and the U.S.A were interfering, avowedly for the protection of their nationals, was China. Concerning the Boxer uprising in China (1900), the French Foreign Minister Delcassé referred to the duty of France as that "of

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[116] Acknowledging this, the Solicitor for the State Department in his Memorandum classifies only twenty instances as simple protection in the period 1854-1911. J.R. Clark Jr., *Right to Protect Citizens in Foreign Countries by Landing Forces, Memorandum of the Solicitor for the Dept. of State, October 5, 1912*, 2nd rev.ed., (Washington, U.S. Government Printing Office, 1929), p.34

[117] H. Bonfils, *Manuel de droit international public*, 4th ed rev. by Fauchille, vol.1, (Paris, A. Rousseau, 1905), p.160

protecting her citizens and obtaining for her merchants the guaranties obtained by others".[118]

A considerable debasement of the initial rescue operation occurred in the Dominican Republic (May 1916-August 1925).[119] The Dominican President was impeached by the Minister of War who rushed his troops into the House of Representatives. The American Minister cabled the State Department that "we must stand by the President at all hazards, in spite of any action of this present Congress".[120] Ships were gathered and the American Minister, Mr. Russell, cabled that

> "in view of probable landing [American] troops here tomorrow which may not be understood in other parts of the Republic as being for protection of American Legation, Consulate, American citizens, and in view of the fact that there are in other parts of the country Americans who would be in danger, I request additional ships be sent here with force sufficient to protect American life and property".[121]

Accordingly, two companies of marines were landed for the protection of Americans and the massed foreigners in the Haitian Legation. The tide of events was a disappointment to Mr. Russell for, to his frustration, the Dominican House of Representatives elected a new President. More American forces were landed with clear instructions to take action only when necessary "to protect the U.S. forces ashore, preserve the peace, protect lives and property of American citizens and other foreigners, and to uphold constituted authority".[122]

The insurrection was put down with the assistance of these forces and Mr. Russell requested that the Dominican Republic should be put under martial law. President Wilson "with the deepest reluctance" gave his authorisation.[123] The Dominican Minister at Washington protested to the Secretary of State about this "unexampled act in contempt of the sovereignty of the Dominican People,

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[118] *U.S. Foreign Relations*, (1900), p.313 in J.B. Moore, *A Digest of International Law*, vol.V, (Washington, Government Printing Office, 1906), p.483
[119] M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States*, (Baltimore, The John Hopkins Press, 1928), p.127
[120] *U.S. Foreign Relation*, (1916), p.223
[121] *Ibid.*, p.223
[122] *Ibid.*, p.229-230
[123] *Ibid.*, pp. 240-243, 246-247

which..... brought to a climax the illegal course of the forces of American intervention".[124]

The interventions in the Dominican Republic (1965) and Grenada (1983) coincided with the provision of assistance and installation of regimes friendly to the U.S.A. The real purpose was the overthrow of a leftist government in Grenada, and thus the argument of protecting U.S. nationals appears spurious.[125] In the Dominican Republic the policy was emphatically put forward by President Johnson: "the American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere".[126]

**IV.6** *Reaction: local - international.* The reaction to such incursions is mixed. There is often condemnation either of the initial action or of its effects. In some instances, however, there is commendation. The Uruguayan Foreign Secretary sent a letter to Captain Lynch in 1855 expressing the gratitude of his government for the American protective action.[127] In Hawaii (1874), resolutions of thanks were sent by the Hawaiian Government, the Legislative Assembly and the Chamber of Commerce of Honolulu.[128] In Nicaragua (1912), the "daughters of this beloved soil ..... celebrated with enthusiasm" their [American troops] arrival upon its shores.[129]

Concerning Manchuria, the press was at the beginning sympathetic to the Japanese grievances against the Chinese misrule. *The Times* wrote that "the [Japanese] army has for all intents and purposes become - after its initial well prepared and warlike invasion - a military equipped police force in a disordered part of China where the Central Chinese Government can exercise little or no authority".[130] The League of Nations eventually condemned the Japanese action

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[124] *Ibid.*, 244-245

[125] J. Quigley, "The United States Invasion of Grenada: Stranger Than Fiction", 18 *U. Miami Inter-American L.Rev.*, (1986-87), p.271

[126] 52 *Dep't State Bull.*, (1965), p.746; V.P. Nanda, "The United States Action in the 1965 Dominican Crisis: Impact on World Order - Part II", 44 *Denver L.J.*, (1967), p.225

[127] *Brazil Squadron Letters*, M S, vol.II, (September 1854 - April 1856), No.104, pp.654,655

[128] 43th Cong., 2nd Sess., H. Ex. Doc., No.1, Part 3, pp.195,186,197

[129] *U.S. For. Rel.*, (1912), p.1061

[130] The Times, (21 Sept., 12,21 Oct., 2,7 Nov., 1931), cited in J.R. Clark Jr., *Right to Protect Citizens in Foreign Countries by Landing Forces, Memorandum of the Solicitor for the Dept. of State, October 5, 1912*, 2nd rev.ed., (Washington, U.S. Government Printing Office, 1929), p.138

in Manchuria, but rather late when it was clear that there was no factual basis for intervention to protect nationals and also mounting evidence of a general policy of expansion and interference by Japan in Chinese affairs. Viscount Cecil, interpreting the Council Resolutions, said that "the obligation to withdraw was dependent upon the safety of Japanese nationals ..... but no permission was given always to take action to defend its nationals in Manchuria".[131]

The reaction to the Israeli incursion at Entebbe was politically predictable. Western states were supportive whereas Non-Aligned or Communist states condemned the action as an act of aggression. France supported a conditional interpretation of the U.N. Charter. Accordingly, the action did not infringe the territorial integrity or the political independence of Uganda, although it might have infringed its sovereignty.[132] On the other hand, the Soviet Union saw in the action "..... an outright violation of the Charter especially of Article 2, paragraph 4..... .".[133] The Security Council failed to reach a decision condemning this action.

The British government also conveyed her pleasure for the safe return of the Israeli hostages from Entebbe. It also supported the American action in Iran as a rescue operation which required a limited amount of applied force in contradistinction to a military action which requires a considerable amount of force.[134] The E.E.C in a communiqué expressed its "solidarity" with the U.S. government and abstained from any criticism.[135] The operation was, on the other hand, censured by communist and Third World countries. As for the *I.C.J.*, it did not seize on the lawfulness of the action which occurred during the preparation of its judgment but instead claimed that it felt "bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations ..... .'[136]

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[131] *L.N.O.J.*, (1932), p.345
[132] U.N. Doc. S/PV. 1943, (14/7/1996), pp.28-32
[133] 13 *United Nations Chronicle*, no.8 (1976), pp.16-17
[134] See statement of Sir Ian Gilmour, 983 *Hansard H.C. Deb.*, (1980), p.881-885
[135] *Le Monde*, 30 avril 1980
[136] *Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep.*, (1980), p.1, at p.43, para. 93

In the Grenada case, it is reported that the students expressed their gratitude but this is unverifiable and it is suggested that the real threat emerged during the U.S. landing.[137] In the Security Council and the General Assembly[138] the U.S. action was overwhelmingly condemned but some states have acknowledged the legal position of protecting nationals.

In the Dominican Republic, the reaction was politically tailored. The Communist and Third World States condemned the action, whereas U.S. allies and major European states such as France and Britain embraced the offered legal justification. France disproved the additional U.S. aim of "preventing another Cuba".[139]

The Security Council only belatedly addressed the situation in Liberia, on January 22, 1991. Previous efforts were unsuccessful. Although the situation had international repercussions, with thousands of refugees pouring into neighbouring countries, the Security Council considered the situation as an internal matter for Liberia. The Security Council only "commended" the efforts by ECOWAS.[140] In that meeting, the Representative of Liberia was unequivocal in his sentiment of frustration with the working of the Security Council and emphasised:

> "[t]he imperative need to review and perhaps reinterpret the Charter, particularly its provisions which calls for non-interference in the internal affairs of Member States. Regrettably, the strict application of this provision has hampered the effectiveness of the Council and its principal objective of maintaining international peace and security. As a result, millions of innocent men, women and children have continued to be victimised by conflicts throughout the world and this world body, which has the moral obligation and authority, has been prevented from averting these human tragedies".[141]

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[137] J.N. Moore, "Grenada and the International Double Standard", 78 *A.J.I.L.*, (1984), p.145, at p.162; J.H. Karas, J.M. Goodman, "The United States Action in Grenada: An Exercise in Realpolitik", 16 *Inter-American Law Rev.*, (1984), p.53, at p.55

[138] G.A. Res. 38/7, (2/11/1983)

[139] 20 U.N. SCOR, 1198th mtg., (1965), paras.37,111,112, pp.13,24

[140] U.N. SCOR, 2974th mtg., U.N. Doc. S/PV 2974 (1991), p.473, (Statement of the President, Mr.Bagbeni Adeito Nzengeya)

[141] *Ibid.*, (Statement of Mr. Bull)

The U.S. operation in Liberia happened at a time when the international community was preoccupied with the Gulf Crisis and it paid minimal attention to the suffering and destruction in that country. However, surprisingly, even the most vociferous critics of U.S. policies failed to comment on the action. Only the Cuban Ambassador to the United Nations condemned the lack of Security Council authorisation.[142] The disposition of the Administration was explained by the Assistant Secretary of State for African Affairs. He commended the result of the action which implemented the U.S. policy in the region as stated by him earlier, which was "to make sure that the American lives are protected". [143]

**IV.7** *The general humanitarian character of the action.* Another important feature of these rescue operations, which also impinges upon their legal basis, is the nationality of the people to whom protection is accorded and the states which are involved, either actively or by providing assistance.

According to the perspectives of this study, the effect of these actions is essentially humanitarian; the rescuing of people, and that on this ground there should be no discrimination between the endangered people. The present case study presents a medley of illations concerning this issue. Some actions are strictly limited to nationals of the rescuing state, or those of the participating in the operation states. Others have a wider mandate and rescue foreign nationals indistinguishably but only a small number are concerned with the local population.

In most of the pre-Charter period, the interposing state alone or in co-operation with other states rescued nationals not solely restricted to members of the state in question. In fact, they were American or nationals of the major European countries. The explanation for this may be political or historical. Nationals of these countries were identified with their state which was a colonial power. Therefore, the anger and disillusionment against their policies was directed towards these particular nationalities. On the other hand, nationals of these particular states often travelled or lived in other countries, thus offering themselves an easy target. In modern times, where mutual communication is

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[142] R.B. Lillich, "Forcible Protection of Nationals Abroad: The Liberian 'Incident' of 1990", 35 *German Y.B. I.L.*, (1992), p.205, at p.212

[143] *U.S. Policy and the Crisis in Liberia, Hearing Before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 101st Congress, 2nd Sess.1990, p.24

abundant, the protection afforded to different nationalities alludes towards the humanitarian character of such a measure, beyond a strictly defensive character. The latter, if still valid, would require the abandonment of foreign nationals to their destiny. An illustration of such humanitarian action in evidence is Liberia, where foreign nationals were rescued together with Americans. The U.S.A, while refuting suggestions for wider intervention, sent on August 5 a contingent of 255 Marines to evacuate U.S. and foreign citizens from Monrovia, without approval from the Liberian authorities. At the first stage of "Operation Sharp Edge", they rescued 74 people, mainly U.S. citizens working within the Embassy or Communication Installations sites in Liberia. According to the White House, the operation was staged "to safeguard lives, to draw down the number of Americans at the Embassy to minimum staff, and to provide additional security for those who remain". It stated also that they would remain "as long as necessary to insure the safety of U.S. citizens in the country".[144] During two weeks of operation, they rescued almost 2,000 foreign nationals, including 600 Lebanese nationals and 300 Indians as well as those from Italy, Canada, France, U.K, Portugal, Spain, Philippines, and Iraq, and ultimately, only 166 U.S. citizens.[145] The Bush Administration stated that "the U.S. action did not indicate or constitute any intention on the part of the U.S. Government to intervene militarily in the Liberian conflict". [146] The second part of the rescue operation occurred in April 1996 with the resurgence of internal strife. The operation started on April 11, 1996 in which the American evacuated 2,000 foreign nationals, including 400 Americans, to the neighbouring state of Sierra Leone.

The humanitarian purpose of the initial phase of the U.S. action in the Dominican Republic (1965) was reiterated by President Johnson:

> "..... as we had to go into Congo to preserve the lives of American citizens and haul them out when they were being shot at, we went into the Dominican Republic to preserve the lives of American citizens and the

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[144] R.B. Lillich, "Forcible Protection of Nationals Abroad: The Liberian 'Incident' of 1990", 35 *German Y.B. I.L.*, (1992), p.205, at p.209

[145] 36 *Keesing's*, (1990), p.37644; *Wash. Post*, 6 Aug. 1990, A17; "U.S. Evacuates 800 from Liberia", *N.Y. Times*, (20 Aug. 1990), A9

[146] *N.Y. Times*, (6 Aug. 1990), A2; *Wash. Post*, (6 Aug. 1990), A1; *Press Release, United States Mission to the United Nations*, Press Release USUN 60 - (90), 5 August 1990

citizens of a good many other nations ..... We removed 5,600 people from 46 nations, and we didn't sprain an ankle doing it".[147]

This statement reveals the humanitarian character of the action which has also been maintained by other decision-makers. Ambassador Bunker stated that "United States forces were dispatched purely and solely for humanitarian purposes, for the protection of the lives not only of the United States citizens but the lives of citizens of other countries as well".[148]

Natives are generally excluded from such protection. Nevertheless, the American troops extended their protection to native "reputable" Nicaraguans during their rescue action of 1912. In the same humanitarian spirit is the intervention of Lieutenant Nicholson to secure captured political opponents in Uruguay (1855) who were threatened with massacre by governmental troops.[149] This reveals the material constriction of such action which coincides with its legal underpinnings as a state defensive action. However, the moral dilemma it represents is obvious when distraught people are left behind and advocates towards altering the legal basis to one of a humanitarian nature as it will be presented later. Reports of the airlifting from the U.S. Embassy's compound in Liberia refer to the frustration and agony of the remaining Liberian civilians.[150]

A germane issue is the assistance offered by other states or their participation in the rescue mission. This could not transform the action to collective self-defence because the assistance is not necessarily military, or indeed active and, on the other hand, not all the states whose nationals are to be rescued offer such assistance. Whereas the safeguarding of particular nationals incites the mission, securing of non-nationals could not be regarded as incidental because it is prompted by considerations of humanity.

**IV.8** *A preliminary evaluation.* In order to recapitulate, the discussed cases share in common certain significant characteristics and also comply to a large extent

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[147] 53 *Dep't State Bull.*, (5/7/1965), pp.19,20

[148] 52 *Dep't State Bull.*, (1965), p.854. See also Senator Fulbright: "If the United States had really been intervening to save American lives, as it had a moral if not strictly legal right to do, it could have done so promptly and then withdrawn and the incident would soon have been forgotten". 111 *Cong. Rec.* (15/9/1965), 23001

[149] *Memorandum*, p.60

[150] *The Newsweek*, April 29, 1996, pp.18-19; *The Economist*, 13-19 April, 1996, pp.58-59; *The Sunday Times*, 14 April 1996, A.15

with the criteria of customary law as they have been articulated by Professor Waldock. That is, imminent threat; inability by the territorial state to protect foreign nationals and proportionality of the pursued action with the objective.

Firstly, the protective actions usually occur when the situation is hazardous. This assertion coincides with our previous observation concerning humanitarian intervention proper, whereby the propensity for humanitarian intervention increases when state authority declines and lawlessness reigns. There is a shared appreciation that sovereignty and non-intervention protect the authoritative function of the state. If this ceases to function, then foreign intervention is legitimised because it tries to contain the repercussions of such malfunction. The case of Somalia is indicative in that the intervention took place in a country without a government in order to alleviate the plight of starving and brutalised people.

Secondly, concerning the factual situation and the extent of the danger, there may exist reservations but the interpretation of events may be approved or disapproved according to subjective criteria. The British Foreign Secretary, although supportive of the U.S. action in Grenada, disputed, nevertheless, the factual circumstances as presented by the U.S.A. Concerning the latter, the extent of the danger which U.S. nationals were facing was not well established. Thirdly, what some of these cases fail to satisfy is the criterion of proportionality which in cases such as Grenada or Dominican Republic was squandered by the continuation of the initial action which, as such, falls within the said criteria.

Finally, although the self-defence argument was the most prominent in the discussion of these cases, humanitarian motives were not discounted. Thus, the American action in Iran has been justified as a measure of self-defence but with an equally prominent humanitarian aspect. The official justification for the action was spelled out by President Carter who referred to humanitarian concerns: "I ordered this rescue mission prepared in order to safeguard American lives, ....." and "..... the mission was a humanitarian mission. It was

not directed against Iran. It was not directed against the people of Iran. It was not undertaken with any feeling of hostility toward Iran or its people".[151]

Having presented the main aspects of these cases, the discussion proceeds now with explaining the signification of the defensive or humanitarian argument. In particular, how and why an attack against a national could trigger a self-defence action by his national state. This will be achieved by looking at the wording of Article 51 as an inherent or customary right and the requirement of an armed attack. We shall also comment on the links: political; economical; emotional between nationals and their respective states. Finally, the argument of humanitarian intervention will be presented.

## V. THE PROTECTION OF NATIONALS AS CUSTOMARY/ CHARTER SELF-DEFENCE OR HUMANITARIAN ACTION

**V.1** *The protection of nationals within Article 51 of the U.N. Charter: customary self-defence or inherent right.* In the pursued analysis of the self-defence rule contained in the U.N. Charter, two main arguments can be identified: one limited in scope, restricting self-defence to a preceding armed attack; the other broader in scope by admitting the customary content of the right. In this section, the development of the customary right in relation to the protection of nationals shall be explored.

Although the practice of protecting nationals abroad was established in the pre-Charter period, the theoretical underpinnings of this right were initially obfuscated. The explanation lies in the absence of any legal constriction on war which would have assisted in discerning and identifying lesser uses of force and also in the multifaceted concept of self-help. Hence, the writers of the 19th and early 20th century represent a medley of voices. Some justify such actions under the caption of self-preservation. According to Hall, one instance where the right of self-preservation materialises is with the right possessed by states to

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[151] 80 *Dep't State Bull.*, (1980), No.2039, p.38

protecting their subjects abroad.[152] The same opinion is shared by Wheaton[153] and is reiterated in the Regulations for the Government of U.S. Navy in 1913:

> "[t]he right of self-preservation, however, is a right which belongs to States as well as to individuals, and in the case of States it includes the protection of the State, its honour, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury".[154]

On the other hand, Westlake regards such action as the exercise of the right of self-defence[155] and to the same effect is also a decision of the French Cour de Cassation: ".....que, pour la protection de ses nationaux, la France conserve toujours les droits qu'elle tient de la légitime défense.....".[156] Hyde is also disposed towards the defensive character of the relevant action.[157]

Oppenheim regards the protection of nationals as a circumstance justifying intervention,[158] an opinion upheld by Judge Huber in the Spanish Moroccan Arbitration: "[h]owever, it cannot be denied that at a certain point the interest of a state in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional

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[152] "They have the right, that is to say, to exact reparations for maltreatment of their subjects by the administrative agents of a foreign government if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain" He observes that "it is only when those [local] laws are not fairly administered, or when they provide no remedy for wrongs, or ..... constitute grievous oppression in themselves, that the state to which the individual belongs has the right to interfere in his behalf". W.F. Hall, *A Treatise on International Law*, P. Higgins (ed.), 8th ed., (Oxford, Clarendon Press, 1924), pp.331,332.

[153] H. Wheaton, *Elements of International Law,* G.C. Wilson, (ed.), *Classics of International Law,* (Oxford, Clarendon Press, 1936), p.106, para.76

[154] *Regulations for the Government of the Navy of the United States,* (Washington, 1913), paras. 1646-1648, cited in M. Offutt, *The Protection of Citizens Abroad,* (Baltimore, The John Hopkins Press, 1928), p.6

[155] J. Westlake, *International Law,* 2nd ed., part.I., (Cambridge, Cambridge University Press, 1913), p.299

[156] Cour de Cassation, Ch. crim, arrêt du 17 mai 1839, in A.C. Kiss, *Repertoire de la Pratique Francaise en Matiere de Droit International Public*, tome I, (Paris, Editions du Centre National de la Recherche Scientifique, 1962), para. 10

[157] "When ..... the safety of foreigners in their persons and property is jeopardised by the impotence or indisposition of the territorial sovereign to afford adequate protection, the landing or entrance of a foreign public force of the state to which such nationals belong, is to be anticipated" and then he qualifies it by saying that on grounds of self-defence, foreign forces may not unlawfully penetrate the territory of a state. C. Hyde, *International Law*, 2nd rev.ed., vol.I, (Boston, Little Brown & Co., 1951), p.647, para. 202

[158] "A state's right to protect its citizens abroad, where they are being wrongfully treated, may justifiably lead it to intervene in order to secure their proper treatment". L. Oppenheim, *International Law*, 9th ed., Sir R.Y. Jennings, Sir A. Watts (eds.), vol.I, "Peace", Part I, (London, Longmans, 1992), p.440

provisions. This right of intervention has been claimed by all states: only its limits are disputed".[159]

However, legal theories were of minimal value at a time when the *jus ad bellum* was unrestricted. It is essential, therefore, to consider whether this state of affairs has remained intact or whether it was mitigated by subsequent legal developments. In particular, it is necessary to examine whether the League of Nations and the Pact of Paris which outlawed war have constricted the right of self-defence to such an extent as to preclude the protection of nationals.

The primordial task of the League was to maintain international peace and in this respect it was "un echec total".[160] The Covenant did not contain an absolute prohibition on war but only certain restrictions. Whereas the Covenant referred to "war", the technical notion of war was controversial and ambiguous. States could, consequently, exploit this weakness in order to initiate ostensible wars.[161] This was the most important but not the only defect of the Covenant. The comparison between the propitious intentions of the League and the modes of attaining them which are subject to lacunas,[162] supports, by inference, the argument that states retained significant liberty in the area of *jus ad bellum*.

A complementary instrument is *The General Treaty for Renunciation of War as an Instrument of National Policy* (1928). The Pact employs the ambiguous phrase "resort to war" whose technical determination was omitted. Implied within this phrase is that the use of force short of war was within state discretion.[163] It has been argued that lesser uses of force were prohibited by

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[159] *Claims of British Subjects and British Protected Persons against the Authorities of the Spanish Protectorate in Morocco,* Award of 1925, *R.I.A.A.* II, p.616, at p.641

[160] J. Kunz, "La crise et les transformations du droit des Gens", 88 *R.C.*, (1955 II), p.1 at p.68. It should also be pointed out that the League was doomed to fail for more profound reasons than the identified gaps or the non participation of the U.S.A may suggest. Charles De Visscher debits the failure to "une confiance trop grande dans la puissance de la raison"; "le caractère trop statique du Pact"; "l'absence de presuppositions axiologiques et sociologiques"; and "le fait que le droit de la S.d.N entre 1920 et 1939 s'est trouvé trop en avance sur les faits". C. De Visscher, *Théories et Réalités en Droit International Public,* 4ème éd., (Paris, Pedone, 1970), pp.69-78

[161] J.L. Brierly, "International law and Resort to Armed Force", 4 *Cam. L.J.*, (1932), p.308; H. Lauterpacht, "'Resort to War' and the Interpretation of the Covenant During the Manchurian Dispute", 28 *A.J.I.L*, (1934), p.43; J.F. Williams, "The Covenant of the League of Nations and War" 5 *Cam. L.J.*, (1933), p.1; Q. Wright, "The Test of Aggression in the Italo-Ethiopian War" 30 *A.J.I.L*, (1936), p.45.

[162] Y. Dinstein, *War Aggression and Self-defence*, 2nd ed., (Cambridge, Grotius Publications, 1994), pp.77-83

[163] C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *R.C.*, (1952 II), p.455, at pp.471-474

virtue of Article 2 which envisaged the peaceful settlement of disputes.[164] Nonetheless, at that time, measures not amounting to war were considered peaceful.[165] Secondly, wars in self-defence were permitted. The Pact does not contain any provision on this subject. The declarations of the participants were, however, explicit and unambiguous. Foreign Secretary Kellogg, following probably Talleyrand's dictum that "si cela va de soi sans le dire, cela ira mieux encore en le disant", declared: "[t]here is nothing ..... which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign state and is implicit in every treaty ..... Every nation alone is competent to decide whether the circumstances require recourse to war in self-defence".[166] During the deliberations in the American Senate, Senator Borah, responding to a question by Senator Bingham, affirmed that any military or naval action purporting to protect nationals is in self-defence.[167] The British Foreign Secretary stated, regarding the right of self-defence, that "I am entirely in accord with the views expressed by Mr. Kellogg in his speech of April 28, that the proposed treaty does not impair or restrict in any way the right of self-defence".[168] The French and Germans expressly corroborated this view. It appears from the claims of the principal signatories in the course of diplomatic correspondence that states were the sole judges of the circumstances justifying recourse to war in self-defence. Consequently, the contention would not be preposterous that, notwithstanding these developments, states retained not a modicum but a magnitude of freedom in the area of *jus ad bellum* .[169] The most crucial question in this respect is whether these developments curtailed to any degree the customary rule of protecting nationals.

It has been maintained that the customary law is identical with the law of the U.N. Charter contained in Article 51, which, supposedly, justifies self-defence

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[164] Q. Wright, "The Meaning of the Pact of Paris", 27 *A.J.I.L.*, (1933), p.50, at pp.51-54.
[165] D.W. Bowett, *Self-defence in International Law*, (Manchester, Manchester University Press, 1958), pp.135-136: "..... under the accepted terminology of international law, measures involving the use of force but falling short of war are characterized as 'pacific'..... ."
[166] Note of June 23, 1928, in 22 *A.J.I.L.*,(1928, Suppl.), p.109
[167] P. Mandelstam, "L'interpretation du Pacte Briand-Kellogg", *R.G.D.I.P.* (1933), p.596
[168] Cmd 3153, p.10, in D.J Harris, *Cases and Materials on International Law*, 4th ed., (London, Sweet & Maxwell, 1991), p.820.
[169] It was observed that an interpretation which leaves to the interested state the right to decide conclusively whether the Treaty has been observed, probably deprives the Pact of the essential *vincullum juris* and renders it legally meaningless. H. Lauterpacht, "The Pact of Paris and the Budapest Articles of Interpretation", 20 *Trans. Grotius Soc.I.L.*, (1934), p.178 at p.198.

only in the case of an armed attack.[170] However, the repeated practice of states and the legal amplitude concerning the use of force would rather refute this assertion.[171] The intricacies of the Covenant and of the Pact justify the assertion that the customary law of force has not been totally modified. Only war, which is heavily charged in human conscience, became questionable as a relational method. The League of Nations, which was the first elementary step towards regulating force, confronted the reluctance of states, firstly, to endow the League with substantive powers and, secondly, to fulfil their minimal obligations. The Kellogg-Briand Pact was another valiant attempt in this process. Nevertheless, the right of self-defence was retained unaffected which, in conjunction with the ambiguities the term "war" conveyed, amplified more the basis for resorting to force. Thus, the admission of self-defence seems to legalize what the Pact sought to exorcize. State practice, past and present, manifests that the argument of self-defence is the most frequently invoked in order to justify the use of armed force.[172] Given this "broad limitation" on the use of force, it is not convincingly stated that the states have abnegated their perceived rights on this area. Concerning the protection of nationals, some of the legal bases underpinning this right have become questionable, in particular those related to self-preservation or even intervention, but not, however, the notion of it being a right exercised under the rubric of self-defence. According to this formula, the nationals are envisaged as an extension of the state. Hence, an injury to them is an injury to the state and the state resorts to self-defence in order to protect them. In order to recapitulate, the pre-Charter law sufficiently supports a wide self-defence concept covering cases of armed attack and others extending into the purview of self-help or even self-preservation.[173] In addition, state practice

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[170] I. Brownlie, *International Law and the Use of Force by States,* (Oxford, Clarendon Press, 1963), p.280

[171] Lord McNair, *Law of Treaties*, 2nd ed., (Oxford, Oxford University Press, 1961), pp.209-210: "The last half century has, however, witnessed a change, if not a transformation, in the attitude of international law ..... towards the use or treat of force for the purpose of attaining national objectives (other than the emergency protection by a state of its nationals and its or their property located in a foreign country when the local authorities are unable or unwilling to give this protection)".

[172] Some examples in the period before the outbreak of World War II are the China-U.S.S.R hostilities of 1929; the Manchurian incident, 1931; the Sino-Japanese hostilities of 1937. As it was said somewhat intemperately but not out of context, self-defence sanctions all wars. E. Borchard, 1 *ZaöRV*, (1929), p.126, cited in H. Lauterpacht, *supra* note 169, p.198

[173] "Accordingly, a legal literature which recognised a *jus ad bellum* still acknowledges a system of justifications for the use of force which included self-defence". Brun-Otto Bryde,

before or after the Charter, although inconsistent, has, on the other hand, precluded any restrictive reading of Article 51

Be that as it may, the controversial point of whether the U.N. Charter has abridged or abolished the right of self-defence, or, whether a customary right exists apart from Article 51 should be considered. More specifically we shall consider: (i) the role of customary law within Article 51 and (ii) the requirement of an armed attack for self-defence and protective action. The latter will be considered in the next section.

Article 51 betrays a certain belief in the immanence and self-evidence of this right by referring to "inherent" right or "droit naturel". It should be admitted that it cannot pride itself for effulgence and this has rendered the legitimacy and the confines of self-defence nebulous. Inherent right connotes a *jus naturalis* substance, an inalienable right. On the other hand, it may be construed as being inherent to sovereignty. The genesis of Article 51 and its deliberation satisfies the first construction. There was no reservation of self-defence because this right was considered to be "unimpaired" and "admitted". Consequently, it could be maintained that the understanding of the drafters concerning this right was that it is inalienable, non-suspensible and that even a treaty of immense importance such as the Charter could not derogate from it. As a natural right, it has an existence independent of the Charter and Article 51 simply acknowledges this fact.[174] A purely natural right of self-defence raises the question of its content and its determination. Consequently, this would direct the discussion towards the naturalist concept of objective values with all the criticism it conveyed.

The second contention is that self-defence is an attribute of sovereignty, that is, an inherent right to sovereignty. It was recognised in the Note of the U.S. Government to the Pact of Paris whereby self-defence was characterised as inherent in every sovereign state. This interpretation could not answer the

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"Self-Defence", in *Encyclopedia of Public International Law*, vol.4, (Amsterdam, North-Holland Publ. Co., 1982), p.212; D.W. Bowett, *Self-defence in International Law*, (Manchester, Manchester University Press, 1958), 29-114

[174] See statement of U.S.S.R representative to the Security Council concerning the Soviet invasion of Afghanistan: "Article 51 of the Charter does not create the right of States to individual or collective self-defence. It merely confirms that right and particularly stresses that this is an inalienable right of States, and that hte Charter in no way whatsoever impairs it". U.N. Doc. S/PV.2190, p.12, para.111

question posed above concerning the extent and legality of this concept. If self-defence is conterminous with the concept of sovereignty it may fall victim of the latter's variable content. Like the concept of intervention, it may connote an unbridled right or a right which is proscribed and circumvented by positive law. Hence, the difficulty of including natural rights into positive law reappears as with the case of (non)-intervention.

Acknowledging the customary character of self-defence within the term "inherent" addresses the question of its content. This view was accepted by the *I.C.J.* in the *Nicaragua Case* where it interpreted the word "inherent" as conveying the meaning of customary law.[175] Any reservations, thus, pertain to the substance of what is a customary right of self-defence. The *I.C.J.* identified armed attack as a common prerequisite in both customary and Charter law.[176] The Court in the latter occasion referred, *expressis verbis*, to "collective armed response" and this affirms our previous observation concerning the double notion of self-defence: collective self-defence if an armed attack occurs; individual self-defence without the requirement of an armed attack. However, there is a tendency to relate this pronouncement with the case of individual self-defence. The position of the present author on this issue will be negative for the reasons demonstrated in the section dealing with the Court's reasoning.

In order to recapitulate, Article 51 encompasses the customary law concerning the individual right of self-defence. This law is abundant with practice which, therefore, supports the inclusion of the right to protect nationals within the boundaries of self-defence. The discussion will now proceed with an elaboration on the concept of armed attack.

**V.2** *Protection of nationals as self-defence when an armed attack occurs.* Nationals comprise the human component of the state[177] and there exists a

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[175] *Nicaragua Case,* p.54, para.94, p.102, para.193

[176] *Nicaragua Case,* p.122, para.237, p.110, para.211: "In the view of the Court, under international law in force today - whether customary international law or that of the United Nations system - States do not have a right of "collective" armed response to acts which do not constitute an 'armed attack'".

[177] *Deutsche Continental Gas-Gesellschaft, R.T.A.M,* vol.IX, p.336: "Un Etat n'existe qu' à condition de posséder un territoire, une population habitant ce territoire et une puissance publique qui s'exerce sur la population et sur le territoire.". *Montevideo Convention on the Rights and Duties of States*, (1933), Article 1, in 28 *A.J.I.L.*, (1934 Suppl.), p.75: "A State as a person of international law should possess the following qualifications; (a) permanent population; (b) defined territory; (c) government and (d) capacity to enter into relations with other states". H.

mutual reciprocal psychological link between them. The identification of interests between nationals and states is concomitant with the emergence of modern states. It has its origins in the "lettres de marche" or "lettres de représailles" (reprisal letters), whereby individuals avenge and rectify any delict incurred with the acquiescence of the local ruler.[178] However, the consolidation of state power, its political, military and economic predominance caused the "nationalisation de l'ancien système des représailles privées".[179]

The protection afforded to nationals by their state under the rubric of self-defence is based on the theory of social contract.[180] The relinquishment of certain rights by individuals, in particular the right to life and liberty, is confluent with their consensual attribution to the national state which pursues their redemption.[181] The state is instrumental in affording the necessary

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Kelsen, "Recognition in International Law. Theoretical Observations", 35 *A.J.I.L.*, (1941), p.605, at pp.606-609; T.C. Chen, *The International Law of Recognition,* (London, Stevens & Sons, 1951), pp.54-63; P. Guggenheim, "Les principes de droit international public", 80 *R.C.*, (1952 I), p.1, at pp.80-96; P. De Visscher, "Cours général de droit international public", 136 *R.C.*, (1972 II), p.1, at p.46; Ch. Rousseau, *Droit International Public,* Tome II, "Les sujets de Droit", (Paris, Sirey, 1974), pp.15-17; J. Crawford, "The Criteria for Statehood in International Law", 48 *B.Y.B.I.L.*, (1976-77), p.93, at pp.111-143 and *The Creation of States in International Law,* (Oxford, Clarendon Press, 1979), pp.31-76; *Oppenheim's International Law,* 9th ed., Sir R.Y. Jennings and Sir A. Watts (eds.), vol.1, "Peace", Part.1, (London, Longman, 1992), pp.120-122

[178] C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *R.C.*, (1952 II), p.455, p.459: "..... in the absence of other means of redressing injuries to foreigners, it served a purpose and played an important part in the development of the modern right possessed by States of protecting their nationals abroad". A.V. Freeman, *The International Responsibility of States for Denial of Justice,* (London, Longmans, 1970), p.54: "..... an individual who was wronged in a strange land and who had there been unable to obtain reparation for his injury from the local sovereign, might with the permission of his own prince, initiate forceful measures to obtain that justice which had been refused to him". R.B. Lillich, "Duties of States Regarding the Civil Rights of Aliens", 161 *R.C.*, (1978 III), p.329; R.B. Lillich, *The Human Rights of Aliens in Contemporary International Law,* (Manchester, Manchester University Press, 1984), ch.1, p.5

[179] P. De Visscher, "Cours général de droit international public", 136 *R.C.*, (1972 II), p.1, at p.155, G. Clark, "English Practice with Regard to Reprisals by Private Persons", 27 *A.J.I.L.*, (1927), p.694, at pp.704-705: "As the English State through the 14th, 15th, an 17th centuries gradually became better organised and developed more effective authority within its own territory, it progressively encroached on the freedom of individual Englishmen to deal with outsiders as they chose ..... . Thus it would appear that as the English state approached a condition of governmental organisation comparable in inclusiveness to that of the English towns in the 13th century, it took away from private persons, as the towns have done more than five centuries earlier, the right to use force on their own account".

[180] D.W. Bowett, "The Use of Force in the Protection of Nationals", 43 *Trans. Grotius S.I.L*, (1957), p.111, at p.116; D.W. Bowett, *Self-defence in International Law*, (Manchester, Manchester University Press, 1958), ch.V, p.91

[181] E. de Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains,* trans. C.G. Fenwick, (Washington D.C, Carnegie Institution of Washington, 1916), in *Classics of International Law,* Bk.II, ch.VI, sec.71; Rustommjee v Queen, (1875-76), 1 *Q.B.D*, p.487, at p.497; *Panevezys - Saldutiskis Railway Case, P.C.I.J.*, (1939), Series A./B., No.76, p.16: "In taking up the care of its nationals, ..... a

protection. Therefore, the contract theory explains why an injury towards nationals is perceived as an injury to the state, which is an instrument created through the consent of this particular community's members. It also explains the compulsion experienced by the members of this particular community to redress the wrong which is translated into a political imperative for the government. Consequently, the bearers of injuries coalesce conceptually from nationals to the state, which resorts to self-defence in order to rectify the damage.[182] In this case, self-defence appears as a vindication of state sovereignty, but it may additionally mean the vindication of human rights if the state is redefined as people consenting to waive certain rights which are protected now by the state. This issue will be presented subsequently. Returning to the state justification, it is also possible to trace the forcible protection of nationals as an aspect of self-defence in a rather utilitarian perception of the individual's function within a society. People are viewed as the locomotives in the development of states. Their economic, cultural, political engagement contributes to the particularities a state acquires. The loss of nationals is viewed as a material loss of the state

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state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law". *Mavromatis Concession Case, P.C.I.J* Series A, No.12, p.11; Separate Opinion of Judge Gros in *Barcelona Traction Company Case, I.C.J. Rep.*, (1970), p.3, at p.276-277: "The damage to the company is that it is destroyed; the damage to the shareholders is that they are injured in respect of their property through the destruction of the investment; the damage suffered by the state of the shareholders is that one component element of the national economy has undergone spoliation".

[182] Sir C.J.B. Hurst, "Nationality of Claims", 7 *B.Y.B.I.L.*, (1926), p.163, at p.165; P.B. Porter, "L'intervention en droit international modern", 32 *R.C.*, (1930 II), p.607, at pp.647-650; V.H. Rutgers, "La mise en harmonie du Pacte de la S.D.N avec le Pacte de Paris", 38 *R.C.*, (1931 IV), p.1, at p.69; R. Redslob, *Traité de Droit des Gens,* (Paris, Recueil Sirey, 1950), p.256; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* (London, Stevens & Sons, 1953), p.93; D.W. Bowett, The Use of Force in the Protection of Nationals", 43 *Trans. Grotius S.I.L*, (1957), p.111, at pp.116-118 and *Self-defence in International Law,* (Manchester, Manchester University Press, 1958), pp.94-105; Sir G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 *R.C.*, (1957 II), p.1, at pp.172-173; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *R.C.*, (1952 II), p.455, at p.503; H.F van Panhuys, *The Role of Nationality in International Law,* (Leyden, A.W. Sijthoff, 1959), pp.113-114; J.E.S. Fawcett, "Intervention in International Law, A Study of Some Recent Cases", 103 *R.C.*, (1961 II), p.347, at p.404-405; C.G. Fenwick, "The Dominican Republic: Intervention or Collective Self-defence", 60 *A.J.I.L.*, (1966), p.64; A.V.W. Thomas & A.J. Thomas, *The Dominican Republic Crisis 1965,* The Ninth Hammarskjöld Forum 1967, (Dobbs Ferry, N.Y, Oceana Pub.Inc., 1967), p.14; D.P. O'Connell, *International Law,* 2nd ed., (London, Stevens & Sons, 1970), vol.I, pp.303-304; J.H.W. Verzijl, *International Law in Historical Perspective*, vol.1, "General Subjects", (Leiden, A.W.Sijthoff, 1972), p.242

because it diminishes the collective capability for progress.[183] Consequently, the state defends the essence of its sovereignty by protecting its nationals.

Nonetheless, the self-defence justification is archaic and rather contumelious to the evolution of the individual stigma in international law because it treats individuals as mere objects. The development of human rights law has interloped into the area of protection and it is on the basis of protecting the human rights of nationals and non nationals that a state should justify forcible actions. This reasoning alters the legal basis for the relevant action but it does not as yet draw into disrepute the protective function of the state due to the inadequacies and disparities in the protection of human rights. The human rights development should not obscure the fact that the individual in many instances appears powerless and desperate. The protective power (even if forceful) of his state should be supportive to the realisation of the individual's human rights. It should be founded on the experienced abhorrence towards the violations of human rights which the state attempts to rectify, rather than on a commensuration of offences. Therefore, the protective power of the state has two aspects, one negative aspect of dissuasion and one positive of actual protection when the need arises. In the end, there must be a synthesis, an osmosis of the protection of human rights and that of the state's protective function.

Having said that, the rationale for the theory of state imputation is not otiose. The individual has not escaped the identification with his national state and suffers occasionally for the vices attributed to his state. The selective targeting of nationals in acts of terrorism or hostage-taking are a flagrant violation of human rights. Moreover, they present an intimidation which compromises the

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[183] F.S. Dunn, *The Protection of Nationals. A Study in the Application of International Law.* (Baltimore, The John Hopkins Press, 1932), p.38. See Brief of the U.S.A in the Santa Ysabel Cases before the U.S.-Mexican Special Claims Commission of 1923: "His (the citizen's) productive power, his ability to contribute to the intellectual and social progress of the community, and other elements which are obvious, are under present conditions matters of primary importance in the national life and development and any act of foreign nation which destroys or impairs the productive, intellectual and social value of a citizen constitutes a material injury to the nation to which he belongs, entirely aside from any question of offense to the national honour or injury to the person himself or to those dependent upon or attached to him". *Ibid.*, p.212, note 3; F.S. Dunn, "International Law and Private Property Rights", 28 *Col. L.Rev.*, (1928), p.166, at p.170. U.S. President Coolige said: "the person and property of a citizen are a part of the general domain of nation, even when abroad" in R. Quadri, "Cours général de droit international public", 113 *R.C.*, (1964 III), p.237, at p.396

exercise of state sovereignty. Therefore, such actions exacerbate the protective potency of the state because they create a beleaguered mentality which politically sane governments could not ignore. The Entebbe incident is indicative. The hostages were Israeli nationals or people with Jewish sounding names who were held hostage solely due to political animosity towards their national state. The terrorists also demanded the release of a number of detained Palestinians in certain countries. Had those countries complied, it would have involved compromising their national sovereignty. Also in Liberia, the view of assimilating nationals to their states gained support. The rebel leader Johnson had threatened to massacre U.S. citizens within Liberia. Under circumstances of lawlessness, the American nationals pleaded with their state for help and the latter was compelled into action for humanitarian reasons coupled with political expediency because it did not want to appear to be discarding its responsibilities towards its nationals.

In this regard, the exhortation that an attack on a national is an attack upon the state is not unreasonable and its further elaboration would show intrinsic validity. It has an internal aspect linked to the repercussions on the national psyche and an external, linked to the aims of the attackers. Regarding the internal aspect, it is beyond the purpose of this work to contemplate the emotional link between members of the same group. It is a sentimental bond which juxtaposes the national conscience. Obscure in its foundation, it is nevertheless pervasive.[184] This intrinsic association creates an interest in the welfare of members of the same national group, particularly when they are beyond the national boundaries. Whereas the plight of a sole national does not provoke concern when positioned in his home state, his predicament in a foreign state *au contraire* does provoke concern for his plight or even national excitation, galvanised by national fears, sensitivity, domestic sensationalism or political motivations. Nonetheless, even the sheer knowledge of maltreatment, devoid of sentimentality, may offend the level of national psyche shared by members of the same group. The external manifestation is that the attack on a

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[184] As Fustel de Coulanges put it in a celebrated letter to the German historian Mommsen "les hommes sentent dans leur coeur qu'ils sont un même peuple lorsqu'ils ont une communauté d'idées, d'intérêts, d'affections, de souvenirs et d'éspérences". C. Rousseau, *Droit International Public*, Tome II, "Les sujets de Droit", (Paris, Sirey, 1974), p.27

foreign national purports to compromise the political independence of action in a particular state, which is an aspect of sovereignty. The state or group which perpetrates such an attack aims at impelling the state of nationality to adopt the dictated comportment. It is a subtle, nonetheless serious, infringement of political independence through the medium of foreign nationals. As such, it could fall within the ambit of Article 2(4), provoking a self-defence action.[185] The forcible protection of nationals against deprivations and injuries serves in this context double interests under the rubric of self-defence. It protects a state on an important base of power, its nationals, and frustrates external coercion.

**V.3** *The protection of nationals as self-help. Reaffirmation of Kelsen's legal theory.* The writings of the 19th century international lawyers Bluntschli, Bonfils and Pradier-Fodéré are evidence of the contention that the protection of nationals is a means of enforcing international law. As Bluntschli put it: "..... the constraint employed against a state to oblige it to fulfil its international duty is not an intervention".[186] Bonfils remarks: "There is no intervention either in the act of constraining by reprisals or force of arms a state to fulfil its international obligations".[187] Pradier-Fodéré wrote:

> "C'est un devoir pour tout État de protéger ses nationaux à l'étranger par tous les moyens que le droit international autorise. Il leur doit cette protection lorsque l'État étranger a procédé contre eux en violant les principes du droit inernational. ..... Il doit les protéger aussi, lors même que les mauvais traitement ou dommages subis par ses nationaux ne sont pas directement le fait de l'État étranger, ..... mais des personnes ayant appuyés un caracère privé, et si État dans le quel le délit a été commis n'a rien fait pour s'y opposer".[188]

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[185] See Article 9 of *Inter - American Treaty of Reciprocal Assistance* (1947) which characterises as aggression "Unprovoked armed attack by a State against the territory, *the people* or the land, sea or air forces of another State".

[186] J.C. Bluntschli, *Le droit international codifié,* trans. by C. Lardy, 5th ed., vol.I , (Paris, Alcan, 1895), p.273, sec.474

[187] H. Bonfils, *Manuel de droit international public*, vol.I, (Paris, A. Rousseau, 1905), p.160

[188] P. Pradier-Fodéré, *Traité de droit international public*, tome 1, (Paris, G. Pedone-Laurel, 1885), p.614, para.402

American Secretary of State Hughes in his statement at the Havana Conference delineated in essence this argument attacking the proposed prohibition on intervention. He said:

> "the rights of nations remain, but nations have duties as well as rights. We all recognize that. This very formula, here proposed, is a proposal of duty on the part of a nation. But it is not the only duty. There are other obligations which courts and tribunals declaring international law, have frequently set forth; and we cannot codify international law and ignore the duties of states, by setting up the impossible reign of self-will without any recognition on the part of a state of its obligations to its neighbours".[189]

If this reasoning is to be endorsed, the protection of nationals can be justified under the heading of enforcing the obligations of international law, which was also exempted from the Pact of Paris as not being an instrument of national policy.[190] This theory illuminates the defects of the pre-Charter system, which seems to accommodate this right. At this point, the question of sanctioning international law as an attribute of legal quality emerges. Customary international law has permitted self-help as a means of enforcement and post-Charter law permits, according to Kelsen, self-help in the form of self-defence, reprisals, and retorsion.[191]

On August 17, 1937, due to the renewed tension between China and Japan, Secretary of State Hull ordered a regiment of marines to proceed to Shanghai. He said that "it is the policy of the American Government to afford its nationals appropriate protection: primarily against mobs or other uncontrolled elements ..... . It has been the desire and the policy of the American Government to remove these forces when performance of their function of protection is no longer called for".[192] The initiated action was protection of nationals but the rationale reveals that it was thoroughly understood that the U.S. should demand respect for international law. The latter fixes certain boundaries of rights and

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[189] Cited in C. Hyde, *International Law,* 2nd rev.ed., vol.I, (Boston, Little Brown & Co., 1951), p.252.
[190] J. Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons, 1954), p.300.
[191] H. Kelsen, *Principles of International Law,* 2nd ed., (N.Y., Holt, Rinehart and Winston, Inc., 1967), pp.64-87
[192] Dept. of State Press Release, (Aug. 23, 1937), in 31 *A.J.I.L.*, (1937), p.669 at p.670

action and it protects an alien in his legitimate activities. Abandoning this protection is to abandon not only the law, but the foundations of human justice.[193]

The Entebbe incident is also illustrative of the validity of this interpretation. The Israeli action may be seen as an act which sanctions the failure by some states to remove an international wrong. Uganda had failed to comply with her obligations under the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the general right of protection afforded to foreigners from the host country. Therefore, the Israeli action rectified the situation.[194] In this respect, the cryptic legitimacy of force under the U.N. Charter comes to the fore and contributes to the relevant discussion concerning the circularity and indeterminacy of legal doctrines.

**V.4** *The protection of nationals as a humanitarian action.* Under the heading of human rights, such action protects the basic human rights' interests of individuals. The first aspect of self-defence, which has not been made inoperative, is narrowly confined to state interests and a degree of political exaggeration in a situation of crisis is not uncommon. What is disturbing is the traditional juridical understanding of the state, its personification beyond the societies it represents. The second view of human rights, attaching importance to the human values of societies, is cosmopolitan and purports to promote the values of human persons. In this respect, the state appears to be the instrumentality for the protection of individual human rights when another state pursues a policy of prosecution. The human rights approach which disconnects the identification of injuries between an individual and his national state could lead to the advancement of human rights also in the host state. The discriminatory treatment accorded to nationals because they are not linked to a foreign state is unacceptable. Furthermore, it could - although it is conjectural - depoliticize the disputes and reduce friction by diffusing tensions emanating from national interests and honour.

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[193] C. Eagleton, 31 *A.J.I.L.*, (1937), p.665 at pp.667,669

[194] J.A. Sheeban, "The Principle of Self-Help in International Law as Justification for State Use of Armed Force", 1 *The Fletcher Forum*, (1977), p.135; J.J. Paust, "Entebbe and Self-help: The Israeli response to Terrorism", 2 *The Fletcher Forum*, (1978), p.86

Thus, the human rights approach[195] embodies the second pillar of the intrinsic dichotomy pertinent to rescue operations. The other pillar presented above is sovereignty transmuted into self-defence. The human rights approach clarifies the values which are at stake when rescue operations occur. What is really at stake is the human right to life or liberty which the operation rectifies and therefore it should not be limited to nationals.

This approach may additionally reconcile the positivist and naturalist aspects of international law because it designates consensual human rights as the rights to life and liberty which rely on naturalist premises. Concerning the positivist aspect, the protection of nationals is a remedy for the obligations a state has assumed relating to human rights. The problem is then reduced to identifying the sources of these obligations which would require elaboration on the development of human rights law.[196] Thus, we may start with the provisions of the U.N. Charter concerning human rights which "..... have become part of intentional customary law and are binding upon all States, whether they are Members of the United Nations or not".[197] The *I.C.J.* in the *Namibia Case*, considering the non-respect of the United Nations provisions on human rights, held that it consisted of "..... a flagrant violation of the purposes and principles of the Charter".[198] In addition, the human rights obligations were characterised *erga omnes* in the *Barcelona Traction Case*.[199] In this case the Court made an *obiter dictum* which is important for the legality of the protection afforded to nationals from its state, under considerations of humanity. It said that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights *irrespective of their nationality*".[200] This dictum hence confirms the extension of the state's protective function when the human rights of its nationals beyond its territory are infringed.

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[195] T. Schweisfurth, "Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights", 23 *German Y.B.I.L.*, (1980), p.159
[196] E. Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter", 66 *A.J.I.L.*, (1972), p.337, at p.341
[197] *Y.B.I.L.C*, (1976), vol.II, pt.2, p.105
[198] *Advisory Opinion on the Legal Consequences for States of the Continues Presence of South Africa in Namibia (South West Africa), I.C.J. Rep.* (1971), p.14, at p.58
[199] *Barcelona Traction Case, I.C.J. Rep.*, (1970), p.14, at p.32
[200] *Ibid.*, p.47

Another aspect of the human rights approach also concerns the relationship between nationals and their state, which succeeds in demythologising their intimacy. According to this approach, respect for human rights does not cease at the borders of the national state. The state cares about its nationals beyond its narrow jurisdiction as human beings, not as a state compendium. The natural law dimension of the rescue operations under the rubric of human rights is similar to the discussion of humanitarian intervention in the preceding chapters and should not be repeated here.

Dealing above with the relevant cases, the Israeli action in Entebbe has been justified as an act of humanitarian intervention.[201] What was in issue in this instance, beyond the aims of any action, was the personal integrity of the hostages who were threatened with annihilation. Eventually, the Israeli rescue operation saved their lives. The Liberian case provides the most compelling arguments for enlarging the factual and legal basis of such actions. As was stated above, in this case foreign nationals were rescued, whereas the natives were left to face their dire plight. Had the initial action been a humanitarian intervention, it might have terminated the brutalities. The humanitarian aspect of the rescue operation is evident but insufficient, because it is limited only to foreigners. The situation in Liberia warranted humanitarian action and humanitarian considerations were invoked by the participating states in the West African Force. Thus, for the Côte-d'Ivoire it involved "l'envoi d'une force pour éviter la boucherie qui se déroule à ses portes".[202]

In order to recapitulate, the discussion of humanitarian intervention and the protection of nationals within the legal framework of the use of force as it has been constructed by the U.N. Charter has revealed the tension between the prevalent assumptions in this order - sovereignty and human rights - as well as within the wider philosophical sources of natural law and positivism. There is now a need to express a preference between these two interpretational approaches.

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[201] Letter to the *New York Times* by Professors McDougal and Reisman, (16 July 1976), in B.H. Weston, R.A. Falk, A. D'Amato, *International Law and World Order*, (St.Paul, Minn., West Publishing Co., 1990), p.945

[202] *Le Monde diplomatique*, (septembre 1990), p.24

# VI. TOWARDS A TENTATIVE CONCLUSION

With this Chapter on self-defence, the exploration into the legality of humanitarian intervention *lato sensu* has been concluded. The argument within Article 2(4) of the U.N. Charter has been presented in the previous Chapter and the particular instance of protecting nationals abroad in this Chapter. According to the traditional approach, it may seem that the protection of nationals is beyond the auspices of this study concerning humanitarian intervention. However, the reasons for a humanitarian approach have been contemplated in this Chapter. It has been argued that the traditional argument of treating these instances as a measure of self-defence is legally insufficient and conceptually inadequate. Consequently, it has been suggested that they should be incorporated into the wider genre of humanitarian actions.

Additionally, this section fulfilled the aim of applying to existing legal argument the theoretical identifications made at the outset of this study, beyond the requirements of a purely legal exposition. It should be submitted that the conventional legal argument as it is formulated in the area of force by Articles 2(4) and 51 of the U.N. Charter reproduces the theoretical controversies underpinning these articles and their inherent conception of a model society.

The gist of our presentation is to show that the legal argument contains ambiguities attributed to the wider theoretical context where it resides. Consequently, it afflicts the issue of humanitarian intervention with indeterminacy and incommensurability. Although the general trend of this work is to convince the reader that determinacy is "un oiseau volant" and it is futile to search for something non-existent, it was necessary to deal with the legal issue at least as a reaction to the promotion and proclamation by the legal augment of the determinacy of its deliberations. On the other hand, the fatalistic and retreating mood which the knowledge of indeterminacy may generate would be inappropriate. Human mind and human nature are misspent if they withdraw into a position of nihilism.

As a consequence, the next Chapters will address this issue and present a case for reconstruction. It is characterised, with some audacity, as reconstruction for,

otherwise the whole project will remain unfulfilled, oscillating between what is considered to be a definite and an indeterminate legal argument. We shall not try though to evade what already exists by imposing another inflexible principle. On the contrary, a dialogic model emerges where the problem which inhumanity presents and how to tackle it can be discussed. After presenting this framework, some relevant cases will be discussed.

# CHAPTER SEVEN

# RECONSTRUCTION: HUMANITARIAN INTERVENTION AS THE PROTECTION OF HUMAN DIGNITY IN A DISCURSIVE MODEL

*This chapter deals with human dignity as the initial assumption which justifies humanitarian actions - it presents and negates the legal attempts to objectivity and having established relativity it also avoids declination towards nihilism - it projects human dignity as a communicative-discursive model which is facilitative in establishing the legal relevance of humanitarian intervention.*

## I. THE SEARCH FOR OBJECTIVITY

**I.1** *Concreteness and objectivity in legal arguments.* In the previous chapters, we have presented the main legal theories respecting humanitarian intervention and have subsequently explored the function of legal doctrine concerning humanitarian intervention within this theoretical setting. An initial observation would aver to the fact that the principal legal propositions, loosely described as deontological or teleological, are vying to discountenance certain fundamental problems within their argumentative structure which concern legal certainty or legal promulgation. Eventually, these aspects of legal argument reproduce and recombine themselves within the reasoning in order to elude legal irrelevance. More concretely, one argumentative aspect distances law from ideas because the latter are deemed subjective. They are, according to Hartian terminology, "open-textured", general and abstract. Ideas are verified only according to the subjective criteria of the person who holds the pertinent views.[1] This approach attempts to present law as depsychologised rules which apply automatically.

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[1] T. Hobbes, *Leviathan*, C.B. Macpherson (ed.), (Harmondsworth, Penguin Books, 1968), ch.4. pp.109-110: "For one man callethe *Wisdome*, what another calleth *feare;* and one *cruelty*, what another *justice*; one *prodigality*, what another *magnanimity;*..... . And therefore such names can never be true grounds of any ratiocination".

Accordingly, law enjoys normativity and procures objectivity. The idea of law is transformed into an objective instrument for application which excludes political fiat in its wider meaning and, thus, preserves individual freedom: "[a] free people ..... obeys nothing but the laws, and thanks to the force of laws, it does not obey men".[2] Another approach underlines the role of policies or ideas in legal thinking. It has social ramifications and is presented as a panacea to the bifurcation of legal argument by accommodating the above considerations within its premises. It started with a disgruntled attitude towards formalism and presents law as a social phenomenon which promotes social ends.[3] Accordingly, an empirical study is presented as specifying legal propositions because it is interpreted as representing an accumulation of the actors' preferences. The interplay between demands, claims and counterclaims creates "mutual tolerances" and "uniformities of pattern" in the application of authority. This procedure procures "value clarification" whose inclusion in law provides the basis of authority.[4] In this relationship, law enjoys concreteness because it is intertwined with practice but it menaces normativity because practice may inflate law. On the other hand, it could be argued that this practice represents a consolidated feeling towards a superseded principle and thus it legitimates law. Again, it could be counter-argued that the appreciation of such feeling befalls to interpreting the practice which poses afresh the problem of subjectiveness.[5]

Whereas this exposition describes the traditionally antithetical positions of natural and positive law separately or concurrently as they submerge into realism, in fact, they both contain the opposite argument as well. Pure naturalism and pure positivism do not provide distinct answers but they mutually reinforce each other. As rules concerning humanitarian intervention

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[2] Cited by M. Cranston in "Introduction", J.J. Rousseau, *The Social Contract*, trans. & intr. by M. Cranston, (London, Penguin Books, 1968), p.32

[3] R. Pound, "Philosophical Theory and International Law", I *Bibliotheca Visseriana*, (1923), p.71; N. Politis, *The New Aspects of International Law*, (Washington, Carnegie Endowment for International Peace, 1928); C. De Visscher, "Cour général de principes de droit international public", 86 *R.C.*, (1954 II), p.445, at p.451: "C'est à une conception fonctionnelle du pouvoir, á une conception sociale du droit que s'attache notre ensegnement". M.S. McDougal, "International Law, Power and Policy: A Contemporary Perspective", 82 *R.C.*, (1953 I), p.133

[4] M.S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea", 49 *A.J.I.L.*, (1955), p.356, at pp.357-358

[5] P. Allott, "Language, Method and the Nature of International Law", 45 *B.Y.B.I.L.*, (1971), p.79, at pp.123-125

are notably absent and therefore are inadequate to answer the problem of intervention, the argument then resorts to certain moral ideas or to modifications of the pure positivist position which spring from a conception of justice. This fact inevitably impinges on the positivity of rules and in the words of Unger "[t]he greater the commitment to ..... solidarity as sources or ideals of law, the less it is possible to distinguish ..... law from ideas of moral obligation or propriety that are entertained in the different social settings within which disputes may arise. And the less importance do positive rules have in law".[6]

The presented legal articulations claim to fulfil the postulate of certainty through objectivity.[7] Law is perceived an automation, where the relevant rules apply correspondingly when certain relations take place. However, they are constricted between the Scylla of ideas and the Charybdis of facts.[8] Since Plato, western philosophy has been concerned with the substratum of ideas which exists in the world. This, however, has not deciphered the problem of certainty. Whereas one can claim that ideas are external to the observing person and thus objective, it raises the issue of how one can apprehend an external idea. On the other hand, if ideas are the projection of individual construction, they are exposed to subjectivity and hence disallow any intersubjective value.

The other aspect is the relevance of facts. One can define knowledge as a sensorial perception of facts but again fail to produce certainty. If facts are presented objectively as being unconnected with phenomenology, this attitude fails to explain the composition of and relation between facts. It merely takes account of them for empirical cognition. If, on the other hand, facts are extrapolated from feelings or ideas, it would be difficult to deny their association with superseded elements. Choosing one of the two positions -ideas or facts - results in either apology, whereby law is collateral to state practice or utopia, whereby law becoming detached from the latter, is ultimately

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[6] R.M. Unger, *Law in Modern Society. Toward a Criticism of Social Theory*, (N.Y., The Free Press, 1976), p.214

[7] H. Lauterpacht, *The Function of Law in the International Community*, (Oxford, Clarendon Press, 1933), p.189; O. Schachter, *International Law in Theory and Practice*, (Dordrecht/Boston/London, M. Nijhoff, 1991), chs. I,II,III, pp.1-48

[8] R. Dworkin, *Taking Rights Seriously*, (London, Duckworth, 1977), chs. 2,3

speculative.[9] The quest for objectivity seems again distant because the arguments are ingrained with subjectivity. The law as fact argument is implanted with the manipulable will of the state, whereas the law as idea with the manipulable "will" of the transcendental premises.

Thus, both positions fail to produce viable answers separately, therefore they reformulate, recombine and reconcile their opposing elements eclectically in order to overcome the mutual detachment.[10] In law, this scheme conceives of objectivity as something which is "out there".[11] This may imply a certain moral idea, justice, *recta ratio*, a *Grundnorm* or a rule of recognition.[12] The imprint of objectivity is, however, dissipated quickly when someone engages in any discussion concerning the modes of knowing these principles or the mere objects for discussion. Objectivity can also present itself as a method and thus external to the knowing subject. It can take the form of imputation, right authority or a project for the postulation of human dignity. Objectivity then is procured by default, through the external-objective methodology. However, it cannot provide an answer to the question of "why" because it cannot confine the explication of law hermetically within law. It needs an external foundation. Whereas the search for a norm may be explicated within the law, the question of the fundamental norm transgresses legal technique and involves conceptual or logical questions. The content of this fundamental norm, however sagacious, may be irresolute entailing questions in the field of "sein" and not "sollen", causality and not imputation. With certain scepticism, Kelsen has admitted that

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[9] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Helsinki, Finnish Lawyers' Publishing Company, 1989); D. Kennedy, *International Legal Structures*, (Baden-Baden, Nomos Verlagsgesellschaft, 1987), ch.1, in part. pp.11-53

[10] R.A. Falk, "The Interplay of Westphalia and Charter Conceptions of the International Legal Order", in R.A. Falk, C.E. Black (eds), *The Future of the International Legal Order*, vol.I, "Trends and Patterns", (Princeton, Princeton University Press, 1969), p.32, at p.35: "..... an intermediate position, one that maintains the distinctiveness of the legal order while managing to be responsive to the extralegal setting of politics, history and morality". P. Allott, *supra*, note 5, pp.100-105, 113

[11] R. Rorty, *Contigency, Irony and Solidarity*, (Cambridge, Cambridge University Press, 1989), p.5

[12] R.J. Bernstein, *Beyond Objectivism and Relativism*, (Oxford, Blackwell, 1983), p.9: "..... distinction between the subject and the object [where] what is 'out there' is presumed to be independent of us, and knowledge is achieved when a subject correctly mirrors or represents objective reality". Hereinafter cited as *Beyond*

on this matter there exists resemblance between the *Grundnorm* and natural law.[13]

**I.2** *Concreteness and objectivity in international law.* In international law, the objectivity and autonomy of law is achieved through the test of pedigree, borrowing Dworkin's phrase, or a Hartian rule of recognition, which is a test of sources.[14] If a certain standard meets the criteria of legal promulgation, it becomes a rule. Consequently, the myth that morality or politics are excluded and that international law is a legal science whereby rules are formulated by induction is sustained. This approach, aspiring for the wholeness of law,[15] is itself idealist and it fails to exclude the revisiting of discretionary ideas in hard cases or when rules are "relatively indeterminate".[16] In such cases, the role of courts and judges becomes instrumental and in international law could be self-defeating.[17] According to Justice Cardozo: "International law ..... has ..... a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests to its jural quality".[18] This implies creativity and discretion and according to Brierly: "the act of the Court is a creative act in spite of our conspiracy to present it as something else".[19]

These aspects described above as candidates towards objectivity could also be characterised as foundational or external because they allude to an external referent. However, they both involve acceptance of a certain conviction which presents itself as empirically shared, such as with Kelsen's *Grundnorm* in international law according to which states should behave as they customarily do. This restates a shared form of inter-state life as an accepted conviction within the system, to which all propositions of law should refer without the need for evidence. Whereas the latter procedure may hint at objectivity, the

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[13] H. Kelsen, "Justice et droit naturel", (trad. E. Mazingue), in *Annales de philosophie politique*, vol.III, "Droit Naturel", (Paris, PUF, 1959), p.1, at p.121

[14] R. Dworkin, *Taking Rights Seriously*, (London, Duckworth, 1977), p.17

[15] J. Stone, "Non-Liquet and the Function of Law in the International Community", 25 *B.Y.B.I.L.*, (1959), p.124

[16] H.L.A. Hart, *The Concept of Law*, (Oxford, Clarendon Press, 1961), p.132

[17] J. Raz, *The Authority of Law*, (Oxford, Clarendon Press, 1979), pp.87-88: "Law-applying institutions are, ..... a constant feature of law in every type of society and their existence should be regarded as a defining characteristic of law".

[18] *New Jersey* v. *Delaware*, 292 U.S. 361 (1934)

[19] J.L. Brierly, *The Basis of Obligation in International Law and Other Papers*, H. Lauterpacht, C.H.M. Waldock (eds), (Oxford, Clarendon Press, 1958), p.98

empirically defined proposition hints towards the opposite direction. The projection of human dignity by the policy school or the idea of reason by natural law are subjected to the same criticism. Both suggest that the embeddedness of these proposals into a shared "form of life" engenders other propositions presented as objective but this "form of life", by definition, would deny them the objectivity which a penumbra of deducted logicality may imply.[20]

The predominant culture presents international law as rules independent of facts, that is practice. The latter is external to law and dealing with it would compromise the normativity of rules.[21] A judicial verification of this process is the *Nicaragua Case* or a normative approach to humanitarian intervention, whereby any such action is considered as contravening the rule on the non-use of force. The other facet of international law is concerned with the facts to which it applies the rules in order to substantiate them.[22] In this case, normative positivism is disowned because the possibility of modification through the facts is accepted. The function of sanction is thus the acknowledgement of the reception of a particular rule in the social reality. Whereas for the normative positivist, sanction is internal to law and any legal deformity is understood as a violation, the realist position understands the contrary practice as the formation of new custom. The inescapable dilemma is that, in order to correct normativity, law should immerse itself into facts; alternatively the purity and separateness of the legal science could be preserved by accepting the distinction between law and social observation.

The separateness of both facets seems unjustified. One should accept the embeddedness of facts or ideas within each other because mere description is oblivious to the fact that our perception is contingent on our concepts and that these concepts are "internalised" through the social practices we observe.[23] Consequently, the "law as fact" approach should rely on ideas in order to

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[20] L. Wittgenstein, *On Certainty*, (Oxford, Blackwell, 1969), pp.15-16, 28, 35-36, paras. 102, 105, 144, 274, 298

[21] E. Kaufmann, "Règles générales du droit de la paix", 54 *R.C.*, (1935 IV), p. 309, at p.319

[22] E. Giraud, "Le droit international public et la politique", 110 *R.C.*, (1963 III), p. 419, at pp.462-463

[23] "The concepts we have settle for us the form of experience we have of the world". P. Winch, *The Idea of a Social Science and Its Relation to Philosophy*, (London, Henley, 1947), pp.14-15,83-91. The consciousness of society is "a product of the human society as a whole". M. Horkheimer, *Critical Theory: Selected Essays*, M. O'Connell et al. trans., (N.Y., 1972), p.200

become normative. Those ideas categorise and characterise the facts. Thus, an action would be categorised as intervention due to a certain idea of intervention and it would be characterised accordingly as lawful or unlawful only due to this idea. On the other hand, the law as idea should be subjected to the arbitration of facts in order to be concretised. Therefore, although the two positions are interrelated, each can be subjected to the criticisms voiced against the opposite position.

Could the "objectivity" of method decode this irresolvable problem? The policy school presents such a method after criticising the illusory content of rules due to their interpretative matrix. For the policy scientists, the method should reflect a social operation and not *a priori* schemata. Again, objectivity remains unfulfilled. The social matrix requires a certain conception in order to be disentangled and appreciated, which depends on pre-existing convictions. Returning to the previous example of intervention, a particular act could be diversely characterised as an act of force or domination, or as humanitarian intervention. The facts thus depend on interpretation according to conceptual matrices in order to become legally relevant. In a nutshell, one can see what the interpretation of a "fact" consists of only by applying a previous conception, which itself explains its significance as the final arbiter of facts by resort to another fundamental concept.[24] Explication of facts or ideas could consequently produce uncertainty because it is not based on an assured legal foundation. The law as fact or as idea is based on a particular conception of "man" or "society" which re-emerges in the interpretation.[25]

Thomas Franck introduces the concept of legitimacy and fairness in an attempt to avoid the positivist conundrum of requiring obeisance to international rules within a voluntaristic international society. Legitimacy according to Franck explains the issue of compliance and concerns "the right process".[26] He considers as indicators of legitimacy and fairness the element

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[24] N. MacCormick, O. Weinberger, *An Institutional Theory of Law,* (Dordrecht, D. Reidel Publishing Co., 1986), pp.13-16, 49-67

[25] S. Sur, *L'interprétation en droit international public,* (Paris, L.G.D.J., 1974), p.32: "..... on y considère davantage les choses comme on voudrait qu'elles soient plutôt que telles qu'elles sont".

[26] T.M. Franck, "Legitimacy in the International System", 82 *A.J.I.L.*, p.705, at p.706: "Legitimacy is used here to mean that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right

of determinacy; symbolic validation; coherence; and adherence to a normative hierarchy.[27] Consequently, rules being legitimate secure compliance without the need of an enforcer. However, at the international level, the role of the state poses an intractable problem. Whereas international rules or institutions may be legitimised by the right process, this conceals the activist role of the state or of some more prominent states. The Security Council, for example, appears to be a legitimate institution because its formation and function is contained in a legitimate organisation endowed with a legitimate charter. Therefore, its decisions should be legitimate. However, its working and power sharing affects the issue of legitimacy.[28]

In Chapters Five and Six but also throughout this study, we have presented the *modus operandi* of the world constitutive process as it is experienced today. In the context of humanitarian intervention we notice a strong preference for a multilateral implementation with the authorisation of the Security Council or for a genuine U.N. action under Chapter VII. The expectation which underlines this view is the prospect of containing conflicting individual interests, whereas the aspiration is that a procedural method within the legal confines of the United Nations Charter would confer legitimacy, what Franck considers as institutional legitimacy and fairness. This reminds us of the procedural fairness employed by Dworkin whereby the due process attributes legitimacy to the end result. The constellation of power within the Security Council is, however, unequal and the possibility of fairness being translated into pursuing particularised interests should also be acknowledged. Consequently, Franck's approach will be subjected to the same criticism which sustained McDougal's designation of human dignity as a sort of ideological imperialism enjoying now the benefit of hiding particularised interests behind an "objective" procedure.

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process." T.M. Franck, "Why a Quest for Legitimacy?", 21 *U. Calif. Davis L.Rev.*, (1988), p.535

[27] T.M. Franck, *The Power of Legitimacy Among Nations*, (N.Y., Oxford University Press, 1990), chs. 1,3,4,7,9,10,11 and *Fairness in International Law and Institutions*, (Oxford, Clarendon Press, 1995), ch.2

[28] D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council", 87 *A.J.I.L.*, (1993), p.552

The difficulty with his exposition is that it is unreflective and considers the working of the Security Council to be *ipso facto* an institutionally fair procedure. As was observed, the constellation of power in the Security Council is such that it permits only certain actions whose *ad hoc* character has been discussed in previous chapters. At this occasion, it should be mentioned that Franck's procedural legitimacy influenced by Dworkin is developed in order to countenance this *adhocism* and shows a belief in formal justice. However, the contemplation of "fairness" or "reasonableness" introduces a degree of indeterminacy and subjectivity and it is not possible for the procedure as such to heal this inconsistency.

According to Franck, fairness requires that like cases should be treated alike but this presupposes a standard under which the likeness will be found.[29] As it has already been observed, the approach of the United Nations institutions is "checkerboard", that is, it applies its principles in a half-coherent fashion and that which is coherent is attributed to a higher principle which, in the jargon of international relations, is peace and order. The *modus operandi* of the Security Council is to consider cases of human degradation such as South Africa or Rhodesia, Iraq, Somalia, or Haiti as constituting a threat to the peace. Following Dworkin, the half-loaf approach is not sufficient and ranks even below the no approach.[30] Peace and order is presented as a principle which can occasionally validate the "checkerboard" approach, or, finally, restore coherence. However, incoherence exists also within this standard. Not all the cases which have the potential of being a breach or threat to the peace are dealt with alike or have triggered the same reaction by the Security Council and, additionally, peace is not the only standard involved. For example, cases of invasion have not been treated alike because of policy considerations which attempt to delimit the juridical meaning of any action but also due to practical needs. Then come into play the standards which will be applied. If it is non-intervention or human rights, state independence or justice, the procedural fairness of treating each case alike is distorted. As it

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[29] This is similar to Dworkin's discussion of "integrity". R. Dworkin, *Law's Empire*, (London, Fontana, 1986), pp.179, 190-192. The incoherent application of rules is characterised by Dworkin as "checker-boarding", *ibid.*, p.179

[30] *Law's Empire*, p.182: "such "compromises are wrong, not merely impractical".

has been discussed in Chapter Five, Article 2(4) on the use of force does not convey the proposed by Franck legitimacy.[31] What is more significant is that, whereas Article 2(4) speaks of a prohibition, it does not state what is expected instead, that is, which action is beyond the bounds of the perceived prohibition. Hence, states acquire the benefit of interpreting themselves what is the expected course of action and this fact introduces a de-legitimising element while certain actions, humanitarian intervention included, are posited beyond the perimeter of this article. Additionally, the statement of the United Nations purposes entangles further the pursued "right course" of action.[32] Franck, as usually lawyers do, succumbs too easily to legalism. Hence, it seems that, the promising language apart, the whole project is justifying and legitimising the *status quo* and, by denying any standard for adjudication beyond an emptied procedural one, abridges legitimacy.

At a more general level, Franck, probably following a strong jurisprudential tradition since Austin, treats international law with the concepts and precepts of domestic law. Whereas die-hard positivists would require obedience and sanctions, soft positivists, Franck included, posit the validity of international rules on other precepts such as legitimacy, borrowed from domestic systems. Moreover, one can trace here a link between domestic and international law. Similarly, Kelsen provides a link between the two fields of law on another basis, that of effectiveness. The dissimilarity of links is justified because Kelsen's system springs from different legal and philosophical sources. Legitimacy may be included in the notion of effectiveness but their theoretical basis is different. Effectiveness resides on the sphere of *Sein,* whereas legitimacy on *Sollen.* However, they both share in common the search for the connecting thread between the two systems. Concerning Kelsen, we have explained that the link can be changed to one which envisages observance of human right norms. We should here underline that Franck's approach is procedural and does not necessarily satisfy the notion of justice or fairness. Iniquitous laws can be promulgated even according to due

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[31] L. Wittgenstein, *Philosophical Investigations,* 2nd ed., G.E.M. Anscombe trans., (Oxford, Blackwell, 1958), para.201, p.81: "No course of action could be determined by a rule because every course of action can be made out to accord with the rule."

[32] The problems of discretionary power which a legitimate organ such as the Security Council may encounter have been discussed in Chapter Two, Section VI.3

process if this process is being approached superficially, that is, technically and not substantially. On the other hand, the perception of legitimacy as right process could exert a conservative influence on international law while new claims would be viewed as contestable, unless they become endorsed. In such circumstances the lack of standards for legitimacy beyond the procedural ones is a hindrance.

In the present work, we have demonstrated the half-loaf approach by the Security Council which involves compromises in theory and practice, and, also, we propose a more reflective approach under the notion of human dignity. Lacking such a standard, the determinations will be minimised and they will not satisfy substantive justice or fairness.

**I.3** *Certainty disowned through criticism. The emergence of conversation.* The critical reflection on standardised concepts may present itself as destroying knowledge and the certainty which accompanies it.[33] The argument could be summarised in the question posed by Ludwig Wittgenstein: "[w]hy should it be possible to have grounds for *believing* anything if it isn't possible to be certain?".[34] It evolves a certain scepticism towards our concepts which, although they discard the illusion of certainty, they simultaneously project the mind towards justifying that which is "known". This mode does not involve a reign of subjectivity but indicates that beliefs and concepts may be followed or adhered to without attempting to present them as objective.[35]

The fabrication of subjective elements into neutralised components in legal discourse cannot produce certainty.[36] The method of hypostatisation implies an "objectification mistake". The interlocutors who objectify human interactions by

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[33] 36 *Stanford L.Rev.*, (1984); J.W. Singer, "The Player and the Cards: Nihilism and Legal Theory", 94 *Yale L.J.*, (1984), p.1, at p.48: "..... the unstated premise behind this fear is the idea that we are entitled to have an opinion only if we can back it up by a method for deciding legal and moral questions that can compel agreement by its inherent rationality".

[34] L. Wittgenstein, *On Certainty*, (Oxford, Blackwell, 1969), p.48e, para. 373; C. Taylor, *Philosophy and the Human Sciences. Philosophical Papers 2,* (Cambridge, Cambridge University Press, 1985), p.18, para.373: "..... uncertainty is an ineradicable part of our epistemological predicament".

[35] R. Rorty, *Philosophy and the Mirror of Nature,* (Oxford, Blackwell, 1979), pp.333-4, hereinafter cited as *Mirror,* J. Fishkin, "Liberal Theory and the Problem of Justification", *NOMOS* XXVIII, p.207, at p.216

[36] S. Sur, *L'interprétation en droit international public*, (Paris, L.G.D.J., 1974), discussing natural law and sociological theories affirms that "n'établit nullement un fondament assuré du droit, pas plus qu'il n'en fournit clairement une détérmination objective.", p.32

transgressing the contingent matrix and perceiving it as external structure suffer from "false consciousness".[37] This is evidenced in natural law or more clearly in Kelsen's theory whereby something contingent to human experience is presented as a dehumanised supposition. It could not, however, relieve us from uncertainty as it was said above. The encrusted belief in certainty is not a virtue in itself if we disagree on what we should be certain about.[38] Certainty, objectivity and determinacy are presumed to anaesthetise the propensity for political abuse and predatory techniques which occur when that matrix is discarded but fail to procure these qualities to themselves.[39]

The exposition of the fallibility of the traditional doctrine provokes the fear that "there really is no middle ground between matters of taste and matters capable of being settled by a previously stable algorithm".[40] Subjectivity is viewed with caution while it can reify absolute power.[41] Without standards to adjudicate good or bad action, everyone is left to pursue their preferences and eventually the mightiest will prevail.[42] If law contains a restraining power and is based on a rational foundation, what could constrain conduct dismantling that foundation? It rather results in predatory conduct where as Hobbes said "every man is enemy of every man".[43] The objectification mistake perpetrates an

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[37] R. Geuss, *The Idea of a Critical Theory. Habermas and the Frankfurt School,* (Cambridge, Cambridge University Press, 1981), p.14

[38] B. Williams, *Ethics and the Limits of Philosophy,* (London, Fontana Press/Collins, 1985), pp.169-170: "Some people argue in favour of a certainty model by saying that we need ethical conviction and that only knowledge can bring it. They ignore the obvious fact that no amount of faith in cognitive certainty will actually bring about ethical conviction if we cannot agree on what we are supposed to be certain about".

[39] F. Boyle, "Ideals and Things: International Legal Scholarship and the Prison - House of Language", 26 *Harv. J.I.L.*, (1985), p.327, at pp.347-349

[40] *Mirror*, p.336

[41] E.A. Percell Jr., *The Crisis of Democratic Theory. Scientific Naturalism and the Problem of Value,* (Lexington, University Press of Kentucky, 1973), p.163: "Since positivists held that reason could formulate no meaningful and valid conception of justice, they logically left physical force as the only arbiter of human affairs". (discussing Lon Fuller)

[42] Plato, *Gorgias,* W. Hammilton trans., (Harmondsworth, Penguin Books, 1960), p.78, para.483: "Nature ..... herself demonstrates that it is right that the better man should prevail over the worse and the stronger over the weaker". Thusydides, *The Peloponnesian War,* Rex Warner trans., (Harmondsworth, Penguin Books, 1954), Bk 5, p.402, para.89: "The standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept".

[43] T. Hobbes, *Leviathan,* C.B. Macpherson (ed.), (Harmondsworth, Penguin Books, 1968), ch.13, p.186: M. Wight, "Western Values in International Relations", in H. Butterfield, M. Wight (eds.). *Diplomatic Investigations: Essays in the Theory of International Politics,* (London, Allen & Unwin, 1966), p.89, at p.122: "..... the health of the political realm is only maintained by conscientious objection to the political". F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", 96 *Harv. L. Rev.*, (1983), p.1497, at pp.1499-1428. "Individual self

ideological construction which installs itself between the agent and social action and reduces human dialogue to a monolithic description. It objectifies human beings by viewing them according to Sartre as existing *en soi* rather than as both *en soi* and *pour soi*, that is as both described and describing objects.[44] In the following sections, the argument for humanitarian intervention will be presented under the assumption of human dignity as a discursive model instead of a reified one, having first discarded the threat of relativism and nihilism.

## II. BEYOND RELATIVISM: IT PROMPTS DIALOGUE

**II.1** *The Cartesian anxiety: objectivism - relativism.* As stated above, human dignity is the initial premise according to which the legal validity of humanitarian actions will be measured. Employing the previous argumentation, however, it abases any residue of establishing the existence of human dignity on an objective basis. According to Descartes, knowledge can be founded on an Archimedean point.[45] This objectivity should be structured on certain axioms, such as God, *ratio* or *cognito*, which are not themselves verifiable but which allow for inferences to be made. The mode of deriving these propositions exposes their contingency and denies their alleged ahistorical character. Consequently, we should dispose of the belief that human dignity could be

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assertion affects morality by splitting our moral lives in to two: we are concerned with living a good life and we associate this with kindness, religion, family life and friendship. On the other hand, we are taught to desire *the* good life, this is associated with public life - politics and the market. We expect people in those situations to be competitive, individualistic, and predatory. In the absence of a rational foundation for a good life, nothing will restrain people from trying to live the good life. Under this view, the result of giving up the idea of a rational basis for morality is that our public moral code of individualistic self assertion will replace our private moral code of kindness and altruism.

[44] *Mirror*, p.378; T.W. Adorno, M. Horkheimer, *Dialectic of Enlightenment*, (London, Verso, 1979), pp.3-80

[45] " ..... I was convinced that I must once for all seriously undertake to rid myself of all the opinions which I had formerly accepted and commence to build anew the foundation, if I wanted to establish any firm and permanent structure in the sciences". R. Descartes, "Meditations on First Philosophy", in *The Philosophical Works of Descartes*, trans. E.S. Haldane, G.R.T. Ross, vol.I, (Cambridge, Cambridge University Press, 1931), p.144; C. Taylor, *Sources of the Self: The Making of the Modern Identity*, (Cambridge Mass., Cambridge University Press, 1989), p.86: "For Descartes the whole point of the reflective turn [was] to achieve a quite self-sufficient certainty".

objectively grounded and accept its historical contingency and "socially context-bound character'.[46]

The difficulty in verifying the value of human dignity against an external form brings about the issue of relativity.[47] If morals or ideas can be equally good or important and also lack an objective basis, how could one claim that human dignity is the crucial factor in ordering the issue of humanitarian intervention? At this point, we are going to present and subsequently refute some of the relativist arguments. Firstly, it should be observed that relativity does not dispense with the need for assessment or conversation, as will be shown subsequently. It denies the possibility of grounding concepts, purposes or institutions but not the final product.[48] It involves practical and reflective interaction which overcomes the mistake of "monological axioms".[49] Secondly, it is claimed that subjectivity could only yield tolerance. Human dignity or human rights in general have been charged with western-specific notions and their application is denied in situations outside this particular environment. Therefore, respect for difference could only be materialised through tolerance of those with different views.[50] If the application of human dignity should be constricted to a western milieu because, it is argued, we are incapable of understanding other environments, how can we demarcate our limits if we are not capable of knowing the limits of contesting ideas? Confining the argument to the issue of divergent understandings just restates the problem. It implies that the different cultures share an understanding, although it is differently expressed. Consequently, a degree of common shared ground between these cultures is presumed, or else the potentiality for understanding would be forfeited. The contradiction in this argument is that it presupposes a common

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[46] A. MacIntyre, *Whose Justice? Which Rationality?*, (London, Duckworth, 1988), p.4

[47] F.R. Tesón, "International Human Rights and Cultural Relativity", 25 *Va. J.I.L.* (1985), p.869; A.D. Rentlen, "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 7 *Hum. R.Q.*, (1984), p.514

[48] R. Rorty, "Pragmatism, Relativism, and Irrationalism", 53 *Proc. & Addresses Am. Phil. Association*, (1980), p.719, at pp.727-730

[49] D. Davidson, "Reply to Burge", 85 *J. of Phil.*, (1988), p.664, at p.664

[50] Absence of a scientific method for "qualitatively evaluating cultures" validates an attitude of "respect for the differences between cultures". Quotation from XLIX *American Anthropologist*, (1947), pp.539-543, in R.B. Brandt, *Ethical Theory: The Problems of Normative and Critical Ethics*, (Englewood Cliffs, N.J., Prentice-Hall Inc., 1959), p.288; J.S. Fiskin, *Beyond Subjective Morality*, (New Haven, Yale University Press, 1984), pp.1,37-41

substratum which vindicates the incomparability of results.[51] The principal inconsistency in the stance of relativity is its proposition of tolerance. If competing ideas, independent of an algorithmic, can be accommodated through tolerance, it seems that tolerance becomes a normative concept contrary to the initial declarations of relativity. On the other hand and in order to retain the relativist argument, if tolerance is an option, intolerance is also an equally valid option.[52] Consequently, one could speak of intolerance or inhumanity and feel disdain towards any criticism against them, not least to intervention which would enforce an idea of humanity beyond its conjectural boundaries. Yet in fact we do not; and this happens because we have an idea of the finished product and through conversation opt for the results of human dignity.

Thus, the demarcation between particular traditions is not insular but involves interaction and communication. As MacIntyre said: "[h]ow and under what conditions traditions can be ..... resolved is something only to be understood after a prior understanding of the nature of such traditions has been achieved. From the standpoint of traditions of rational enquiry the problem of diversity is not abolished, but it is transformed in a way that renders it amenable to solution".[53] This makes explicit the reconfiguration, an overlapping one, between traditions and the idea of communal solidarity. The latter may have a shrinking locality in the sense that "..... the force of 'us' is, typically, contrastive ..... it contrasts with a 'they' which is also made up of human beings".[54] This explains better the force of the argument concerning the protection of nationals abroad, whereby the maltreatment provokes a sense of solidarity towards fellow nationals. On the other hand, it can extend to a wider number of persons or humanity as a whole and this explains humanitarian intervention *lato sensu*.[55]

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[51] D. Davidson, *Inquires into Truth and Interpretation,* (Oxford, Clarendon Press, 1984), p.184

[52] R.B. Brandt, *Ethical Theory, supra,* note 50, p.289: "..... the value of intolerance is as justified (or unjustified) as that of tolerance".

[53] A. MacIntyre, *Whose Justice, supra,* note 46, p.10

[54] R. Rorty, *Contingency, supra,* note 11, p.190

[55] K.R. Monroe, M.C. Barton, U. Klingemann, "Altruism and the Theory of Rational Action: Rescuers of Jews in Nazi Europe", 101 *Ethics,* (1980), p.103; V. Dimitrijevic, "The Place of Helsinki on the Road to Human Rights", 13 *Vand. J. Transnat'l L.*, (1980), p.253

**II.2** *Conspiracy, conservatism and elitism.* Another aspect of relativism is "the conspiracy theory"[56] of human rights. Human rights are considered to belong to what has been called "eurocentrism"[57] and their promotion has been criticised as an ideological tool for Western expansion. Accepting moralities which coincide with national boundaries has been a trait of relativism and a hindrance for action.[58] Humanitarian intervention has constantly been subjected to the charge that it has been subjectively oriented and promoted. Suffice to say that relativism has traditionally been considered as a major obstacle to humanitarian intervention. In the 19th century, Pradier-Fodéré condemned humanitarian intervention to illegality because it relates to "la justice subjective" and not "la justice objective".[59]

One should consider though the dogmatic nihilism of this theory, which depletes any action of meaning by disclosing ulterior, real or imaginary, interests. The Ugandan incident contains interesting insights. During the O.A.U. meeting, the President of Tanzania, Julius Nyerere, condemned the organisation's inaction in relation to human rights violations occurring in Africa: "[t]here is a strange habit in Africa: an African leader, as long as he is African, can kill Africans just as he pleases"[60] and added that "[b]lackness has become a certificate to kill with immunity".[61] In the Central Africa case, again the lack of condemnation of Bokassa's despicable practices was not lost from sight. The Central African Ambassador to the United Nations expressed his "bitter disappointment over the culpable silence of the United Nations and of the Organisation of African Unity"

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[56] K.R. Popper, *The Open Society and Its Enemies,* 5th ed., vol.II, (London, Routledge & Kegan Paul, 1966), p.94

[57] E. McWhinney, *United Nations Law Making,* (N.Y., Holmes & Meires/UNESCO, 1984), p.209

[58] M. Walzer, "The Moral Standing of States: A Response to Four Critics", 9 *Phil. & Public Affairs* (1980), p.220

[59] P. Pradier-Fodéré, *Traité de droit international public: Europeen et Americain,* tome I, (Paris, G. Pedone-Lauriel, 1885), pp.656-657, para.427: "La justice objective se révèle graduellement et après de longues et penibles luttes par l'opinion publique. Quand elle entre dans la conscience générale, c'est à dire, quant elle devient généralement subjective, elle est réalisée sans aucune intervention, et sous la seule impulsion de la civilisation".

[60] 11 *Africa Contemporary Records,* (1978-79), p.394

[61] *Keesing's,* (1979), p.29670A

and criticised the activity of those institutions in the field of protecting human rights.[62]

The position of relativism discharges also a conspicuous conservatism because it suggests that if a society such as Uganda or Kampuchea has been accustomed to inhumanity, so be it. An idea of nationally constrained practices, of a national "sort", is immanent in this argument which negates humanitarian interventions. If certain practices, however inhuman, are attributed to specific cultures, it is a prescription for their perpetuation. This is rather arbitrary because it runs against the relativist argument of "*non cognito*". If the theorist lacks knowledge of the culture, he cannot apprehend the practices as representing a certain culture. They may just be an aberration but this relativist position acknowledges the enactment of certain rules, even if abhorrent, as being authoritative because they are presumed to represent the specific legal and social context of a country. This extreme aspect has been called "ideological positivism".[63] It shares with conceptual positivism a common attitude towards the test of pedigree but it also believes that the morality of the system is the outcome of its being enacted without evaluating its content. This view was vociferously rejected after the horrors of Nazism, whereby the morality of procedurally enacted law clashed with the wider morality. Therefore, the danger of recognising an exclusionist relativism in a latent national context should be emphasised.

Surprisingly, the position of positivists and Critical Lawyers coincide on the issue of contingency. According to Mark Tushnet: "to say that some specific right is (or ought to be) recognised in a specific culture is to say that the culture is what it is, ought to recognise what its deepest commitments are, or ought to be transformed into some other culture".[64] Leaving out the last statement on transformation which is equally problematic, his argumentative line is similar to that of Kelsen. There can only be a description of rights which emanate from the particular context of a certain society. This can be formulated accordingly: because the context is X, rights Y, Z ought to exist. In this way, the danger of

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[62] 4 U.N. GAOR, U.N. Doc. A/34/PV, (1979), p.32, at p.41: "Those institutions, whose basic principles depend on the protection of human rights and freedoms ....., will never be able to do anything useful until they stop being a syndicate of dictatorial oppressive governments".
[63] C.S. Nino, *The Ethics of Human Rights*, (Oxford, Clarendon Press, 1991), p.11
[64] M. Tushnet, "An Essay on Rights", 62 *Tex. L.Rev.*, (1984), p.1363, at p.1365

including personal predilections is averted because the method appears as an objective imputation. The proposition for change appears then arbitrary because a society cannot be transformed unless we have an idea of how it should be transformed. The contingency and relativity of rights obscures the objects of human desire.

Returning now to the main argument of relativity, its inconspicuous elitism, clothed in the language of pluralism and tolerance, will be considered. The admission of compromise is inherent in liberal theories of justice, such as that of Rawls who proceeds from a cautious instrumentality to cautious relativism. As presented in Chapter One, in his book *A Theory of Justice,* he admits two principles - equal liberty and difference - which amount to "justice as fairness". Being concerned with economic and social inequalities, he proceeds to a compromise. Whereas equal liberty, which denotes political and civil rights, is the first principle, its application can be restricted in order to facilitate the effectuation of economic and social conditions which are indispensable for the enjoyment of this principle.[65] This argument could be characterised as relativist-elitist but, in fact, it is venturesome. The antipode is pronounced by Louis Henkin: "[h]ow many hungry are fed, how much industry is built, by massacre, torture, and detention, .....".[66] The danger resides in the inherent relativity of the conditions whose fulfilment would ultimately determine the enjoyment of equal liberty. The deficient conditions may be ameliorated earnestly or they may be perpetuated intentionally. Before the specific problem of humanitarian intervention in a relativist environment is dealt with in the next section, it should be observed that Rawls' disavowal of comprehensive human rights has been developed in response to a relativist criticism against *A Theory of Justice.*[67] In subsequent writings, he confines the application of human rights to western

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[65] J. Rawls, *A Theory of Justice,* (Cambridge, Mass., Harvard University Press, 1971), pp.151-152, hereinafter cited as *TJ*

[66] L. Henkin, *The Rights of Man Today,* (Boulder, Westview Press, 1978), p.130; B. Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in "A Theory of Justice" by John Rawls,* (Oxford, Clarendon Press, 1973), p.77

[67] A.A. D'Amato, *Jurisprudence: A Descriptive and Normative Analysis of Law.* (Dordrecht. M. Nijhoff, 1984), pp.260-1

affluent societies, and by preaching tolerance and self-respect humanitarian intervention becomes a distant prospect.[68]

**II.3** *International relativism: Rawls and Walzer on humanitarian intervention.* In Chapter One, the main tenets of Rawls' theory of justice have been analysed and it was concluded that only just states participate in his comprehensive and exemplary principles of justice. In the "Law of Peoples"[69], where his international law theory is adumbrated, Rawls appears relativistic and cautious not to promote a singular conception of societies, but also eager to recognise pluralistic diversity. He transmutes the conception of tolerance for illiberal views into international society. Consequently, there are similarities with Walzer's *Just and Unjust Wars.*[70] However, Rawls does not reach the end of his argumentative web and still treats tyrannical states as outlaws[71] which justify external intervention. This statement is reminiscent of a 19th century Italian theorist, P. Fiore. He relates international relativism with the liberty and autonomy of people to develop their civilisation and, thus, in principle, he is opposed to humanitarian intervention. Pursuing a similar line of argument which is also traced in Rawls, he says that "la loi de la sociabilité nous oblige à la tolérance" and that this is "nécessaire de ne pas oublier". However, humanitarian intervention is exceptionally admitted in dolorous circumstances as those persisting in Greece "soumise au joug du cimeterre turc".[72]

The correlation between internal unjust circumstances which incite domestic resistance and external intervention has been explained in Chapter One. Walzer distinguishes between the two situations and though, as he says, a state may be illegitimate at home, it is presumed legitimate internationally and that intervention is not justified whenever revolution is.[73] For him, tyrannical governments enjoy a preassumption of legitimacy, acting as a "fit" between the

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[68] J. Rawls, "Justice as Fairness: Political not Metaphysical:, 14 *Phil. & Public Aff.*, (1985), p.223, at p.225

[69] J. Rawls, "The Law of Peoples", 20 *Critical Inquiry*, (1993), p.36, hereinafter cited as *LP*

[70] M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (N.Y., Basic Books, 1977), hereinafter cited as *JUW*

[71] *LP*, pp.37,66; F. Téson, "The Kantian Theory of International Law", 92 *Col. L. Rev.*, (1992), p.53

[72] P. Fiore, *Nouveau droit international public*, P. Pradier-Fodéré (trad), (Paris, A. Durand et Pedone-Lauriel, 1868), p.226

[73] *JUW*, p.89

government and the community.[74] Regarding tyrannical regimes, the only remedy offered by Walzer is revolution, whereas foreign intervention, which would appear under such circumstances as an equal remedy, is not justified. Otherwise, the citizens' rights to rebellion and a general right to self-determination are suspended. The legitimacy of a regime is an international presumption. Its standing is hypothesised, *as if* it were legitimate but the answer to a genuine imposition of legitimacy, can be given only by a domestic process.

The difference in the two approaches concerns the extent of the relativist argument. Walzer's reasoning is a "raw" liberal endorsement of cultural diversity and tolerance, whereas Rawls retreated from an exemplary articulation of justice in his book *A Theory of Justice* towards a cautious liberalism in the "Law of Peoples" where he respects diversification. Only on this latter point do the two opinions converge. Walzer pursues a "pluralistic" legitimacy significantly similar to relativism. Action, and particularly humanitarian action *lato sensu*, in a pluralistic society is impeded by the legitimate purpose of preserving the diverse concepts of justice and prudence which will otherwise be artificially accelerated. It is true that Walzer is permissive in certain cases, amongst which the massacre and enslavement of a state's citizens is included.[75] However, it is also true that his claim of social contingency emasculates the propensity for action.

In the "Law of Peoples", Rawls sacrifices humanoid liberalism for a doubtful pursuit of communitarism.[76] His *A Theory of Justice* is enthusiastically individualist, whereby persons are presented as ultimate moral units[77] and also units for appraisal of societal justice. Consequently, the contingent problem of evaluating the justness of the states which could participate in the initial position is also solved. Lacking such criterion, any possibility of constructive choice is denied. Rawls, in his effort to apply his theory in a concrete social environment, is apprised of the fact that his individualist theory might constrict the participants in the original position arithmetically, considering the variety of

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[74] M. Walzer, "The Moral Standing of States: A Response to Four Critics", 9 *Phil. & Public Affairs* (1980), p.209, at p.212
[75] *Ibid.*, pp.215-217; *Idem.*, *JUW*, pp.101-108
[76] R. Tesón, "The Rawlsian Theory of International Law", 9 *Ethics & International Affairs*, (1995), p.79
[77] *TJ*, p.264-265

existing political institutions some of which, according to his initial articulation are not just but only nearly so. In the "Law of Peoples", he thinks that such a scheme is too narrow and, therefore, he embraces less or narrowly just societies in order to accomplish worthy purposes. First, he is concerned with peace, and under this assumption he proceeds into expanding the room for participants in the original position. In order to preserve peace, states should accept the main features of traditional international law. But which states should accept them? If it is only the just ones, the leverage of disagreement and conflict rises dangerously, for in the actual world the nearly just and the unjust states form the majority. Only by extending or relieving the rigidity of the original position and including therein "hierarchical states" which are ordered by a communitarian perception or an "associationist" view, does the leverage of accepting the principles of international law and thus preserving peace increase. This can only be done by abandoning individualism as an evaluator for just societies.

The shrewd consequentialism of the argument should not be discounted because it appears most suitable for achieving the aim of preserving the peace and also is less likely to be subjected to the often heard argument of moral falsification or moral imperialism. Peace is presented as an aim which all humankind strive towards. In principle, it could not be disproved but its meaning is not finical and therefore indisputable. Leaving aside this practical issue, peace is a presumption and in a relativist philosophy also the opposite, war, should be accommodated, unless someone departs from a pre-ideational basis. The problem in this regard is more acute in relation to human rights which depend on recognition of a kind of common characteristic notwithstanding cultural differences.

**II.4** *A Critique of Rawls' Liberal Relativism.* In the "Law of Peoples", Rawls states a conservative philosophy of international law and hence appears to have regressed from his previous comprehensive liberalism in *A Theory of Justice.* Rawls rectified the criticisms addressed to his previous postulates and moved towards a relativist conception of justice. His concept of justice purports to "find reasonable solutions to conflicts within existing practice"[78] and because societal structures harbour diversity and pluralism, the imposition of a particular version

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[78] J. Rawls, "Outline of a Decision Procedure for Ethics", 60 *Philosophical Rev.*, (1951), p.177

of comprehensive justice could only be maintained by institutions which contain conflicting interests. The stability offered under those circumstances is ephemeral and subject to shifts of power. For stability and order therefore, there is a need to reduce the scope of comprehensive justice to "certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society".[79] Rawls appears more concerned with the stability and unity of a system in adjudicating incommensurable conceptions of the meaning of justice: "[i]n a constitutional democracy, one of its most important aims is presenting a political conception of justice that cannot only provide shared public basis for the justification of political and social institutions but also helps ensure stability from one generation to the next".[80]

This does not mean that he abandons liberalism, but he tries to avoid the use of oppressive methods in order to affirm an imposed comprehensive concept of justice within a society which will achieve stability and peace.[81] Stability and unity can only be attained by an overlapping consensual standard[82] which a comprehensive concept of justice in a pluralistic society could not present. In that context, Rawls abandons a comprehensive liberalism because the minimum consensus requires diminishment. However, he still resides within it by stressing the importance of peace and toleration, asserting that no concept of justice should presuppose exclusive precedence over any other but inadvertently admitting that these preceding concepts should.

Before explaining the function of those ideas in the theory of international law, two other features in his thought are worth commending. The first is Hobbesian in its character, without that necessary meaning that Rawls embraces Hobbes' theory. Contrary to its previous individualism, his later theory of justice is tied to order.[83] The other feature is more Heggelian, it concerns the abandonment of the Kantian noumenal realm and an exploration into the actual world "for the fundamental intuitive ideas viewed as latent in the public political culture of a

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[79] J. Rawls, "The Priority of Right and Ideas of the Good", 17 *Phil. & Publ. Affairs*, (1988), p.251, at p.252

[80] J. Rawls, "The Idea of an Overlapping Consensus", 7 *Oxford J. Leg. Studies*, (1987), p.1

[81] J. Rawls, "The Domain of the Political and Overlapping Consensus", 64 *N.Y.U.L. Rev.*, (1989), p.233, at p.234

[82] J. Rawls, "The Idea of an Overlapping Consensus", 7 *Oxford J. Leg. Studies*, (1987), p.1, at p.6

[83] J. Hampton, "Should Political Philosophy be Done Without Metaphysics?", 99 *Ethics*, (1989), p.791

democratic society".[84] Thus, it is not surprising that his theory of international law regresses from liberal idealism to relativism.[85] Rawls proceeds with an investigation into the existing practices in international relations and examines the values embedded in them. The actual world does not contain solely liberal states but also those he baptised as hierarchical and tyrannical which adhere to certain values. Consequently, he constructs his concept of justice on the merits of those values. Then his concern for order and peace comes into play. Were we to impose a comprehensive liberal conception of justice, it would enhance the opportunities for instability in a pluralistic world. Consequently, we should restrict our perspective and abide by the liberal tenet of tolerance. Hence, his tolerance of less liberal societies comes into the light, a tolerance, that is, of restrictions on principles of justice within societies.

Rawls' theory suffers from inherent tension in his endeavour to accommodate liberal ideas of human rights and justice and those who partially reject those same ideas. His concern with order, stability and peace distances himself from a comprehensive and aspired concept of justice. Toleration of hierarchical states could, according to Rawls, ensure stability, their exclusion, nevertheless, is not a *carte blance* for waging war. One would expect that his examination of actual state practice would render more prudential results on the circumstances of waging war. States do not resort to war intuitively but their decision depends on political, diplomatic, military considerations. Otherwise humanitarian actions would be more often than not. In fact, any humanitarian action depends on questions concerning the seriousness of humanitarian tragedy, the permissibility - political, military - of any action, the chances of success. Take for instance the case of China, a hierarchical state. Non-action in that case was not because China in Rawls' scheme is included in the plane of equal relations between liberal and hierarchical societies. It is for more important geo-strategic considerations which remain unaltered, were China was to be excluded from a status of equality with liberal states. Hence, peace could be preserved in this rather negative form. What the later Rawlsian theory is doing is to compromise

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[84] J. Rawls, "The Priority of Right and Ideas of the Good", 17 *Phil. & Publ. Affairs*, (1988), p.251, at p.252

[85] T.W. Pogge, *Realising Rawls*, (Ithaca, Cornell University. Press, 1989), ch.6, in part. pp.267-273

a substantial liberal concept of justice in order to achieve some dubious results which may be achieved in any case.

His relativistic position concerning international justice is unable to answer the unavoidable question of assessing the international structure. How can one assess it and work towards its amelioration without a background concept of justice? As was explained in the preceding sections, there is not and there shall not be, at least in the foreseeable future, a criterion of justice which is neutral and congenial to all cultures. His proposed "overlapping consensus" is difficult to apply in a democratic national society with a sufficient degree of cultural unity among its members. This reveals how difficult such a theory would be in the international society with multifarious diverse elements. And even if the latent "fundamental intuitive ideas" were to be found, those ideas would be in the best of circumstances reduced to singularity. Diversification does not preclude a dialectic agreement for value optimisation. This would stand at the opposite pole of consensual value minimisation. For such an agreement, idealistic conviction is required.

Furthermore, the fear of cultural diversity that induces Rawls to shrink from his theory of justice to more relativistic concepts has to show more than the mere existence of cultural diversity. It has to show lack of agreement which is actual and not presupposed - *ipso facto*. One may start from different premises and finally arrive at the same result but that does not mean that our initial ideal is not worth sustaining because others begin from a different premise. Rawls' arguments for the optimisation of the least advantaged were adopted by Third World countries which, by definition, start from different premises. Those demands were rejected by Western states on the claim that they are instigated from diverse cultures, although they corresponded to our liberal ideals or our domestic instantiation of the concept of justice. Such rejection of the principles of justice on grounds of cultural diversity is hypocritical.

On the other hand, it is premature to cut short the chance for dialogue or discussion between the culturally diverse participants on the merits of the principles. The lack of convergence or agreement is, thus, pre-empted. Then the suspicion, reasonable or not, of moral - cultural disagreement, abrogates the

potentiality of action. We mainly act on the beliefs we hold and we should accept the possibility of reforming or modifying them when our *praxis* is tested. We do not start our life with an assumption of withdrawal because our ideas are not as radiant due to a thousand other competing ideals. If we think for a moment about the development of our ideas (Bill of Rights, French Revolution) we may become convinced that they required conviction and persistence. Because it is difficult to trace whether denial of any components of those principles is a genuine trait of a particular culture or a thin veil for justifying political expediencies, regressing and compromising those principles is not worth doing. And this presents the human conundrum: relativism is indefensible whereas objectivity is untenable. What is left is conversation.

## III. RECONSTRUCTION THROUGH A DISCURSIVE MODE: HUMAN DIGNITY AS EDIFICATION

**III.1** *A recapitulation.* Legal theory concerning humanitarian intervention as it is presented above displays a tragic property,[86] reminiscent of the hero's character in ancient Greek tragedies. Legal theory presents multiple variables each of which is related to certain goods. These goods have been simplified as peace, order, justice, human dignity. Practitioners, politicians and the layman agonise like the tragic hero who should choose among incommensurable and competing 'goods'. Antigone is considered the exemplary tragic persona. She experienced psychic and mental trepidation in making her choice. Kreon, the master of Thybes, was determined to impose human order without respect to the dictates of divine justice. The heroine was adamant that the latter prevails but eventually human ordering wrecked her audacity. In a certain way, Antigone as a play can exert a therapeutic function. It appeases both the psyche and the reason of the audience or the reader. It satisfies in other words the sense of justice but also that of order. Whereas order and formality prevails, the reader

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[86] A. MacIntyre, *After Virtue: A Study in Moral Theory*, (London, Duckworth, 1981), pp.223-225; J. Finnis, *Natural Law and Natural Rights*, (Oxford, Clarendon Press, 1980), pp.92-95

associates himself with the catharsis which the interplay with justice achieves. This paradigm applies also to international law.

International law is presented as a complete system whereby rules provide answers and reduce the subjectivity of discretion. They emit an aura of objectivity because they are formulated in a legalistic milieu and the internal construction of the purportedly coherent rules is obscured. The exposition of the latter yields a sense of relativity of the pertinent positions. In order to escape the strictness of rule reductionism, international law is permitting a modicum of *ad hoc* justice in certain issues which is tied inexorably to the application of rules. The area of maritime delimitation is a prime example of such technique where equity as well as other interests are admitted.[87] Humanitarian intervention is another example, although highly disputed. As observed above, international lawyers and state officials have referred to that modicum of justice when applying the pertinent international rules on intervention. This technique again does not save us from the quest of objectivity or the flight from relativism.

The quest of objectivity was presented above as the Cartesian anxiety: "..... the right to conceive high hopes if I am happy enough to discover one thing only which is certain and indubitable".[88] This raises another issue related to human tragic character. The quest for "foundation" has not only a logical appeal but also an emotional one. It embodies the human drive to escape from subsuming into chaos and madness where the lack of a fixed point would lead. Leaving apart the question of whether this point is reason, God, or a point within a method, the quest is ontological because it relieves us from the uncertainty which our finite and fallible human nature is subject to. And this is the best defence against relativism, which denies this fixed point or presents a multiple of such points. If the position that there is nothing which accounts for a reasonable basis is accepted, we are in the position described by Descartes that:

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[87] "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it". *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Rep.*, (1982), p.18, at p.60, para.71; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Rep.*,(1984), p.247, at p.292, para.89; *North Sea Continental Shelf Cases. I.C.J. Rep.*, (1969), p.3, at pp.46-50, paras.85-90

[88] R. Descartes, "Meditations on First Philosophy", in *The Philosophical Works of Descartes.* trans. E.S. Haldane, G.R.T. Ross, vol.I, (Cambridge, Cambridge University Press, 1931), p.144

"I can neither make certain of setting my feet on the bottom, nor can I swim and so support myself on the surface, .....".[89]

Relativism on the other hand is only self-referential, self-defeating and paradoxical. Rejecting objectivism and promoting relativism, the truth of this position - relativism - is implicitly admitted. But truth is relative and can also be false. This argument undermines the whole position of relativism. What is needed in order to escape from this quandary is to liberate ourselves from the fixed notions of objectivity and relativism. It should be commented that these notions are used in their wider meaning. Thus, objectivity refers to a metaphysical reality where there must be an epistemological distinction between the "ought" and the "is". This is mainly Kelsen's method but also it refers to a metaphysical realism to which the subject should reflect, and this is the natural law method. Another aspect is a method of empirically seeking to find "objective truths" in a world of vicissitudes. This requires the discovery of the permanent features in human aspirations and practice, which becomes the search for human dignity in the policy school. Relativism can be viewed as a response to the rigorous Kantian distinction of "is" and "ought". Only if there is an objective and universal "ought" can we escape heteronomy. The refutation of this *a priori* deterministically brings into light the relativity of morality.[90] What is needed then is a new conversation which unites the *theoria*, *praxis* and *phronesis*. It shows that we can hold views, moral or political, without the need to ground them objectively or that they can be discussed without the need of universal agreement.[91] Conversing avoids also the danger of viewing legal matters as a competing ground of ideas which are inimical to preferences. Humanitarian intervention is such an area where legal argument should overcome its cumbered modes and idiosyncrasy and extend to a new approach. This approach is a conversation of deciding and choosing through the *praxis* of trying to reach the best solution.

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[89] *Ibid.*, p.149; I. Kant, *The Critique of Pure Reason*, trans. N.K. Smith, (London, Macmillan, 1929), p.257: "This domain is an island, enclosed by nature itself within unalterable limits. It is the land of truth - enchanting name ! - surrounded by a wide and stormy ocean, .....".
[90] A. MacIntyre, *After Virtue: A Study in Moral Theory*, (London, Duckworth, 1981), p.21
[91] *Mirror*, pp.333-334

**III.2** *The reconstruction.* In the previous section the argument that humanitarian intervention could be objectively verified has been debunked. However, it has been argued that what is left is not chaos but conversation. At this point, an attempt to describe an alternative will be made by borrowing insights from visionary projects but in parallel maintaining the possibility of dialogue. Legal argument, being contradictory and devoid of foundational premises, projects the individual as the final arbiter, the one who will make the choice among conflicting values. To think differently is to decry humanity and join those who would like to escape the burden of making choices, preferring to nullify conversation by hypostatizing particular events.

Rejecting rational reasoning does not make us agnostic about our moral or political values. People hold views even if they cannot derive them from reasonably or logically ascertained principles. Discursive theory enfranchises ourselves from the vain attempt to prove that values are true instead of justified. Thus, it enhances the dialectic by transgressing the perceived point where the legal argumentation is assumed as finite.[92]

The dialectic procedure kindles transformation and revision of legal concepts through discursive agreement. The lawyer is relieved from the argumentative rigidity of the legal system and can imagine a revisionary programme by an evaluation of the facts.[93]

Conversation challenges the view that the rules are natural or necessary and holds that values and morality are not a matter of reason but of conviction. Therefore, we should not feel ashamed of our views. By deconstructing foundational theories, the communal and indissociable nature of life is emphasised and also the quest to bring it about.[94] People live in a social, cultural, ideological context and form opinions from within.[95] The

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[92] F. Boyle, *supra* note 32, p.358: "Yet the fetishism of essences, the belief that this is how one showed oneself to be correct, actually subverts the commitment to enlightened rationality and replaces it with reified ideas, thus ruling out the possibility of real discussion".

[93] R.M. Unger, *The Critical Legal Studies Movement,* (Cambridge Mass., Harvard University Press, 1983), pp.25-42, 91-117

[94] G. Frug, "The Ideology of Bureaucracy in American Law", 97 *Harvard. L.Rev.,* (1984), p.1276, at p.1368: "The alternative to foundations is not chaos but the joint reconstruction of social life, the quest for participatory democracy".

[95] *Beyond,* pp.XIV, 37: "We should be comfortable viewing both rationality and social life as historically and culturally situated".

understanding of the social context ostracises the notion of an aprioristic, ahistorical, atemporal foundation of our thoughts. "We need to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying".[96] People do not merely have opinions but they form opinions and their formation is a creative procedure within the human context.[97] The request for consensus between conflicting opinions is not found "but created by the same people. They form within their shared living a community of understanding".[98] That creative process is described by Bernstein in the following words:

> "Democratic politics is an encounter among people with different interests, perspectives, and opinions - an encounter in which they reconsider and mutually revise opinions and interests, both individual and common. It happens always in a context of conflict, imperfect knowledge, and uncertainty, but where community action is necessary. The resolutions achieved are always more or less temporary, subject to reconsideration, and rarely unanimous. What matters is not unanimity but discourse. The substantive common interest is only discovered or created in democratic political struggle, and it remains contested as much as shared. Far from being inimical to democracy, conflict - handled in democratic ways, with openness and persuasion - is what makes democracy work, what makes for the mutual revision of opinions and interests."[99]

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[96] R.W. Gordon, "New Developments in Legal Theory", in D. Kairys (ed.), *The Politics of Law: A Progressive Critique*, (New York, Pantheon Books, 1982), p.281, at p.289; R. Rorty, "Pragmatism, Relativism and Irrationalism", 53 *Proc. & Addresses of the American Philosophical Association*, (1980), p.719, at p.727: "Our identification with our community -our society, our political tradition, our intellectual heritage -, is heightened when we see this community as ours rather than nature's, shaped rather than found, one among many which men have made. In the end, the pragmatists tell us, what matters is our loyalty to other human beings clinging together against the dark, not our hope of getting things right".

[97] L. Wittgenstein, *On Certainty*, (Oxford, Blackwell, 1969), p.16e, para.105: "All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life".

[98] *Beyond*, pp.203-204,215-216,223-224,229; M.V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles", 96 *Harv. L.Rev.*, (1983), p.781, at p.826-827

[99] *Beyond*, pp.223-224

Therefore, we need to envisage and conceptualise a mode of doing things. The technique is explained by Unger:

> "You start from the conflicts between the available ideals of social life in your own social world or legal tradition and their flowed actualisation in present society. You imagine the actualisation transformed, or you transform them in fact, perhaps only by extending an ideal to some areas of social life from which it had previously been excluded. Then you revise the ideal conceptions in the light of their new practical embodiments. You might call this process internal development. To engage in it self-reflectively you need make only two crucial assumptions: that no one scheme of association has conclusive authority and that the mutual correction of abstract ideals and their institutional realisations represents the last best hope of the standard forms of normative controversy".[100]

A proposed project of attaining human worth does not depend for its validity on a privileged view or the transcendental objectivity of the proposal but on its argumentative value and its ability for making adjustments. Relieving human beings from distress and disadvantageous circumstances could not be dealt with in a uniform style. It should be evaluated under all the pertinent circumstances, and the arguments turned away from a rigid evaluation of legality to what is significant in that particular case, what is important for the achievement of those values.[101]

The conflicting character of legal thinking mirrors the conflicting character of human life. There is no need therefore to reduce dialogue for the quest of commensuration to arid propositions, but always to think of the alternative arguments which can be achieved by conversation. That conversation, pertinent to the merits of its case, should not assume that, eventually, there should be an agreement but it should focus on the criteria for good arguments and evaluate the propositions presented for the attainment of human worth.

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[100] R.M. Unger, "The Critical Legal Studies Movement", 96 *Harvard. L.Rev.*, (1983), p.561, at pp.579-580

[101] A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, (Manchester, Manchester University Press, 1986), p.114: "The potential task of legal doctrine is to reconstruct conflict situations in accordance with basic principles of understanding, a theory of knowledge based on the development of argument, rather than the search for objectivity or experience as such".

**III.3** *What is human dignity and its function in a conversing argumentation.*[102] The definition of human dignity cannot attain comprehensiveness and it does not aspire thereto. The reason for declining to provide comprehensive determinations is that, in a discursive culture, the content of human dignity will be the object of debate whilst the notion of objective, impersonal definitions has proven to be elusive. The lack of definition coincides also with the stated purpose in this study of enlarging reasoning beyond the inclusive realms of legality and, finally, it is consonant with the other stated purpose of revision. Embracing the prospect of revision supplies legal argumentation with a certain dynamic when the legal project does not correspond to a reformed reality, instead of competing against the wave of change. This may provoke the suspicion or criticism of arbitrariness, according to which human dignity may connote different things to different classes of people or decision-makers and hence justify any action under its rubric. However, uniformity is not required because the participants in the discussion about human dignity are informed of its facets. Once it has been accepted, creativity and diversity are not considered detrimental.

Although human dignity cannot enjoy a definable statement, some referents which might assist our perception thereof could, at least, be advised. The referents would be described minimally whilst it should be maintained that they contain an optimum mandate as well. Thus, we should speak of a dignified human existence and delineate its content by referring to the protection of life. However, although this would be the beginning, it is not the end of the *telos* of human dignity. In addition, quantitative and qualitative indices which dignify human life may be submitted such as freedom from torture, safety, the exercise of civil and political rights, social and economic flourishing.

As was stated above, human dignity has been paraphrased as dignified human existence and this alludes to the two words which the Greeks use for life. There is, on the one hand, the word *zoe*, which is the biological life, and *bios*.

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[102] Some of the ideas concerning the definition of human dignity, although in a different context, are taken from R. Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia*,(London, HarperCollins, 1993)

which is the life as lived. The first denotes the natural content of life, whereas the second denotes human striving. Why did we choose human dignity? Because we think it is important. This conveys manifold qualities: it may connote instrumentality or intrinsticality. It may witness them either disjunctively or accumulatively. We are not concerned at this point with these issues because they eventually refer us to our first article of importance. The point which should be made is that life has natural and human aspects. Leaving aside the human contribution to life, the frustration of the natural component, the biological aspect, frustrates not only the human but has wider repercussions to other people's lives as well. As a matter of fact, life and its biological sustenance is a *sine qua non* for any further discussion. Returning now to the other issue of dignity, it will be confined to self-respect and the respect from others. The inflicted indignity causes considerable mental harm because the person looses his sense of self-respect and autonomy. Additionally, people have invested interests in the character of their lives. Indignity is disrespect towards those critical interests, towards the morality of human beings to pursue their dignified life. Thus, we have made three distinctions: life as *zoe* (existence); dignity as critical interest; dignified life as valuable *bios*. The three of them are interconnected and dignified life cannot be attained if some individuals are denied the possibility of pursuing their interests and, above all, if they are exterminated biologically.

Human dignity as dignified existence becomes then the guiding ideal in a reconstructive programme. It was said above that we need to transform legal argument concerning humanitarian intervention from its present confines. As it exists today, there is a certain theory in the form of non-intervention and sovereignty which surmises opinions, judgements and operations. The latter, though anarchically, capitulate to or redefine the social reality which this theory represents. In order to transform this state of affairs, we need another theory with its own ideal and which helps to discern which standards correspond therewith. The ideal of human dignity could be both visionary, enticing the particular historical and social conjecture, or pragmatic, capturing the significance of current developments which redirect legal theory and *praxis* towards human dignity. It could also be argued from the above attempt

into indicating human dignity that it represents a cumulation of current shared experiences. Life and its protection has been the aim or aspiration of almost all the philosophical trends. At this point, it should be again emphasised that our ideal of human dignity does not depend on any ultimate reason for its validity. This, however, does not mean that there would be no reasons which support this ideal for societal and legal development. Human dignity or any other determining ideal depends on our affective nature and, in extreme cases, upon the Humistic reign of passions.[103] It may also present the danger of seclusion. Instead, the reflective project pursued here whereby a discursive methodology will relate human dignity to actuations, knowledge or consequences was made explicit. Whereas it is a matter of conviction, it was explained above that we should overcome the fear of subjectivity and lack of neutrality which conviction may denote. These arguments are ingrained into reasoning because they offer a leeway from the domain of private ideas. As was commented above, lately Rawls has spoken of an "overlapping consensus" and Dworkin of governmental neutrality.[104] The distinction is a shaky one. We have reasons to act and these reasons depend on or are consistent with our reasons for action. How we act publicly relies on our private reasons. Otherwise, it would be difficult to explain that some people adhere to or accept human dignity privately, whereas their public persona is committed to the opposite, that is human indignity or vice versa. If a state massacres its citizens, its elite - the state here is viewed as a corporation of individuals - should have reasons to do so which are also private. Of course, not all reasons for action or inaction are made public but eventually this act of massacre should be justified down to the actor who is doing it. Therefore, the distinction could not be definite and a personal conviction about human dignity would consequently alter the public domain. Whatever the reasons for adhering to this ideal, it ultimately depicts an ideal for evaluating or approbating our or other people's actions. Additionally, the ideal of human dignity is not presented as an *ad hoc* criterion, but as comprehensive which is

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[103] D. Hume, *A Treatise of Human Nature,* L.A. Selby-Bigge (ed.), 2nd ed., (Oxford, Clarendon Press, 1978), Bk.II, pt.III, para.III, 5th para.
[104] See J. Raz, "Facing Diversity: The Case of Epistemic Diversity", 19 *Phil. & Pub. Aff.*, (1990), p.3

disconnected from instantaneous emotive reactions. Above all, admitting the possibility of transformation, it justifies our ability for revision through discussion, instead of unquestioned adherence to obsolete and stringent doctrines.

Concerning the function of law within this revisionary ideal, there should be a law of human dignity in international relations. Law should arise above the pertinent social context and should not present itself as justification or explication of existing outmoded practices and habits. We could also offer a word of prudence for those cautious to accept a revisionary legal ideal. Human dignity as an ideal is not a newcomer to political or legal thought, it is not an absolute denial of the *déjà vu*; it is merely a revised insight into international life and its acceptance as a guiding ideal.

**III.4** *Conclusion.* This Chapter introduces the third part of this study which contains the exposition of a reconstructive plan for humanitarian interventions. It appears as a necessary outgrowth of the preceding parts which dealt with the issue of legal theory and, secondly, with legal reasoning. Human dignity as a discursive mode provides, according to the opinion of the present author, a valuable answer to the acknowledged dissatisfaction with existing legal argument.

In the next chapter, a more intimate exposition of the concept of human dignity will be pursued as it applies to certain instantations by conversing on their pertinent aspects. We are going also to discuss certain criteria which would help in our deliberations.

# CHAPTER EIGHT

# HUMANITARIAN INTERVENTION AS A *TELOS* OF A CONVERSING CULTURE: SOME PARADIGMS

*This chapter presents the mode of reasoning concerning humanitarian intervention in a conversing culture. It presents the steps for such conversing and finally discusses some cases accordingly. Having elaborated the legal premises for humanitarian intervention, human dignity looms as the most satisfactory criterion.*

## I. HUMAN DIGNITY IN A CONVERSING ELABORATION OF HUMANITARIAN INTERVENTION

**I.1** *Conversing human dignity.* In the previous Chapter, there was an attempt to describe the approach of this study to humanitarian intervention which transcends the distinction between objectivity and relativism towards a mode of dialectical play where there exists deliberation, judgement and choice among the forms of life which should be understood and evaluated. This method embraces certain procedures of human reasoning which realise human dignity. Hence, the situation should initially be identified and also the concurring set of alternatives. Then, the consequences which each alternative may produce are contemplated; at this point, the values inherent in any such alternative are appraised. The theorising person also tries to inform himself with what relevant people have said about those alternatives and thus, finally, he acquires the ability to make decisions in accordance with the initial assumption.

The same mode of reasoning will be adjusted to humanitarian intervention. When a factual situation arises where people are massacred or persecuted, the situation should first be identified in its essence as an affront to human

dignity. Then, the different modes of reaction should be contemplated. One option is indolence, which stems from moral or political listlessness. At its antipode may reside acknowledgement, which peregrinates from apprehension to emphatic acceptance. Reaction may as well take the form of verbal condemnation or humanitarian intervention. The second step involves the articulation and appraisal of the values in each alternative. Then, when all the alternatives are present, the consequences of each alternative should be assessed. Any action entails certain effects which are internal or external in relation to the recipient or promulgating state. Finally, the theorising person could make a choice amongst those alternatives which achieve human dignity.

This methodology assists legal argument in overcoming the futility of grounding ideas in something which is incommensurable. In order to avoid that which has been characterised as "ideological anaesthetic", we should provide good reasons for our preferences. This probably appears inconsequential because the projection of human dignity reverts to the previously criticised attitude of anchoring. It might again give rise to another "objectification mistake". It may also provoke the suspicion of ideological domination when it aspires to being applied in fields or subjects which may not share the same "false consciousness". However, the methodology described above provides the answer to what appears to be a recurrence of the "Cartesian Anxiety" because it reveals the possibility of discourse.

This does not mean that the problem of humanitarian intervention is permanently resolved. It merely elucidates the constituent perspectives of the issue which are not confined to a deductive profferement according to the legalistic approach, but deciphers, conversely, the merits of the issue. The move away from the tradition of legal argumentation, which forces the modes of thinking into compartmentalised areas, raises the prospect of extending, through discussion, these modes into other areas which capture the essence of the problem. Otherwise the capacity of understanding what is really involved in the issue is forfeited. Thus, the argument concerning humanitarian intervention should not be an impersonal, insouciant debate on the aspects of humanitarian action and its effect on rules. It should concern the action's essentiality, that is, how a human tragedy could be averted; how we should

direct our action in order to avoid a human loss. The argument concerning humanitarian intervention is not a legal ping-pong match whereby principles and rules are confronted with counter-principles. Of more concern is the rationale and effect of arguments. As stated above, there should be application of human practical reasoning in order to find the most agreeable solution to the circumstances which succour human dignity, instead of applying "prêt-à-manger" rules.[1]

Consequently, this mode of reasoning is not by itself foundational in its suggestions, although it panders to the ideal of human dignity and also evaluates state actions accordingly. The scintilla of conversing candour, whereby the possibilities and alternatives are conspicuously discussed, opposes the introverted, silent, discourse of existing legal argumentation. Another distinctive aspect is that it accepts the possibility for revision, that is, it is amenable to future arrangements and new dynamics which may endow human dignity with a more comprehensive substance. Such a perspective contrasts with the rather arteriosclerotic character of legal argument. The conversing argumentation purports towards producing an inter-subjective agreement[2] which intimates a sense of community and solidarity whilst the participants are liberated from the constrains of "their" legal approach. In contrast, the scantiness of such a discursive method presupposes a compartmentalised community of hierarchical order, where legal argument provides the sense of certainty, completeness and superiority. In a conversing environment, individuals are capable of retaining their individuality. They are appreciated as units who face the future with the same fear and anxiety and who experience the same conflictual reality, questioning the way of human living.

This technique of discursive argumentation should not be criticised for failing to provide an immovable, secure foundation for the result which may be procured. As it has been shown above, the prospect of a stable referent alludes

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[1] A. MacIntyre, *After Virtue: A Study in Moral Theory*, (London, Duckworth, 1981), p.244; T.A. Sprangens Jr., "Justification, Practical Reason, and Political Theory", *NOMOS* XXVIII. p.336

[2] R. Rorty, "Solidarity or Objectivity", in J. Rajchman, C. West, *Post-Analytic Philosophy*. (N.Y., Columbia University Press, 1985), p.3, at p.5

to the main fallibility of the legal reasoning which, however, should not de-legitimise it but prompt dialogue. As was observed: "The attempt to provide a secure foundation for knowledge is no longer a tenable enterprise. The only rational alternative is to submit our proposed solutions to critical examination, i.e., to evaluate them with a view to possible improvements, to compare them with alternative solutions and to search for new and better solutions".[3]

Although unanimity is not a target to be achieved easily, the dialogue exposes the possibility of an understanding within the vicissitudes of competing values and policies. The tension cannot be solved easily because human dignity is not a mere indicia of a certain aspect of life or, in particular, of legal-political achievement but it is the constituent of such an achievement. As long as legal reasoning is understood as "facts" which can be tested, or as "oughts" which can be either absolute imperatives or merely capricious preferences, then there is no room for such human reasoning.

What is suggested here is that human dignity should become a rhetorical *telos* within this human reasoning, which seeks the acquiescence of people in general due to its dynamics and prudence. This approach is completely different from the hex of subjectivity and withdrawal which prompted Kelsen to say that "I cannot say what justice is ..... I can only say what justice is to me".[4] As a consequence, this attitude would justify in specific cases any pertinent action - fortunate or disconsolate - according to the personal predilections of the person who passes judgement but this does not concern reasoning as it has been implied above. It only concerns the causes for action. The suggested here method assures a modicum of deliberation between the attractive alternatives, and although human dignity is a commitment and its adoption leaves other values outside the spectre of promulgation, it provides good reasons to choose this commitment.

**I.2** *Human dignity as a commitment.* Eventually, human dignity as a commitment outweighs its argumentative value and requires a redirection of state or human activities; therefore it presents the prospect of a coherent plan

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[3] H. Albert, "Science and the Search for Truth", in G. Radnitzky, G. Andersson (eds), *Progress and Rationality in Science*, (Dordrecht, D. Reidel, 1978), p. at p.204
[4] H. Kelsen, *What is Justice*, (Berkeley, University of California Press, 1957), pp.21-22

for living or action. It is not subject to momentary or capricious changes of attitude or formations, but it requires a restatement of habits and impulses and a harmonisation of inclinations with practice. Also, the prospect of modifications cannot be disallowed because, otherwise, any benefit the dialogue may witness would be subsumed. However, admitting the perplexities of life and the unforeseen contingencies does not imply that the *telos* of human dignity is immersed in personal or statist caprices. It is a general *telos* which can be effectuated in many ways. However, it also leaves open the possibility that when another coherent plan emerges which, in the revised circumstances, presents an improvement for alleviating misery, this plan should be pursued. Human dignity should also have a *universal* application. Thus, it overcomes the often-heard criticism of hypocrisy, selfishness, and double standards. According to this position, one of the reasons offered to countenance the argument that the protection of nationals is a measure of self-defence is that it shows a special pleading tied to state interests. It is an egotistical and state-biased justification. It shows indifference to the plight of other people or the nationals of the host state who may be equally or more severely threatened. Therefore, a different approach under the heading of human dignity was proposed, which shows *impartiality* among people. This account is also at variance with John Rawls' *A Theory of Justice*. His original position guarantees neutrality, however precarious, between the chosen principles of justice. They are not chosen because they are favoured in relation to a beneficent plan of life as human dignity is. They are chosen because they are pre-moral. Human dignity on the other hand is a charged good to be pursued because it pertains to a coherent plan of life.

Another requirement which is related to the above of impartiality is that the choice should be *effective* in bringing about human dignity. The person making the choice amongst the alternative ways of approaching human dignity should choose those practices which are fit to achieve this imperative. Discussing previously cases of humanitarian intervention, it was observed that certain actions such as those in the Dominican Republic or Grenada, failed on this account. Those actions, as well as promoting human dignity, also included

its "disvalue", either in the practices chosen or the consequences. Therefore, they could not be included in the discussed genre of actions.

**I.3** *The revisionary program of human dignity applied to humanitarian intervention.* In order to recapitulate, the procedure of evaluation starts, according to this study, with the assumption of human dignity. This is common to legal systems which are based on an assumption, a background theory that legitimises them. The difference with our assumption is that it does not claim objectivity and absolutism. It is the representation of a socially contested moral order in an abstract normative fashion and as a value-based assumption it is exposed to the criticism of arbitrariness. Values are derivative of individuality and the consensus that exists in specific instances on particular values is ephemeral, and mainly corresponds to the aggregate agreement of certain individualities. Furthermore, values reside in our psyche, and therefore they become less intelligible contrary to the comprehensibility of the facts. Events-facts are intelligible because they are apprehensible with our essences. Accordingly, values can be apprehended as psychic events embodied in those factual events. In this way they become intelligible to our essences.[5] That is the function of the initial assumption. It is the tracing of a psychic-value event in the context of factual events.[6] The repetition and cohesion of the same value event in similar cases advocate a redefinition of the existing assumption. Human dignity as a value is part and parcel of the dominant legal theory, which could be characterised as liberal. However, its realisation and exposition has been suppressed because it was estimated that other assumptions within this legal context should take precedence. Its promotion to the position of initial assumption may seem arbitrary but it is not. It is rather the quiet development of a principle by corresponding to the transformations of world society.

The next step in the procedure is to evaluate the conflict and disharmony between the existing ideals or assumptions and their actualizations and then to

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[5] R.M. Unger, *Knowledge and Politics*, (New York, Freepress, 1975), pp.76-81, 88-100

[6] Professor W.Michael Reisman observes that the incidents reflect more accurately contemporary international law than the traditional approach of distilling norms from "..... statutes, treaties, venerable custom and judicial and arbitral opinions" because they reveal more about "the normative expectations of those (government elites) who are politically effective in the world community". W.Michael Reisman, "International Incidents: An Introduction to a New Genre in the Study of International Law", 10 *Yale J.I.L.*, (1984), pp.1,2,3

test those actualizations against the initial assumptions. If there is congruity between actualization and the initial assumption, then one should take the radical step of applying that assumption in the new field to which those actualizations refer, and thus change the existing prescriptive conception. More precisely, if the area under consideration is the use of force by a state to protect human beings (nationals and non-nationals), we begin with the disharmony between the present prescriptive theory of non-intervention and its deviationary actualizations, that is, instances of intervention. Then it should be considered whether those instances correspond to the initial assumption of human dignity. If they do, the whole area is transformed by applying this conception to the pertinent events instead of the flawed previous assumption. Thus, the previous assumptions are revised according to new embodiments.

This scheme has the benefit of correlating social ideals and actualities. It is a constant process of development, enriched by reference to ideas, history, institutions, facts. No one can claim that it corresponds to absolute doctrines because that is contrary to the inner workings of the scheme. Thus, it avoids the normative controversy surrounding stabilised absolute doctrines and the tensions caused by the actual social practice.

Finally, a point should be made concerning the connection of force with human dignity. It probably sounds absurd that force can be reconciled with the value of human dignity, because *ab initio* in the human mind it is descriptive of suffering. Human beings though are not ignorant of actual force in aspects of their life and they have been reconciled with and have accepted force. Law corresponds to physical and psychic coercion which is accepted as long as it is considered reasonable and if it is justified by a particularised social end. The same could be achieved in international society, that is, the transformation of pure force to moral force, through the pursuit of human dignity.[7]

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[7] D. Kennedy, "Form and Substance in Private Law Adjudication", 99 *Harvard L. Rev.*, (1975-76), p.1685, at p.1774

# II. EVALUATION OF PRACTICE UNDER THE REVISIONARY ASSUMPTION OF HUMAN DIGNITY

**II.1** *The protection of human dignity as life or dignified existence, (Bangladesh, Uganda, Entebbe, Kampuchea, Panama, Liberia, Central African Republic, Haiti and Rwanda).* The facts and the legal argumentation concerning the majority of these cases have been presented in the preceding chapters. Two cases, Entebbe and Liberia, were considered under the classical legal argument of rescuing nationals abroad. In this regard, our disquietude concerning the evaluation of these cases under the umbrella of self-defence has been expressed and it has been advised revisiting the doctrine of humanitarian intervention. The cases of Bangladesh, Uganda, Kampuchea and Rwanda are usually considered under the formulation of humanitarian intervention as it is constructed by the prevailing legal argumentation, whereas the remaining ones raise manifold issues.

At this stage, there will be an appraisal of these cases under the notion of humanitarian intervention as the protection of human dignity. An initial observation is that their ambiguous legal characterisation should not obscure the fact that the reaction of the international community through its more representative institutions betrays a sense of *ad hocism*, entangled as it is in an antagonism of interests and principles. The Rwanda case adumbrates the sentiment of dissatisfaction and disorientation and judiciously reveals the need for a revised model, one that incorporates the protection of human dignity. The situation in Rwanda was characterised by genocidal events, indiscriminate and heinous killings, uprooting of populations, coupled with the apathy of states and the inadequacy of international institutions to respond satisfactorily. The French intervention between June and August 1994 was unenthusiastically endorsed or politely ignored by the international community, which, nevertheless, assuaged and tried to persuade her to prolong her operation. The reason for this hesitant approach is obvious and resides in the strong grip of abstractions, such as non-intervention and sovereignty. On the other hand, it is also apparent that these abstractions cannot offer any satisfactory answer to the situation beyond the prospect of

prolonging the massacres. Starting the evaluation from the prospect of human dignity, the French action, limited in time and nature, has provided sanctuary to persecuted Rwandans and assisted international agencies in the provision of aid. The action proceeded with considerable impartiality and avoided influencing the internal political struggle. It only offered security to Rwandans. Finally, it was the most effective measure for safeguarding human dignity amid international inaction and domestic massacres.

In Liberia, the civil war which ravaged the country caused thousands of deaths and created thousands of refugees. Foreign nationals living in the country have been threatened and this prompted the United States in co-operation with other countries whose nationals were equally threatened to intervene twice in order to extricate them from the perilous conditions. Additionally, the participants in the ECOWAS Peace-Keeping force which intervened in the crisis offered humanitarian reasons. According to Salim A. Salim, Secretary-General of the OAU: "..... for an African government to have the right to kill its citizens or let its citizens be killed, I believe there is no clause in the (OAU) Charter that allows this. To tell the truth, the Charter was created to preserve the humanity, dignity, and the rights of the African".[8]

The Liberian incident has been classified under the notion of humanitarian intervention *lato sensu* as the Entebbe case, where Israeli nationals were threatened with killing. As is illustrated in the preceding chapters, the pertinent legal reasoning produces circularity and indeterminacy under the predominant legal doctrines. The starting point for evaluating forceful protecting actions is their legal determination under the U.N. Charter, in particular Articles 2(4) and 51. Article 2(4) cannot be conclusive because its content is of manipulable character. It could be either an absolute prohibition on the use of force or a conditional one. According to the first view, which encompasses the rather dominant theoretical structure of the post-Charter international legal argument, these incidents are illicit. They consist of a violation of the constituent elements

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[8] "Africa's Destiny", *West-Africa Magazine*, 22-28 October, (1990), p.2690. The Nigerian Head of State declared: "We are in Liberia because events in that country have led to massive destruction of property, the massacre by all parties of thousands of innocent civilians including foreign nationals, women and children ..... contrary to all standards of civilised behaviour and international ethics and decorum". *West-Africa Magazine*, 1-7 February, (1993), p.146:

of state sovereignty without the state's consent. However, the second, conditional appreciation of the same article advocates admitting the legality of the action, as not impairing the political independence and territorial integrity of the Liberian or Ugandan state.

The self-defence argument does not escape the criticism of indeterminacy by lending support to both a restrictive interpretation and a wider traditionalistic approach. According to the former view, the U.S. or Israeli action is condemned to illegality. It is an arbitrary act whilst the requirement of "armed attack" which triggers self-defence has not been fulfilled. On the other hand, when the attack on the nationals purports to change the policy of the government, it is recognised as equivalent to the values protected by Articles 2(4) and 51 of the U.N. Charter.[9] That is, sovereignty in the form of territorial integrity and political independence. Additionally, the customary law of self-defence is more permissive than Article 51 allowing for the protection of nationals. In a nutshell, according to this reasoning, the above actions are legal.

The argument for protecting human dignity became crucial in the circumstances whereunder these incidents occurred. The interventionist action not only secured the human dignity of the threatened and subsequently rescued people in its periphery as the attributes of a dignified life but also in its essence, which is the preservation of life. The actions were effective in their purpose and eventually restored the requirement of human dignity. The only reservation concerns the invocation of impartiality or universality. The Entebbe incident, as it progressed, involved solely Israeli nationals threatened with execution, whilst other nationals were released beforehand. Therefore, the rescue operation was strictly confined to the limited subjects of human dignity. On the other hand, the Liberian incident should have had wider recipients of the action. The civil war had condemned foreigners and above all the Liberians to disadvantageous conditions where their mere existence was threatened with annihilation by ferocious acts. Hence, the operation, by rescuing the foreigners whilst leaving Liberians to be exterminated, was discriminatory in this respect. This incident

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[9] O. Schachter, "The Extra-Territorial Use of Force Against Terrorist Bases", 11 *Hous. J.I.L.*, (1989), p.309, at p.312; A.D. Sofaer, "Terrorism, the Law, and the National Defense", 126 *Mil. L.Rev.*, (1989), p.89, at p.93

makes the flaws and inadequacies of the prevalent perception more than evident. Therefore, the assumption of human dignity which becomes a transformative force and applies equally to nationals and non-nationals should be employed. However, this action cannot be entirely discarded from the purview of human dignity, although it should have had a wider mandate.

The next case is Panama, which contains two operative aspects: a purely protective action and an operation with wider aims, which will be discussed subsequently. Starting with the first issue, the incidents which prompted the U.S. "Operation Just Cause" on December 20, 1989, were the killing of one off-duty American soldier and the detention of a U.S. Navy lieutenant and his wife.[10] One of the pronounced justifications for the U.S. action was the protection of U.S. nationals: "[t]he deployment of U.S. forces is an exercise of the right of self-defence recognised in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger ....."[11]

The standard inquiry into the validity of this action would repeat the identified syllogistic pattern. President Bush characterised the attack against the American soldier as an attack on the United States and also the invasion as a pre-emptive action to quash "an urban commando attack on American citizens" in Panama.[12] As was maintained above, Article 51 which is the controlling rule on this occasion is ambiguous. It is maintained that self-defence applies only in response to an armed attack against the territory of the state. On the other hand, the traditional approach of equating an attack on a national to an attack on his national state or, additionally, accepting an interpretation of Article 51 which coincides with the commodious customary rule on self-defence, would justify the action. However, even if the customary law on self-defence is applied in this situation, the criteria of proportionality

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[10] President Bush stated on December 20, 1989 that "..... the reckless threats and attacks upon Americans in Panama had created an imminent danger to the 35,000 American citizens in Panama". Office of the Press Secretary, The White House

[11] See Letter from President Bush to Congress, *H.R. Doc. No.127*, 101st Cong., 2nd Sess., (1990). Also speech to the United Nations by Ambassador Thomas R. Pickering, U.N. Doc. S/PV.2899 (1989), p.31

[12] "Fighting in Panama: Text of Statement by Fitzwater", *N.Y. Times*, Dec. 21, 1989, at A19, col.2; "Excerpts from Statement by Baker on U.S. Policy", *ibid.*, col.3

and necessity[13] which are intertwined therewith, are not satisfied, rendering the whole action legally suspicious. Assuming that the incidents were quite serious and that there was no guarantee that attacks on U.S. nationals would not be repeated, the logistics of the operation entailed the killing of 26 American soldiers and 700 Panamanians, detaining 4,800 Panamanians, and there was also extensive material damage. On these grounds, the action was condemned by the O.A.S. which also affirmed its support for the principle of non-intervention.[14] In the United Nations, a Resolution deploring the U.S. action was vetoed in the Security Council by the U.S.A, U.K. and France but a similar one was adopted by the General Assembly with a considerable majority.[15]

Pursuing an evaluation under the assumption of human dignity, the humanitarian element of the action could not be discounted, but it should also be submitted that its significance was minimal in relation to the protected nationals. The operation as such exceeded the bounds of proportionality concerning the threat posed to the U.S. nationals. It has been observed above that effectiveness is essential for achieving the aim of human dignity but it should not exceed the scope of proportionality.

The Bangladesh case presents an instance of protecting human dignity in its wider context. The Pakistani army had resorted to genocide in order to quell the nationalistic sentiment in East Pakistan. The situation not only caused hundred of thousands deaths but also created million of refugees. In Chapter Five it was observed that the official justification for the action was self-defence in response to the Pakistani attack on the Western Indian boarder. The international community and lawyers indeed justified the action as humanitarian intervention. It was commented that

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[13] It means that apart from police harassment, there was no real danger to American citizens which would justify this large scale operation and that the U.S. Government could have exercise less dramatic measure for the protection of its nationals. See R. Wedgwood, "The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion", 29 *Col. J.Transn.L.*, (1991), p.609, at pp.619-628; *Caroline Case*, 29 *British For.St.Pap.*, p.1137; 30 *British For.St.Pap.*, p.82

[14] *Serious Events in the Republic of Panama*, OEA/Ser.G, CP/RES.534 (800/89) corr. 1, O.A.S., Wash., D.C. (Dec. 22, 1989)

[15] G.A. Res. 240, 44 U.N. GAOR Supp. (No. 49) p.52, U.N. Doc. A/RES/44/240 (1989)

> "..... India's armed intervention would have been justified ..... under the doctrine of humanitarian intervention, and further that India would have been entitled to act unilaterally under this doctrine in view of the growing and intolerable burden which the refugees were casting upon India and in view of the inability of international organisations to take any effective action to bring to an end the massive violations of human rights in East Pakistan which were causing the flow of refugees".[16]

Consequently, the exact character of the action is clouded with ambiguity. This ambiguity can be relieved by using the perspective of human dignity. Thus, the purpose of the action should be the saving of threatened people, and it was effective in this respect. The other effects it engendered, such as the creation of a new state, should not be evaluated in accordance with the magnitude of the impact on the local authorities. Such evaluation is linked with the predominant argument of sovereignty and non-interference. The argument for human dignity transgresses this line and ponders over the real recipients of the action and its effects. The cases of Uganda and Kampuchea should be evaluated accordingly. They should not be evaluated according to the effect they had on the governmental structures which, in any case, were responsible for the human rights abuses which prompted the action. One should look beyond this towards the effect of securing human dignity. These cases were not totally propitious in this field. They stopped widespread massacres at a genocidal level and in this regard they secured human dignity. However, the succeeding situation did not correspond to the standards of human dignity.

In this wider context, the French operation in the Central African Republic (April-May, 1996) presents an analogous instance of promoting human dignity. During an army rebellion and civil disturbances, violence erupted and pillages occurred which cost twelve lives and around sixty injuries.[17] The

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[16] *The Events in East Pakistan, 1971*, A Legal Study by the Secretariat of the International Commission of Jurists, (Geneve, 1972), p.96

[17] According to a spokesman for the rebels: "Le gouvernement ignorait les raisons qui sont à lórigine de cette nouvelle mutinerie and c'est le gouvernement qui n'a pas respecté les engagements pris après les événements d'avril". *Le Monde*, mardi, 21/6/1996, p.4. *Le*

French launched operation "Almandin 2" to protect their citizens and transfer them to safety. According to the French Defence Ministry, the French troops "ont été déployées dans plusieurs quartiers de Bangui afin d'assurer la sécurité des ressortissants français et étrangers".[18] The French evacuated 4,281 people of which 2,278 were French nationals. The Americans also sent a detachment in order to evacuate American citizens.

The wider dimensions of the problem were also acknowledged and these involved the establishment of institutions and practices which would facilitate the democratic process: "[l]a France apporte son secours à un pouvoir démocratiquement élu et respectueux des droit de l'homme, qui serait en danger".[19] Hence, the operation was endowed with a wider mandate. It surpassed the traditional "extraction" of citizens and allowed for the "réduction" of the mutiny; that is, defend the democratically elected president whose demission the mutineers requested and avoid recourse to civil war as in Liberia or Rwanda. The French Minister for Co-operation declared that: "[l]a mission, c'est de maintenir un Etat démocratique, ..... avec tous ses attributs"[20] On this account, the action was supported by African states.[21] It could, with reason, be claimed that, in this case, a "hands off" policy carries the possibility of numerous victims among nationals or foreigners and greater degradation. Concerning the values which are at stake, if the value of independence and sovereignty prevails, intervention is forbidden. The other course of pursued action would be intervention in order to transfer foreign

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*Monde,* jeudi, 23/6/1996, p.4: "Les gens vivent tellement dans la misère que tout ce qu'ils trouvent dans les maisons [des étrangers], ils le volent".

[18] It has also indicated that the French soldiers "ont déjà procédé au regroupement de plus de 800 expatriés sur les bases militaires de stationnement des forces françaises" and that "aucune victime n'est à déplorer parmis les quelque 1800 Français résidant à Bangui". *Le Monde,* mercredi, 22/6/1996, p.3

[19] *Le Monde,* mercredi, 22/6/1996, p.3. According to the French Foreign Minister, France condemns "toute atteinte à la légalité en République Centrafricaine et entend aider les institutions démocratiquement élues à défendre l'ordre constitutionnel et favoriser l'apaisement". 100 *R.G.D.I.P.,* (1996), p.812

[20] *Le Monde,* vendredi, 24/5/1996, p.2

[21] According to the French Minister of Co-operation, Jacques Godfrain: "Les chefs d'Etats africains ..... sont très solidaires d'un de leurs collègues élu au suffrage universel. Donc il y a ..... un fort appui à ce que fait la France". *Le Monde,* vendredi, 24/6/1996, p.2. According to a declaration issued by the EU, it noted with "satisfaction les mesures prises pour la protection des populations et, en particulier les actions enterprises par la France pour assurer la sécurité des ressortissants étrangers, notamment européens, et aider à ce que s'engage une négociation". 100 *R.G.D.I.P.,* (1996), p.813

nationals to safety or humanitarian intervention *lato sensu*, which will neutralise the danger by restoring respect for human rights and the democratic process. In the aforementioned case, the protected values exceeded the scope of a purely protective operation by assisting the rule of law.

We are not going to pursue further the relationship between democracy and the enjoyment and effectuation of human dignity.[22] This is beyond the scope of this study. However, it is necessary to indicate our understanding thereof. It should be acknowledged that the two issues are interweaved but, according to the present author, human dignity, which contains a hard core of preserving life and a soft core of political and social flourishing, empowers the people. The notion of democracy could, hence, be realised through this empowerment. In the course of this study, the cases which claim the promotion of the democratic process will be dealt with according to their long-term and short-term results. Thus, two aspects of the pursued action should be distinguished: the incipient phase where the protected value is life as the hard core element of human dignity and which has been immediately threatened and subsequently protected; and the follow-up phase where the long term result is the expansion of human dignity which now contains also its soft core.

The Panama[23] case will be dealt with accordingly. In this case, there is an undemocratic government with General Noriega as *de facto* leader. It practices authoritarian political methods, some of which pose a threat to its citizenry. In 1989, Noriega annulled the national elections and his "Dignity Battalions" beat and intimidated opposition supporters. The U.S.A, intensified the political pressure for his ousting by imposing economic sanctions[24] and recalling the U.S. Ambassador. The O.A.S, condemned the annulment of the elections in a

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[22] T.M. Franck, "The Emerging Right to Democratic Governance", 86 *A.J.I.L.*, (1992), p.46; L. Fisler Damrosch, D.J. Scheffer, *Law and Force in the New International Order*, (Boulder, Westview Press, 1991), pp.143-184; A.A. D'Amato, *International Law Anthology*, (Anderson Publishing Co., 1994), ch.15

[23] "Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?", 84 *A.J.I.L.*, (1990), pp. 494-524; J. Quigley, "The Legality of the United States Invasion of Panama", 15 *Yale J.I.L.*, (1990), p.276; A. Berman, "In Mitigation of Illegality: The U.S. Invasion of Panama", 79 *Kentucky L.J.*, (1990-91), p.735; A.D. Sofaer, "The Legality of the United States Action in Panama", 29 *Col. J. Transn. L.*, (1991), p.281; L. Henkin, "The Invasion of Panama Under International Law: A Gross Violation", *ibid.*, p.293

[24] Executive Order 12635 (April 8, 1988), "Prohibiting Certain Transactions With Respect to Panama", *Public Papers of the Presidents of the United States: Ronald Reagan, 1988*, (Washington D.C., U.S. Government Printing Office, 1990), pp.425-427

Resolution and asked for the peaceful transfer of power to a democratic government, but its mission was not successful. One of the justifications put forward for the U.S. action was the restoration of democratic institutions in Panama. Concerning this issue, the pertinent legal argument observes the already discussed pattern of bifurcation. On the one hand, intervention should be permitted in order to pursue certain values inscribed in the Charter such as "freedom, democracy, peace".[25] This view supports the use of force which would "enhance opportunities for ongoing self-determination".[26] The opposite view is exposed by Professor Schachter who disapproves of the use of force in order to "topple a repressive regime", because "[t]he idea that wars waged in a good cause such as democracy and human rights would not involve a violation of territorial integrity or political independence demands an Orwellian construction of those terms".[27] According to this line of reasoning, there are principles or values, which concur such as democracy, human dignity, non-interference, sovereignty and, therefore, democracy or human dignity should not take priority. This raises the question of why the other equally important principles such as non-interference or sovereignty are granted preferential treatment. The answer lies in our observation when analysing the interrelation and precedence among the U.N. purposes that "[p]eace was more important than progress and more important than justice ..... War was inherently unjust".[28]

Thus, it is obvious that the argument is in a state of dissension. We shall try to overcome this problem by proposing the value of human dignity. However, the immediate effect of the U.S. action concerning the protection of life is contested because it depends on factually establishing the danger which the Noriega regime posed to its citizens. It should be submitted from the discussion pursued

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[25] See U.N. Charter, "Preamble" and Chapter I. For the policy interpretation of the U.S. Government, see *Dep't St. Bull.*, No. 2081, (Dec. 1983), p.74

[26] W.M. Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)", 78 *A.J.I.L.*, (1984), p.642, at p.643; J.J. Kirkpatrick & a. Gerson, "The Reagan Doctrine, Human Rights, and International Law", in L. Henkin (ed.), *Right V. Might: International Law and the Use of Force*, (N.Y., Council on Foreign Relations Press, 1991), p.19

[27] O. Schachter, "The Legality of Pro-Democratic Invasion", 78 *A.J.I.L.*, (1984), p.645, at p.659. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Rep.*, (1986), p.14, at p.133, para.263

[28] L. Henkin, "Use of Force: Law and U.S. Policy", in L. Henkin (ed.), *Right V. Might: International Law and the Use of Force*, (N.Y., Council on Foreign Relations Press, 1991), p.37, at pp.38-39

elsewhere concerning the danger to foreigners and in particular U.S. nationals, that the factual circumstances could not justify the action on the basis of its short-term purpose. On the other hand, it seems, with the benefit of hindsight, that the long-term effects of the action have assisted in fulfilling the soft core of the human dignity value. Thus, it assisted in diminishing the life threatening conditions to whatever degree they existed and also facilitated those traits of human dignity which would assist in the personal flourishing of the population.

A case which shares similar aspects with those identified above but with different configuration and effectuation is Haiti. Since 1957, Haiti had been ruled by the Duvalier regime with the help of the infamous para-military organisation, the Tontons Macoutes. This came to an end in 1986. In 1990, Jean-Bertrand Aristide emerged victorious from the first democratically held elections with 67.48% of the vote.[29] The new government strove to improve the human rights situation in the country.[30] However, Aristide was overthrown by a military junta under Lt. Gen. Raul Cédras. Following the *coup*, the internal situation in Haiti again turned into a "human rights nightmare" according to the Lawyers Committee for Human Rights[31] and this spawned a mass exodus of refugees claiming persecution.

The international community concentrated its efforts on re-establishing the democratically-elected government.[32] The pressure on the military carbuncle escalated with the embargo and the freezing of assets in the United States.[33] Eventually, Aristide and the junta reached an agreement, the Governor's Island Accord, on July 3, 1993, which provided for the restoration of

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[29] Inter-American Commission on Human Rights, *Annual Report,* (1990-91), OEA/Ser.L/V/II.79, rev.1 (1991), p.468; W.M. Reisman, "International Election Observation", 4 *Pace U. Y.B.I.L.*, (1992), p.1

[30] House Comm. on Foreign Affairs, Senate Comm. on Foreign Relations, 102nd Cong., 2nd Sess., Country Reports on Human Rights Practices for 1992 (1992); Lawyers Committee for Human Rights, Haiti: A Human Rights Nightmare, (1992)

[31] *ibid.*, p.8

[32] G.A. Res. 46/7, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/7 (1992); O.A.S. Res. MRE/RES. 1/91 OEA/SER. F/V.1 (Oct. 3, 1991) (Ad hoc Meeting of Ministers of Foreign Affairs, Washington D.C); O.A.S. Res. MRE/RES. 2/91 OEA/SER. F/V.1 (Oct. 8, 1991) (Ad hoc Meeting of Ministers of Foreign Affairs, Washington D.C); The French Delegation in the Security Council urged the United Nations that "..... ne peut rester passive alors qu'est aujourd'hui bafouée la volonté des électeurs haitiens". S/PV. 3011 (3 October 1991)

[33] Y. Daudet, "L'ONU et l'OEA en Haïti et le droit international", 38 *A.F.D.I.*, (1992), p.89

democracy and the return of Aristide.[34] The implementation of the agreement wavered and the United Nations imposed economic sanctions and introduced a naval blockade.[35] In response to the gravity of the situation and the unabated attitude of the military regime, the United Nations passed Resolution 940 which authorised military action.[36] Pursuant to this Resolution, the restoration of the democratically-elected government was to be implemented by a multilateral force with the crucial participation of the United States.[37] The difference with the cases already discussed lies on the fact that the transfer of power was achieved peacefully by agreement between the junta and the U.S. negotiators.

However, the perspectives of this action should be contemplated. On the one hand, the ideal of sovereignty emerges which advises against intervention and, on the other hand, human dignity which favours intervention. The line between the two values has already been modified. If the ideal of sovereignty and the legal argumentation it reproduces is characterised as the dominant legal perspective, it has already been argued that human rights concerns are sheltered thereunder. Human rights violations have been characterised often as a "threat to peace" which justifies a community's forcible response. Humanitarian intervention has been discussed within this legal order and in principle it has been ostracised, except for a modicum of cases where human rights violations are deemed to constitute a threat to the peace as in Rhodesia, Iraq or Somalia. Under this reasoning, the intervention in Haiti is justified because it was determined by Resolution 940 as constituting a "threat to peace and security", it was characterised by "significant deterioration of the humanitarian situation" and "systematic violation of civil liberties" under the

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[34] *Governor's Island Accord,* OEA/Ser. G CP/INF. 3480/93 (July 3, 1993), in particular point and 10 of the agreement. *United Nations, The Situation of Democracy and Human Rights in Haiti: Report of the Secretary-General,* U.N. Doc. A/47/975-S/26063 (1993)

[35] S.C. Res. 875, U.N. SCOR, 3293nd mtg., U.N. Doc. S/RES/875 (1993)

[36] S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994)

[37] The multilateral force consisted of 15,000 Americans and 266 soldiers from different Caribbean countries. France has welcomed Res. 940 which "..... manifeste la détermination à mener à bien, par tous les moyens nécessaires, la tâche que le Conseil s'est fixée". *PEF* juillet-août, 1994, p.165. France did not participate in the multilateral force, although "approuvant l'intervention américaine", Point de presse du M.A.E. du 15 septembre 1994. *PEF* septembre-octobre, 1994, p.100

margin of Chapter VII.[38] This position is reinforced by a previous Resolution which explicitly refers to "threat to peace".[39] The issue, however, is neither this piecemeal approach to human rights violations, nor the *ad hoc* evaluation of state benevolence or opportunism. Therefore, we need to revisit and rethink the issue of humanitarian intervention and our proposed method of human dignity provides a satisfactory answer. It remedies the agony of the dominant doctrine which is in principle negative and only exceptionally permits humanitarian interventions. More importantly, it has the potential of ameliorating a situation of systematic violations of human rights which the dominant doctrine only strives to achieve. Consequently, the Haitian case may appear as an example of an action where the constituent channels for effectuating the value of human dignity in its soft or hard core have been sustained. The amelioration and realisation of their substance is beyond the scope of this study.

Before we proceed with our next case, the evaluation pursued here has drawn to our attention wider issues than a search into legality would achieve. One can count as positive aspects the protection offered to endangered individuals and the empowerment of the wider population to realise the values of human dignity. Some actions have been derailed and attained results which synoptically can be included in the devaluation of human dignity. The case of Somalia which will be discussed immediately illustrates not only the contradictions of the legal arguments but also the labours of the value of human dignity.

**II.2** *The protection of human dignity and its "disvalue": Somalia.* This case is considered separately because it contains those germane ingredients which became the substance of this study. Consequently, exploration into the character of the case would be, it is hoped, conceptually recapitulating. We should start by identifying the contradictions of the legal argument. This case originally could be genuflected to the duality of (i) collective humanitarian intervention, and (ii) U.N. collective enforcement action under Chapter VII. Another dual configuration may well be added. It may be argued that it was

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[38] W.M. Reisman, "Haiti and the Validity of International Action", 89 *A.J.I.L.*, (1995), p.82; F. Tesón, "Collective Humanitarian Intervention", 17 *Mich. J.I.L.*, (1996), p.323, at p.358

[39] S.C. Res.841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993)

essentially a unilateral action under a collective veil because the logistical and operative participation of the United States was crucial. On the other hand, it could be argued that it was neither a state nor a United Nations collective action but a *suis generis* action. That is, a third type of operation whereby a singular state or a collectivity of states are merely empowered with authority by the United Nations to pursue certain aims.

The indeterminacy transgresses the legal argument and also afflicts the conceptual matrix. It has been explained throughout this work the fundamental contradiction between sovereignty and human rights, or peace and justice. The antithetical relationship is reconciled by an act of capitulation. Justice is subdued to the pursuit of peace. Hence, a monipolar objective undergirds a dual aspiration. Finally, this case illuminates the constituents of human dignity as they have been contemplated in this study and also the factors which may cause their devaluation.

The factual and legal presentation of this case will elucidate the above observations. It should be stated at the outset that its unique national configuration makes Somalia a particular case. Somalia is a nomadic society with a hierarchical structure. The tribes abide by their own laws, although there is a vinculum of cultural and linguistic bonds.[40] In 1969, Siad Barre came into power and tried to impose a national identity amid his "scientific socialist" experiments. The fall of Siad Barre in 1991 created a governmental void which the warring parties strove to fill. The main protagonists were General Aideed and the interim president Ali Mahdi. The inter-clan war created a humanitarian crisis with thousands of refugees fleeing the country and the distribution of humanitarian assistance being impeded. The other parameters of the crisis were the endemic famine, the disastrous economy, and the collapse of the state apparatus. The United Nations addressed the situation with Resolution 733[41] which is the product of an appeal launched by the Organisation of Islamic Conference, the O.A.U, the Arab League and the

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[40] G. Prunier, "La dimension historique de la crise somalienne", 9 *Relations internationales et strategiques,* (1993), p.89

[41] S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg., U.N. Doc. S/RES/733 (1992)

representative of Somalia to the United Nations.[42] This Resolution provided a double mandate: (i) an embargo against the shipment of arms; and (ii) to facilitate the distribution of humanitarian aid. It was also accommodated under Article 41, within the ambit of Chapter VII of the United Nations Charter which underlines the seriousness of the engagement. The implementation of this Resolution lagged behind because of disagreement between the United Nations and the warring clans. The Secretary-General characterised the situation in Somalia as a threat to the peace because of the dangers it posed to neighbouring countries.[43] Accordingly, the wording of subsequent Resolutions which addressed the situation in Somalia escalated towards the above lines. In Resolution 767 it was stated clearly that "the situation in Somalia constitutes a threat to international peace and security".[44]

Proceeding in a siccative evaluation, Somalia represents a humanitarian crisis of a serious magnitude which is dealt with within the matrix of the Charter and in particular Chapter VII. The situation is characterised as a "threat to the peace", a determination repeated also in Resolution 794 authorising the intervention. Accordingly, it seems that it fits squarely within Chapter VII which defines the powers of the Security Council and the United Nations. However, this assertion could be challenged. Concerning the factual aspect, one could question whether the humanitarian crisis constitutes a threat to the peace. This refers to the internal and/or external repercussions of a humanitarian disaster. Contrary to Resolution 688 concerning the persecution of the Kurdish population where the humanitarian operation was tied to the effects on the region, Resolution 794 refers to the "humanitarian deterioration" and the breach of humanitarian law as prompting the action. The determination of this issue is important in order to assess the character of the Security Council's action. In particular, for the assessment of whether the advised action would be for the restoration of human rights or the restoration

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[42] *Letter dated 20 January 1992 from the Chargé D'Affaires A.I. of the Permanent Mission of Somalia to the United Nations Addressed to the President of the Security Council.* U.N. SCOR, 47th Sess., U.N. Doc. S/23445 (1992)

[43] Boutros-Boutros Ghali, "The Situation in Somalia: Report of the Secretary-General", S.C. Doc. S/23693, (11 March 1992), pp.4-5

[44] S.C. Res. 767, U.N. SCOR, 47th Sess., 3101st mtg., U.N. Doc. 767 (1992). See also S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg., U.N. Doc. 775 (1992)

and maintenance of peace. If we are to make an inference from the delphic language used, it appears that human rights issues are within the ambit of force which the phraseology "threat to the peace" implies. But it seems also that the restoration of peace entails the simultaneous restoration of human rights under a magic formula. The aforementioned observations refer to the conceptual subordination-accommodation of justice and peace. Throughout this work, the Somali case has been presented as an illustrative incident of the contemporary legal perception which religiously adheres to the principle of peace as the ultimate rationale, but addresses humanitarian considerations by legal fiat, subsuming them within the perimeters of peace.

Hence, the Security Council unanimously adopted Resolution 751[45] which established UNOSOM with a mandate to oversee the cease-fire, promote reconciliation and facilitate humanitarian assistance. However, instead of ameliorating the situation, Somalia lurched further into anarchy with General Aideed willing to confront the United Nations force.[46] The U.N. Secretary-General Boutros Boutros-Ghali played a locomotive role in this case. His initial plan was towards a "global approach" which contains, instead of the classical methods, new means and novel methods for the pacific settlement of the situation. These methods could be surmised as the division of the country into four regions, and measures towards humanitarian assistance, a cease-fire, disarmament and national reconciliation. Also, he did not exclude the use of enforcement measures under Chapter VII. Consequently, he presented five options in order to tackle the situation, stating also his own preference.[47] The first option provided for a typical peace-keeping operation; the second provided for the relief agencies to negotiate a peaceful solution and the withdrawal of the U.N. personnel. The remaining three options provided for the use of force to a certain measure. In particular, the third option provided for a "minimum regime" around Mogadishu; the fourth, which was finally retained, provided for a multilateral military operation under the authority of the Security Council.

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[45] S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/751 (1992)

[46] The situation was described by the Secretary-General as the "invasion syndrome'". *Letter dated 24 November 1992 from the Secretary-General to the President of the Security Council*, S/24859, p.1

[47] *Letter dated 29 November 1992 from the Secretary-General to the President of the Security Council*, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992)

It was based on a proposal by President Bush to provide 30,000 troops under U.S. leadership (UNITAF). Finally, the fifth option was by itself politically unrealistic. It was based on a revival of Article 47 of the U.N. Charter which has fallen into desuetude.[48] The Security Council in adopting Resolution 794[49] selected the fourth option and authorised the use of all necessary means in order to facilitate the secure distribution of aid. As was said above, Resolution 794[50] was adopted with the insistence and recommendation of the Secretary-General Boutros Boutros-Ghali. It exhibits a more active role for the position of Secretary-General but also the risk of discord with the implementing states.[51]

Resolution 794 cites Chapter VII for the use of force and links the "human tragedy" in Somalia with a "threat to international peace and security". As was maintained above, the purely collective security option recommended by the Secretary-General was not adopted. Instead we have an operation by a group of states with the authority and oversight of the United Nations. Thus, the three elements stated earlier are satisfied: justice through peace; United Nations authority; state action. Additionally, a fourth element is surfacing. A more thorough view reveals that the perceived and implemented operation under Resolution 794 outmanoeuvres the existing legal framework for operations of a similar calibre. Thus, it could be classified as a *suis generis* operation, multilateral or unilateral, with the imprimatur of the United Nations.[52]

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[48] N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security,* (Manchester, Manchester University Press, 1993), pp.100-111; H. McCoubrey, N.D. White, *International Law and Armed Conflict,* (Aldershot, Dartmouth, 1992), chs.8,9

[49] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992). According to the Secretary-General "le Conseil de sécurité a créé un précedént dans l'histoire de l'ONU: il a décidé pour la première fois d'intervenir militairement à des fins strictement humanitaires". A/48/1, para.431

[50] M-C. Djiena Wembou, "Validité et portée de la résolution 794 (1992) du Conseil de Sécurité", 5 *A.J.I. & Comp. L.*, (1993), p.340

[51] "..... parce qu'il implique un jugement de valeur sur une situation dont la portée peut être controversée, et parce que cette initiative préjuge une réponse favorable du Conseil, mais aussi parce que le Secrétaire général risque de cautionner de son nom les mesures prises ultérieurement par le Conseil". Marie-Claude Smouts, "Commentaire de l' article 99 de la Charte des Nations Unies", J-P. Cot, A. Pellet, *La Charte des Nations Unies,* 2e éd., (Paris, Economica, 1991), p.1327, at p.1329

[52] See *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations,* U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 (1995)

Operation "Restore Hope" started on 9 December 1992 with good signs for success but it turned sour due to disagreements between the heavily contributing U.S. Government, the United Nations, and the other participants, concerning the extent and purpose of the operation and the means of pursuing it. The operation was dominated by the Americans which caused disquiet among the other participants. More notably, the spokesman for the Secretary-General Mr. J. Sills, stated that: "[b]ien que cette opération soit hautement appréciée par le Secrétaire général de l'ONU, M. Boutros-Ghali, et qu'elle ait été autorisée par le Conseil de securité, la force militaire unifiée n'est pas sous commandement des Nations Unies, et, par conséquent, le drapeau de l'ONU ne sera pas utilisé par la force."[53] Whereas the mission's mandate was initially limited, the Secretary-General pursued a wider objective of nation-building which involved disarming the warring factions, economic reconstruction and national reconciliation.[54] This transformed the force into UNOSOM II with a wider mandate.[55] It included peace enforcement than the traditional peace-keeping.[56] The command arrangments were perplexing. In addition to UNOSOM II, there was a Joint Task Force and a Quick Reaction Force consisting of U.S. troops which reported directly to the U.S. government. The Somalis soon became hostile to the heavy handedness of the troops. As a result, fights erupted between local people and U.N. forces which, in one instance on June 5, 1993, 24 Pakistani Peace-keepers were ambushed, 56 wounded and also 20 Somalis killed.[57] Gradually, the operation was transformed into an obsessive manhunt for General Aideed who was vilified

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[53] *Le Monde,* 10 Dec 1992; The French Foreign Minister M. Dumas stated: "Il ne faut pas qu'une nation, sous prétexte qu'elle est plus forte qu'une autre, s'arroge le droit d'aller faire le gendarme, de remettre de l'ordre". *Le Monde*, (8 Dec 1992)

[54] *Report of the Secretary-General submitted in pursuance of paragraphs 18 and 19 of Security Council Resolution 794 (1992),* S/24992 (19 December 1992); J.R. Bolton, "Wrong Turn in Somalia", 73 *For. Aff.*, (1994), p.61

[55] S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993)

[56] *Further Report of the Secretary-General submitted in pursuance of paragraphs 18 and 19 of resolution 794 (1992), proposing that the mandate of UNOSOM II cover the whole country and include enforcement powers under Chapter VII of the Charter,* S/25354, 3 March 1993, and addenda: S/25354/Add.1, 11 March 1993 and S/25354/Add.2, 22 March 1993. The U.S. Representative to the Security Council characterised UNOSOM II "an unprecedented enterprise", S/PV.3188

[57] *Executive Summary of the report prepared by Professor Tom Farer of American University, Washington, D.C., on the 5 June 1993 attack on United Nations forces in Somalia*, U.N. SCOR, 48th Sess., U.N. Doc. S/26351 (24 August 1993)

for all the ills of the situation.[58] Consequently, the multilateral force under U.S. leadership was interfering in a partisan manner in the civil war, causing as much havoc and distraction as that which they were intended to stop. The Italians who participated in the operation voiced strong reservations and demanded its mandate be changed. France and the Islamic countries were uneasy and hinted towards withdrawal. The U.S. announced that they would withdraw by March 1994 and the United Nations in their turn decided to withdraw by March 1995. Amid much destruction and confusion the operation was moderated to a traditional peace-keeping one.[59]

As this operation unfolded, other aspects thereof became palpable. The participants in the multilateral force were reluctant to participate in or distanced themselves from extending the mandate of the operation, humanitarian or otherwise. Only the United States pursued the neutralisation of General Aideed and his clan. Thus, there was a certain stage where the implementation of the operation was transformed into a unilateral action.

Trying to assess the achievements of this operation, one can not overlook the fact that it facilitated the distribution of food, and saved millions, but it also dragged the country into deeper civil war and exacerbated passions. Political stabilisation and propitiation of democratic institutions which this operation aimed for have not materialised. The pursued evaluation exposes its contradictory character, similar to its polymorphic legality. On the one hand, the human tragedy was deteriorating by the inaction or inefficiency of the international community to reach those in need. Under such circumstances, the pursued action seemed necessary and indeed facilitated the distribution of food at its initial stage. Subsequently, this action received a wider mandate of installing democratic institutions, relieving the victims of famine and installing national reconciliation. These aspirations coincide with or are prerequisites for the enjoyment of human dignity. A narrow operation to

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[58] S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., U.N. Doc. S/RES/837 (1993)

[59] S.C. Res. 897, U.N. SCOR, U.N. Doc. S/RES/897 (1994); *Further report of the Secretary-General submitted in pursuance of paragraph 19 of resolution 814 (1993) and paragraph 5 of resolution 865 (1993) on the situation in Somalia, including the 3 October 1993 incident in Mogadishu, and presenting three options for the continuation of UNOSOM II*, S/26738, 12 November 1993; *Further report of the Secretary-General submitted in pursuance of resolution 886 (1993), reviewing the options for the future mandate of UNOSOM II*, S/1994/12, 6 January 1994

"feed" the population would have been inadequate and famine would have recurred in the absence of a secure environment. Therefore, the motives and objectives of the wider operation correspond to the vision of conditions which safeguard the human dignity of the population. However, the implementation was deficient and indeed it discarded any such purpose. Conventional wisdom may coagulate around the belief that the operation failed because of a power antagonism between the U.S. and U.N. on the one hand and General Aideed on the other. We submit that it floundered because it ignored the requirements of universality, impartiality and effectiveness which demarcate the purpose of human dignity. It should be acknowledged that the building of a secure order may require a certain confrontation with the recalcitrant participants. There exists a line to be crossed between a purely facilitative and a facultative operation. The confrontation though, if need be, should entail those issues which aspire towards securing human dignity. In Somalia, it started from a misconception and misunderstanding of the society's tribal structure. It proceeded towards an unreasonably obsessive vilification and exclusion of a particular powerholder and his clan. It is difficult to imagine how a viable political environment could be established with exclusion, monomaniac persecution, and polarisation. Consequently, the action lost its impartiality.[60] At this point, it should be pointed out that with "impartiality" we do not mean indifference and insensitivity. We mean definition of aims and understanding of ground realities and means to pursue these aims. The Somali action had defined ends but lacked in the assessment of the situation. In a nutshell, it promoted both the value of human dignity in its hard core as protection of life but also its devaluation by creating conditions in its operative phase which were life-threatening. Concerning the soft core of human dignity, it should be maintained that it failed.

**II.3** *Conclusion* We have already presented some cases which prompted intervention on humanitarian grounds either as a restricted action for rescuing

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[60] I. Lewis, J. Mayall, "Somalia", in J. Mayall (ed.), *The New Interventionism 1991-1994: United Nations Experience in Cambodia, former Yugoslavia and Somalia*, (Cambridge, Cambridge University Press, 1996), p.94; *Report of the Commission of Enquiry established pursuant to resolution 885 (1993) to investigate armed attacks on UNOSOM II personnel*, S/1994/653, 1 June 1994

nationals[61] or as a comprehensive operation for securing the human dignity of the wider population. It has been indicated that the analysis of these incidents under the conventional legal argument could only reproduce the controversies immanent to that argument and its intrinsic conception of societal organisation. The dominant style of legal reasoning with its asseverated tendency of generating objective solutions induces towards hermetic modes of interpretation in the style of "either/or". It frustrates any attempt to enfranchise ourselves from the deductive patterns of the received form of doctrine. Additionally, it overlooks the fact that legal rules are the outcome of specific circumstances which are not unchangeable. Social knowledge is relative and Articles 2(4) and 51 were the foundational principles of an order perceived at its inception as relatively ideal; however, they do not accord absolutely any more with the present historical context. Rules show inner growth and unexpected or unpredictable alterations force the rules to adopt new imports. The attempt to portray them as immunised from new trends will be self-defeating. In order to progress beyond this point, we should assess what is important in this process of facts and ideas and what is considered important or significant by those who create decisions and by those who are affected or concerned by them. Therefore, human dignity has performed a central role as a commitment which directs human or state actions. It is above all a reflective stance concerning the importance of the goods to be realised. Being a reflective standpoint, it avoids the criticism of subjectiveness because, although it assists us in distinguishing among the heap of received information what is relevant and important,[62] it accepts modifications and allows for reconceptualisation.

The objective of securing human dignity in its multiple manifestations has made steady progress since its initial inception, and the present social environment is ripe for human rights issues to become the foundational principles of a restructured international society. Otherwise it would be prosaic to classify these incidents by the conventional legal reasoning of justifying actions' legality through the matrix of the legal rules. The purpose of this study has been to open

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[61] "The Unites States frequently employs armed forces outside this country - over 200 times in our history - for the protection of American citizens or national security". *United States v. Verdugo-Urquidex*, 110 *S,Ct.*, (1990), p.1056, at p.1065

[62] A. MacIntyre, "The Indispensability of Political Theory", in D. Miller, L. Siedentop, *The Nature of Political Theory*, (Oxford, Clarendon Press, 1983), p.17

the hermetic legal rules to rendition by disburdening legal argumentation. The contingency of events affects the coherence of legal argument. Thus, we have tried to discover the conformity of events with the realities of life and detecting discord between actual and ideational social life, we transformed the format of that theoretical matrix by proposing the perspective of human dignity. The conventional arguments of non-intervention, self-defence, or U.N. collective action secure indeterminacy in the evaluation of these actions because there is a contradiction between the received legal posture and the wider socio-legal evaluation of the event. By integrating law into a social whole, the evaluation is different from these arguments and that was the original aim of this study. Rules should not be applied only as directives to particular facts without contemplating the results of their mutual interaction. By looking at the whole action, one can trace the moral tendencies and value elements one has linked with the action. This comprehensive evaluation is different from the opportunistic interest in "hard cases", where important values are at stake, and also form the automation of the legal argument which cannot look far beyond the legal context. Consequently, the appreciation of those values and their coherent application in a set of events becomes a guiding principle or the principal assumption that directs our evaluation of events in that area, probably contrary to the existing preconception.

# EPILOGUE

Reaching the end of this study, the question of its value and of its contribution to the literature of humanitarian intervention is encountered. Is this study different from the mainstream literature on humanitarian intervention or is it a reproduction of already existing knowledge? Has our aim of presenting a novel approach been fulfilled or has it been dissipated under the weight of legal tradition?

Our aim has been to provide a unison of the mind with the situation whereby a reflective argument is constructed. This can only be achieved by elucidating the interrelations of theory and *praxis*, that is to say, the theory and *praxis* of humanitarian intervention which, eventually, induces the theorising person into presenting his own perspective.

The motivation for this approach has been the status of legal reasoning which oscillates between objectivity, relativism and nihilism.[1] We have identified in the course of this study certain legal traditions. The mainstream or traditional argumentation claims objectivity by alluding to superseded ontologies or objective procedures and, also, excludes non-legal elements. It has been criticised for rigidity and alienation from practical interests. Legal realism introduced the study of other disciplines and it attempted to influence policy. It has been, however, criticised for reducing law to politics. The Critical Legal Studies are more generous in their attitude towards other disciplines and they endeavour to provide a holistic view of legal phenomena. They have failed because they did not distance themselves from a certain legal "technology". That is, a legal methodology which produces "objective" legal results. Hence, whereas the mainstream legal argument "legalises" phenomena, Critical Legal Lawyers use deconstruction as a methodology which eventually becomes the means and the end.

We have explained at the outset of this study that the followed methodology springs from a sense of dissatisfaction with the existing legal argument. There,

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[1] O. Korhonen, "New International Law: Silence, Defence or Deliverance?", 7 *E.J.I.L.*, (1996), p.1

we identified a sense of *déjà vue* in the works concerning humanitarian intervention. The thrust of their argument is a more or less legalistic approach. They may differ in the pursued aims or results, however, they do not distance themselves from "legal technology" and fail to see the gist of the matter, that is, they fail to see what is involved when a humanitarian intervention takes place.

In more detail, the legal position which considers humanitarian intervention as illegal *per se,* observes, strictly, the letter of the relevant U.N. Charter rules, opinions of publicists, pronouncements of states in formal gatherings and decisions of courts. Thus, any action which could be characterised as humanitarian intervention is condemned to illegality under the force of the aforementioned indices. This creates a sense of complacency within the legal profession because it appears as succeeding, eventually, in containing and evaluating a situation within the relevant legal context. However, it does not address the real question. The situation - action and reaction - is not an arithmetic condition, whereby the outcome is a definite conclusion. This approach fails to address or side-steps a common human question: "what should be done" in a situation of mass killings.

On the other hand, the legal approach has also a positive aspect not distanced again from the letter of the law. Now, this letter is being expanded, extended and, thus, contains a residue for humanitarian actions. What this approach avoids remarkably is to explain why this same law appears to be more permissive of humanitarian actions. The answer to this question is only hinted at, dressed in a legalistic language. It lies in the pressure which a humanly intolerable situation puts on the norms which, thus, grow cracks in their interpretative orthodoxy.

We could characterise these approaches as unreflective. They are unreflective because, by legalising the different aspects of any action, they produce legal arguments which do not correspond to the essence of the action.[2] An example from the cases discussed in the preceding Chapters would be illustrative and would make our point more comprehensible. In Rwanda, there is a state,

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[2] A. Carty, "Introduction: Post-Modern Law", in A. Carty (ed.), *Post-Modern Law,* (Edinburgh, Edinburgh University Press, 1990), p.1

sovereign and independent, whose two main national components have vowed to eliminate each other. Due to international lethargic reaction, France sends troops which create a safety zone and assist in terminating the massacres. This action has also been acknowledged by the United Nations.

The identification of those components which would assist in legalising the evaluation of the situation, comprise of: (i) state; (ii) sovereignty; (iii) foreign troops; (iv) intervention; (v) authorisation; (vi) consent; (vii) mass massacres. As said above, these components could direct the theorising person towards different outcomes. The first four, coupled with the lack of consent and authorisation, would produce a negative view of illegality. It appears that the seventh element of mass killing becomes of a minimal value. But is this the real issue? Isn't it that those killings have disturbed our conscience?

The other approach takes cognisance of the element of mass killings but dissipated within the other identified components. It, however, reaches a different conclusion of accepting the legality of the initiated action. This approach, which seems to be more permissive, sometimes becomes procedurally inflexible. It introduces criteria which automatically attribute or deny legality to the action such as a time limit; mode of the pursued action; and disinterest. These criteria provide a rule of thumb approach but it would again be naive to consider that states can be put on the psychiatrist's couch where their hidden motivations will be revealed. The mass killings criterion is included but without any further elaboration.

The above argumentation shows that international lawyers disagree and lack understanding on the principles which should apply in a particular case. They also disagree on the constituents of a chosen principle, i.e. on what standards should be applied to the use of force. Hence, legal argument can take the often repeated and less courageous form of a verbal tirade against the means and silence towards the ends, or the opposite of embracing the ends and overlooking the means. If the action fulfils certain criteria, then it is legal or illegal irrespective of results. It also seems that lawyers are satisfied with this mode of reasoning and pursue a piecemeal approach to "hard cases" where the answer is not so obvious.

In order to avoid the perpetuation of this dilemma, we should choose within a discursive framework where alternatives are considered and in this aspect the dominant legal argument which would condemn the action as illegal is deficient because of its formality and unreflectiveness. Consequently, we proposed a mode of evaluating interventionist actions by beginning with an assumption of securing human dignity and then examining the contribution of these actions to this direction as well as speculating the formative course of the law. The premise of human dignity provides strong reasons for the use of force and its conditionment. There should not be much reliance on legalistic principles which are used in a "juristic push-button devise"[3] fashion but one should appraise the different variables, policies, their interrelations and weight in certain contexts.

In contradistinction to the traditional approaches, the suggested approach which promotes human dignity delivers a spherical view of the situation. It is prospective and perspective, overcoming the sterile and unreflective evaluation towards a more comprehensive approach. Under the auspices of this study, there have been illustrations of how human dignity is increased when endangered individuals are saved or partially effectuated when only the nationals of the interfering state are rescued. Also, how human dignity is decreased when other interests are promoted. We also have had the opportunity to see the immediate effects of the action which is the protection of life or the long term effects which is the promotion of a dignified life. An example discussed above will be more illuminating. In Liberia, amidst the civil war which cost the life of thousand Liberians and ransacked the country, endangered foreigners were rescued by the intervening Americans. The one-sided and incomplete approach which the existing doctrine produces is more than evident. The action is characterised as protection of nationals and, thus, legitimised according to a certain interpretation of the self-defence argument or, it is characterised as illegal under another interpretation. According to the prevalent position, the action does not satisfy the criteria of a humanitarian action and, thus, the crucial issue of indiscriminate killings is overlooked.

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[3] J. Stone, *Aggression and World Order: A Critique of the United Nations Theories of Aggression*, (London, Stevens & Sons, 1958), p.11

According to the approach of this study, the issue of savageries cannot be evaded. The action, thus, is partly characterised as a humanitarian action because, rescuing foreigners, saves their life and restores their human dignity. However, this action is incomplete because it did not ameliorate the situation as for natives as well as foreigners to enable them live in conditions of dignified existence. Hence, the inquiry is directed towards the essence of the case and observes that it has been deficient. This involves an intellectual redirection, whereas the existing argument would produce a sense of fake completeness by addressing only one issue, that of intervention, on an elusive legal basis.

This consists of the innovative character of the present research for it opens the horizon towards a more human-centred and comprehensive encounter. As was said at the beginning, this study presents an attempt to indicate the connectedness of the mind with the situation and expose what is significant in each case. This is the only method for producing meaningful arguments and influencing reality. Because, only by developing a personal argument and applying it to concrete situations can the theorising person influence and ameliorate the situation. A reflective attitude towards conditions of genocide or mass killings may influence the situation because it entails the personal responsibility of the theorising person. Personal responsibility and reflective argumentation arise from the interrelation and influence between the situation, the theory, and the personal stance of the individual person. It is both ways. The theorising person, lawyer or politician, who starts from the theory of human dignity approaches the situation accordingly and, of course, this new relation affects other relations as well. It creates, thus, awareness for other relevant instances. Another important aspect is that the claim of one-sided responsibility - scientific, legal or political - vanishes. And this has been the sombre character of international argument. It self-indulged in the legal world and became alienated. By opposing the influences of the situation and of the salubrious mind, legal scholars seemed to evade the world and just appeared to be the human personnel in the vast factory of law. The situation in Rwanda, Burundi, Liberia, Kampuchea, to take some examples, do not need a "technological" approach of legality or illegality. This is insignificant and, above all, it hides the

personal responsibility of the international lawyer. He influences the situation even in the case of a "technological' approach but this is insignificant and indifferent. Personal responsibility and meaningful influence comes only when there is reflection on what is significant and how to achieve it. In order to achieve this, it would be necessary to include in our thinking the whole cadre of indices and also the modes of influencing practice. It is unfruitful to only "lawyerise".

Consequently, the approach of human dignity pursued in this study contains responsibility, reflection, openness, account for the results, but above all a belief in the strength of the theorising person to stand above the thrust of tradition.

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